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A TREATISE

ON THE LAW OF

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COMMERCIAL PAPER

CONTAINING

A full statement of existing American and Foreign Statutes,
together with the text of the Commercial Codes of
Great Britain, France, Germany, and Spain

By JOSEPH F. RANDOLPH

Editor of JARMAN ON WILLS and WILLIAMS ON EXECUTORS

SECOND EDITION

IN THREE VOLUMES, WITH APPENDIX

VOL. I.

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Entered, according to the Act of Congress, in the year 1899, by

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TO THE HONORED MEMORY OF MY FATHER,

JOSEPH F. RANDOLPH,

OF NEW JERSEY,

Who loved the law as a great bill of rights, and devoted his long and
useful life to it as the best defense of men's rights
and avenger of their wrongs,

THIS BOOK IS OFFERED,

In grateful memory of the precepts and example, by which he ever
encouraged that exact justice, that diligence, that rea-
sonable charity, which make and adorn

THE LAW OF COMMERCIAL PAPER.

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PREFACE TO SECOND EDITION.

In preparing the second edition of this work the reason for its existence has seemed to the author more clear than before. The numerous changes of statute and the annual addition of nearly a thousand decided cases prove that all has not yet been said on this division of the law. The plan of this book has been to seek instruction in the decisions of the higher courts, with little or no attempt to supplement it by the logic or learning of a treatise. The mass of material and the great and increasing variety of illustration which it furnishes have controlled the form, and, to some extent, the proportions, of the book. While it differs in scope and arrangement from a digest, it differs as much, both in form and in aim, from a text-book of instruction. With some loss in symmetry and in apparent completeness, the rule has been rigidly followed to restrict the text to the law as expressly decided or enacted in this specific field; and in so doing the author has dropped many old and authoritative cases that have established, in contracts of general character, rules which are doubtless applicable to Commercial Paper in common with other contracts. This book has aimed at an orderly arrangement, and an exact and brief statement, of many thousands of decided cases. A complete assemblage of these may be impracticable, but an effort has been made for completeness.

The subject is now regulated by Codes throughout Europe and in the Dominion of Canada. In the United States the Negotiable Instruments Law, adopted in 1897 and 1898 in several states, and the older Code in force since 1872 in California, represent efforts to put into uniform expression the multiform views and preferences of the forty-five United States. When these statutes have been generally adopted and the rules for their construction codified, the cases that have been decided and the books that treat of them will find their place among the older histories of the law.

The reference to American statutes, unless otherwise stated, is to the last published compilation or revision of each state.

JOS. F. RANDOLPH.

New York, 1899.

PREFACE TO FIRST EDITION.

Commercial paper, as an instrument of exchange, has no ancient law. Its origin, although obscure, is not traceable into a remote past, and, if not born, it has at least grown up, with the cities and commerce of modern times. Throughout Europe, and within the present century, the rules that govern bills of exchange have taken the form of codes. By the Code Napoleon, the Spanish Code of Commerce, the German Exchange Law and the more recent English Bills of Exchange Act, and their various derivatives, the transactions of nine-tenths of the commercial world are now governed.

In a few of the United States this important branch of the law has been codified; and since the adoption of the English Bills of Exchange Act in 1882, effort has been made to procure the enactment of a similar law by the Congress of the United States. This has been met at the outset by grave questions as to the constitutional power of Congress in the matter. In Canada, the power to legislate on this subject is now happily exclusively reserved to the Parliament of the Dominion by the imperial Act of Parliament, by which it was constituted.

It has been well said by the learned author of the recent English statute, that the province of a code is to state with authority, in brief, precise and orderly fashion, the existing law; not to invent new principles or reform old ones. Following his own rule, the first step taken by Mr. Chalmers in his great work was to read all the English cases (some 2,500), and make a digest of the principles of law established by them and modified by a score of English statutes. The American who would render a like service to his brethren of the American Bar, with due respect to the courts and legislation of *all* the States and to the necessities of *the bar of the whole country*, must give years to the work where his English example gave months; must read thousands of cases, in addition to the hundreds that the English reports contain, and examine hundreds of statutes, in addition to the score of British acts.

In the meantime, while our overworked profession waits for a

brief and precise statement of simple and almost universal laws, —while Cicero and the later prophets fail, and it is still “*alia lex Romæ, alia Athenis*,”—and while American legislatures give us a yearly supplement of a dozen laws, and our courts add five hundred varying decisions, on the old and finished subject of commercial paper, a new compilation and statement of the law, as it now is and as it has been since we were a people, may be welcomed as a service to the Bar. As such this work is offered to the profession, in the hope that the toil of one may lighten the labors of many, and that the arrangement and statement of the law, in its diversities as well as in its unity, may be some contribution toward the noble work of rendering at least one modern branch of law more simple and more universal, and making a possibility of that bold presumption that all men know the law. In this hope the author has ransacked the entire body of reported American and English cases and of modern text-books upon this subject, as well as the whole mass of American, English and foreign statute law, verifying, correcting and rejecting citations, and aiming throughout at a correct and concise statement of the points decided and enacted, without opinion or comment of his own.

For the sake of brevity, leading text-books are referred to by the author's name only, the citation being invariably that of the American paging or paragraph (if so designated) of the American edition, i. e. the seventh American edition of Byles on Bills, the thirteenth of Chitty on Bills, the third of Daniel on Negotiable Instruments, the third of Edwards on Bills, the second of Parsons on Bills and Notes, the fourth of Story on Bills and the seventh of Story on Promissory Notes. For information as to foreign statutes the author is indebted chiefly to the careful and excellent compilation of “Wechselgesetze,” prepared and published in Germany by Justizrath von Borchardt.

JOS. F. RANDOLPH.

Jersey City, N. J., August, 1886.

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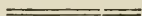
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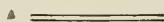
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COMMERCIAL PAPER.

VOLUME 1.

CHAPTER I.

GENERAL PRINCIPLES AND DEFINITIONS.

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Commercial Paper.

§ 1. "Commercial paper" is rather a popular than a technical expression, often used, however, both in statutes and in decisions of courts, to designate those simple forms of contract long recognized in the world's commerce and governed by the law merchant. This *lex mercatoria* or common law of merchants is of more universal authority than the common law of England. It applies, in general, to bills of exchange, promissory notes, checks, bank bills, and letters of credit; and in more recent times its principles have been extended, in part at

least, to other evidence of indebtedness, such as duebills, certificates of deposit, and corporation bonds.

Negotiable Instruments.

§ 2. These instruments may be *negotiable*, in the legal sense of the term, or *nonnegotiable*. To the latter class belong those which by reason of their form or character possess only the quality of transferability incident to all simple contracts. Negotiable instruments, on the other hand, may be so transferred as to give the assignee greater rights than the assignor himself possesses. In such case the paper becomes in the assignee's hands a valid obligation for what it purports on its face to be, although it may have been without consideration or subject to other defense in the hands of the payee or intermediate holders.

Bill of Exchange—Foreign or Inland.

§ 3. A bill of exchange is an unconditional order for the payment of a certain sum of money by the person addressed in it to the person in whose favor it is drawn.¹ An order may have all the force

¹ Bill of Exchange Defined.

Blackstone.—“An open letter of request from one man to another desiring him to pay a sum named therein to a third person on his account.” 2 Bl. Comm. 466.

Kent.—“A written order or request by one person to another for the payment of money at a specified time absolutely and at all events.” 3 Kent, Comm. 74.

Byles.—“An unconditional written order from A. to B., directing B. to pay C. a sum certain of money therein named.” Byles, Bills, 1.

Chitty.—“An open letter of request from and order by one person on another to pay a sum of money therein mentioned to a third person on his account.” Chit. Bills, 1.

Parsons.—“A written order for the payment of money.” 1 Pars. Bills & N. 52.

Chalmers.—“An unconditional order in writing for the payment of a sum of money absolutely and at all events.” Benj. Chalm. Dig. Bills & N. art. 1.

Edwards.—“An open letter directing the person to whom it is addressed to pay the sum therein specified to a third person named in the instrument on account of the writer or person by whom it is drawn.” 1 Edw. Bills & N. § 1.

Daniel.—“An open letter addressed by one person to a second, directing

of a bill of exchange as between the immediate parties to it without being recognized by the law merchant as a negotiable bill. This often occurs through additions or restrictions contained in the instrument, directing it to be paid out of a particular fund or in a particular currency or on some contingency. These and other irregularities in form will be considered hereafter.²

Bills of exchange are either *foreign* or *inland*. Inland bills are drawn and payable in Great Britain (by English law) or (by American law) in the state whose jurisdiction is invoked. If the bill is either

him, in effect, to pay absolutely and at all events a certain sum of money therein named to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to bearer or to the drawer himself." 1 Daniel, Neg. Inst. 35.

Bouvier.—"A written order from one person to another directing the person to whom it is addressed to pay to a third person a certain sum of money therein named." Bouv. Law Dict.

California Civil Code.—"An instrument, negotiable in form, by which one, who is called the 'drawer,' requests another, called the 'drawee,' to pay a specified sum of money." Section 3171.

English Bills of Exchange Act 1882.—"An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer." 45 & 46 Vict. c. 61, § 3.

² Bill of Exchange—Form.

Exchange for £1,000:

New York, May 1st, 1884.

Six months after date of *this first of exchange* (*second and third unpaid*), pay to the order of John Byles one thousand pounds, value received.

To Charing Cross Bank, London.

Henry George.

Bills of exchange, especially inland bills, are often drawn in one part instead of triplicates. In this case the words italicized in the bill are, of course, omitted.

\$1,000.

New York, May 1st, 1884.

Ten days after sight pay to Mr. John Byles or order one thousand dollars, value received.

Payable at the First National Bank of Philadelphia.

To Messrs. Brown & Sons, Philadelphia.

Henry George.

To these words are frequently added in the body of the bill directions as to place of payment and account to be charged, e. g. "Payable at the Westminster Bank;" "Charge the same to my account;" "Charge to account of A. B."

drawn or payable in another state or country, it is a foreign bill.³ The United States are in this respect foreign to one another, and a bill drawn in one state payable in another is a foreign bill.⁴

Bill of Exchange—Parties.

§ 4. The person by whom a bill is drawn is called the *drawer*; the person on whom it is drawn, the *drawee*; the person in whose favor it is drawn, the *payee*. These are not necessarily three distinct persons. A man may draw a bill on himself or make it payable to himself. The drawee becomes an *acceptor* if he accepts the bill. The payee becomes an *indorser* if he transfers the bill by indorsement. One who is not a party to the bill as drawer, drawee, or payee may make himself liable upon it as a *guarantor* or as a *surety*, or may accept it “for the honor” of another party, and become an *acceptor supra protest*. In foreign law the guarantor of a bill is known as *aval*. The bill itself may suggest persons to whom application shall be made on the drawee’s refusal, i. e. “*in case of need*” or “*au besoin*.”

Acceptance—Acceptance Supra Protest.

§ 5. The acceptance of a bill of exchange is the drawee’s agreement to pay it when it falls due.⁵ An agreement on the part of a

³ Byles, Bills, 397; Chit. Bills, 14; 1 Daniel, Neg. Inst. 8; 1 Edw. Bills & N. § 8; 1 Pars. Bills & N. 55; Story, Bills, § 465; 2 Bl. Comm. 466.

⁴ Buckner v. Finley, 2 Pet. 586; Dickins v. Beal, 10 Pet. 572; Bank of U. S. v. Daniel, 12 Pet. 32; Phoenix Bank v. Hussey, 12 Pick. (Mass.) 483; Ocean Nat. Bank v. Williams, 102 Mass. 141. “We are all clearly of the opinion that bills drawn in one of these states upon persons living in any other of them partake of the character of foreign bills, and ought so to be treated. For all national purposes embraced by the federal constitution the states and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects the states are necessarily foreign to, and independent of, each other.” Washington, J., in Buckner v. Finley, supra.

⁵ Byles, Bills, 187; Chit. Bills, 318; 1 Pars. Bills & N. 281; 1 Edw. Bills & N. § 606; Gallagher v. Nichols, 60 N. Y. 438; Ray v. Faulkner, 73 Ill. 469. “An engagement to pay the bill in money when due.” Bouv. Law Dict., in loco. “A promise to pay it according to its terms.” Beasley, C. J., in Bonnell v. Mawha, 37 N. J. Law, 200.

stranger to pay the bill at maturity, if the drawee does not, is called an *acceptance for honor* or an *acceptance supra protest*.⁶

The simplest and most common form of acceptance is by the word "Accepted" written across the face of the bill over the acceptor's signature. A promise to accept often binds the promisor as an actual acceptance.

Presentment for Acceptance—Dishonor—Protest and Notice.

§ 6. The holder of a bill may, and in some cases must, present it to the drawee for acceptance. The time and manner of presentment are regulated in most countries and in many of the United States by statute. On the drawee's refusal to accept, the bill should be presented to parties designated "*au besoin*." When acceptance is refused, protest must be made in case of foreign bills, and in the case of all bills notice of dishonor must be given to the other parties who are liable to the holder upon the bill.

Protest is a formal notarial certificate attesting the dishonor of a bill. It should be annexed to the original bill or a copy of it, and should state the time, place, and manner of presentment, to whom it was made, what answer was received, and for whom and against whom the bill is protested.⁷

The protest may also contain a *notarial certificate* of the notice of dishonor given to the parties entitled to such notice. *Notice of dishonor* is in general necessary, and want of it will discharge other

⁶ Form of Acceptance Supra Protest.

"Accepted supra protest for the honor of A. B., and will be paid at my office if regularly presented when due. John Jones."

"Accepted S. P. John Jones."

"Accepted under protest for the honor of A. B., and will be paid for his account if refused when due and regularly protested. John Jones."

⁷ Byles, Bills, 262; Benj. Chalm. Dig. Bills & N. art. 176; Sprague v. Fletcher, 8 Or. 367; Walker v. Turner, 2 Grat. (Va.) 534. "A notarial act made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchanges, etc." Bouv. Law Dict. "Protest, in a more popular sense, includes all steps after the dishonor of negotiable paper

parties from further liability. In some of the United States the notary's certificate of notice of dishonor is itself statutory evidence of the facts stated in it. The certificate should state particularly the time, place, and manner of giving the notice. The notice should identify the bill clearly, state its dishonor, and inform the party addressed of his liability thereon.⁸

necessary to charge a party to it." Milligan, J., in *Ocoee Bank v. Hughes*, 2 Coldw. (Tenn.) 52.

Form of Protest for Nonacceptance.

United States of America, }
 State of New Jersey, } ss.:
 County of Hudson,

On the first day of December, A. D. 1884, at the request of A. B. (holder's name), I, Charles Henry, a notary public of the state of New Jersey duly commissioned and sworn, did present the original bill of exchange hereto annexed (or of which a copy is hereto annexed) to C. D. (name of drawee), at his place of business in Jersey City, and demanded acceptance, who refused to accept the same; whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly and publicly protest, as well against the drawer and indorsers of the said bill as against all others whom it may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of acceptance of the same.

Thus done and protested at Jersey City, in the county aforesaid, in the presence of John Doe and Richard Doe, witnesses.

Charles Henry,
 Notary Public.

[L. S.] In testimonium veritatis.

⁸ Form of Notice of Protest for Nonacceptance.

To A. B.:

Please take notice that a bill of exchange drawn by C. D. upon E. F. for one thousand dollars, dated December 1st, 1884, payable three months after sight, in favor of G. H., and indorsed by you, has been presented by me to E. F. at his place of business, No. 10 Broad street, in Jersey City, and acceptance, being duly demanded, was refused; whereupon, by direction of the holder, the same has been this day protested for nonacceptance, and you are held liable therefor.

Charles Henry,
 Notary Public.

Jersey City, December 15th, 1884.

Form of Notary's Certificate of Notice.

United States of America, }
 State of New Jersey, } ss.:
 County of Hudson,

I, Charles Henry, a notary public of the state of New Jersey, duly commissioned and sworn, do hereby certify that on the fifteenth day of December,

Promissory Notes.

§ 7. A promissory note is an unconditional promise to pay a certain sum of money to the person in whose favor it is drawn.⁹ As was said of orders for the payment of money, a promise may have the effect

A. D. 1884, due notice of the protest of the annexed bill of exchange (or bill of exchange of which a copy is hereto annexed) was served upon the drawer, C. D., personally, at his residence, No. 10 Broad street, in Jersey City, and upon the indorser, A. B., by putting the same into the post office directed to him at New Haven, Conn., said place being the reputed residence of said A. B., and the post office nearest thereto, and said notice being mailed at Jersey City and the postage prepaid.

Witness my hand and official seal, at Jersey City, the fifteenth day of December, A. D. 1884.

Charles Henry.

[L. S.]

Notary Public.

As has been said, the substance of this certificate may be incorporated into the certificate of protest.

If the party to be notified was absent, this should appear. If he could not be found, it should appear that diligent inquiry had been made. If formal protest is unnecessary, as in the case of inland bills, and is omitted, notice of dishonor and the certificate of giving such notice should be substituted for notice of protest.

9 "Promissory Note" Defined.

Blackstone.—"A plain and direct engagement in writing to pay a sum specified at a time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large." 2 Bl. Comm. 467.

Kent (following Bayley).—"A written promise by one person to another for the payment of money absolutely, at a specified time, and at all events." 3 Kent, Comm. 74.

Byles.—"An absolute promise in writing, signed but not sealed, to pay a certain specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order, or to the bearer." Byles, Bills, 5.

Chitty.—"A promise or engagement in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or his order, or to the bearer." Chit. 585.

Daniel.—"An open promise in writing by one person to pay another person therein named, or to his order, or to bearer, a specified sum of money, absolutely and at all events." 1 Daniel, Neg. Inst. 36.

Parsons.—"In its simplest form, a written promise. A negotiable note is always a promise to pay money." 1 Pars. Notes & B. 14.

Story.—"A written engagement by one person to pay another person therein

of a note as between the immediate parties to it, and yet lack the requisites of a negotiable promissory note by reason of additions, conditions, restrictions, or uncertainties contained in it. The requisite form of a negotiable note will be considered hereafter.¹⁰ The person who gives the note is called the *maker*. The maker and the payee are, in general, the usual and only original parties to a note. It may, however, be drawn payable to the maker's own order, and take effect only on indorsement and delivery by him; and it may contain contracts of guaranty by third persons indorsed or written on its face.

named absolutely and unconditionally a certain sum of money at a time specified therein." Story, Prom. Notes, § 1.

Chalmers.—"An unconditioned written promise to pay absolutely and at all events a sum certain in money either to the bearer, or to a person therein designated, or his order." Benj. Chalm. Dig. art. 271.

Bouvier.—"A written promise to pay a certain sum of money at a future time unconditionally." Bouv. Law Dict.

See, too, Hall v. Farmer, 5 Denio (N. Y.) 485; Walters v. Short, 10 Ill. 252.

California Civil Code.—"An instrument negotiable in form whereby the signer promises to pay a specified sum of money." Section 3244.

English Bills of Exchange Act 1882.—"An unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer." Section 83.

¹⁰ Promissory Notes—Form.

\$500.

Jersey City, May 1st, 1884.

Thirty days after date I promise to pay to John Jones, or order, five hundred dollars, at the First National Bank in Jersey City, value received.

Henry James.

\$300.

Jersey City, May 1st, 1884.

On demand we promise to pay to the order of John Jones three hundred dollars, value received.

Payable at No. 1 Broadway, New York.

George & Co.

\$300.

Jersey City, May 1st, 1884.

Three months after date we promise to pay to the bearer three hundred dollars, value received.

Payable at the First National Bank in Jersey City.

George & Co.

Checks.

§ 8. A check is a bill of exchange drawn on a banker payable on demand.¹¹ It presupposes funds of the drawer in the hands of the bank or banker drawn upon. In fact, however, the want of such de-

¹¹ "Check" Defined.

Byles.—"In legal effect, an inland bill drawn on a banker payable to bearer (or order) on demand." Byles, Bills, 13.

Chitty.—"A written order or request addressed to persons carrying on the business of bankers and drawn on them by a party having money in their hands, requesting them to pay on presentment to a person therein named, or to bearer, a named sum of money." Chit. 578.

Daniel.—"A draft or order upon a bank or banking house purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money, to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." 2 Daniel, 583.

Edwards.—"In substance, a bill payable on demand." 1 Edw. Bills & N. § 19.

Parsons.—"A brief draft or order on a bank or banking house directing it to pay a certain sum of money." 2 Pars. Notes & B. 57.

Story.—"A written order or request addressed to a bank or to persons carrying on the business of bankers by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." Story, Prom. Notes, § 487.

Chalmers.—"A bill drawn by a customer on his banker payable on demand." Benj. Chalm. Dig. art. 254.

Cowen, J., in *Harker v. Anderson*, 21 Wend. (N. Y.) 372: "A bill payable on demand."

Shaw, C. J., in *Bullard v. Randall*, 1 Gray (Mass.) 605: "An order to pay the holder a sum of money at the bank on presentment of the check and demand of the money."

Kent, C. J., in *People v. Howell*, 4 Johns. (N. Y.) 296: "Falls within the description of an order for the payment of money." So, *Spofford, J.*, in *State v. Crawford*, 13 La. Ann. 300.

Eastman, J., in *Barnet v. Smith*, 30 N. H. 256: "Substantially the same as an inland bill." So, *Kent, J.*, in *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5.

Drake, J., in *State v. Riekey*, 9 N. J. Law, 312: "A request to pay money to the drawer or his order, *as a right* if he have funds, but in some measure a matter of *favor* if he have not. If there be funds belonging to the drawer, it is a demand of them; if not, it is a request of credit to that amount."

Burrill.—"A written order or request addressed to a bank or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment to a person named therein, or to him

posit goes to the value rather than to the character of the instrument. The form of a check is that of an inland bill of exchange which designates neither time nor place of payment, and makes no reference to consideration or account to be charged.¹² It is not usual to present checks for acceptance, but a check may be presented to the bank for its certification. Checks are usually certified by the cashier or paying teller of the bank by writing or stamping the word "Certified" or "Good" on the face of the check, with the signature of the certifying officer. This certification is equivalent to the acceptance of a bill.

Bank Notes.

§ 9. A bank note or bank bill (as it is sometimes called) is the promissory note of a bank or banker payable to bearer on demand.¹³ It is intended to circulate as money and is generally treated as money.

or bearer, or order, a named sum of money." Burrill, Law Dict. So, Campbell, J., in *Bowen v. Newell*, 5 Sandf. (N. Y.) 326, and Bouv. Law Dict., in loco.

California Civil Code.—"A bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest." Section 3254.

English Bills of Exchange Act 1882, § 73, as in text.

¹² Form of Check.

No. 100.

Jersey City, Sept. 1st, 1884.

Second National Bank.

Pay to the order of Henry James five hundred dollars.

\$500.00.

Brown & Co.

¹³ "Bank Notes" or "Bank Bills" Defined.

Byles.—"A promissory note made by a banker payable to bearer on demand, and intended to circulate as money." Byles, Bills, 9.

Daniel.—"The notes of incorporated banks designed to circulate like money and payable to bearer on demand." 2 Daniel, Neg. Inst. 676.

Edwards.—"A species of promissory note drawn payable to bearer on demand, and for many purposes considered and treated as cash." 1 Edw. Bills & N. § 20.

Parsons.—"The promissory note of a bank payable on demand to bearer, and therefore negotiable by delivery." 2 Pars. Bills & N. 88.

Savage, C. J., in *Haxtum v. Bishop*, 3 Wend. (N. Y.) 21: "Bank notes are promissory notes."

Butterfield, J., in *Townsend v. People*, 4 Ill. 326: "A written promise on the part of the bank to pay to the bearer a certain sum of money on demand."

And as to the identity of bank notes and bank bills, see *Low v. People*, 2

In many respects, as between holder and maker, it is governed by the rules controlling other similar notes. But the right to issue such notes, being virtually the power to create paper money, is in most countries restricted by statute.

Letters of Credit.

§ 10. A letter of credit is a request from one person to another to make advances to a third person on the credit of the one who gives the letter.¹⁴ It generally provides for payments to the payee in such installments as he may desire within a designated period of time and aggregate limit of amount, to be evidenced by the payee's drafts for such sums on the original drawer of the letter of credit in favor of the original drawee or of the person making the payment. It is *general* if addressed to no person in particular, and *special* if addressed to special persons. In effect, it is an agreement to accept and promise to pay such drafts or generally to repay the payments made on the letter. In form, it is ordinarily drawn for the benefit of a particular person and is not negotiable.

Parker, Cr. R. (N. Y.) 37; State v. Wilkins, 17 Vt. 151; State v. Hays, 21 Ind. 176.

They are not *securities for debt*, but to all intents and purposes *money*. Wright v. Reed, 3 Term R. 554; Miller v. Race, 1 Burrows, 452; U. S. Bank v. Bank of Georgia, 10 Wheat. 333; Southcot v. Watson, 3 Atk. 226. But not so *provincial notes*. Ellenborough, C. J., in Pickard v. Banks, 13 East, 20.

¹⁴“Letter of Credit” Defined.

Story.—“An open letter of request whereby any person (usually a merchant or banker) requests some other person or persons to advance moneys or give credit to a third person named therein for a certain amount, and promises that he will repay the same to the person advancing the same, or accept bills of exchange drawn on himself for the like amount.” Story, Bills, § 459.

Daniel.—“A letter of request whereby one person requests another person to advance money and give credit to a third person, and promises that he will repay or guaranty the same to the person making the advancement, or accept bills of exchange drawn upon himself for the like amount.” 2 Daniel, Neg. Inst. 800.

Rapalje and Lawrence.—“An authority by one person, A., to another, B., to draw checks or bills of exchange, with or without a limit as to amount, upon him, with an undertaking by A. to honor the drafts on presentation.” Rap. & L. Law Dict., in loco. See, too, Comstock, J., in Mechanics' Bank v. New York & N. H. R. Co., 4 Duer (N. Y.) 480; *Id.*, 13 N. Y. 599; and Bronson, J., in Birkhead v. Brown, 5 Hill (N. Y.) 634.

Certificates of Deposit—Duebills.

§ 11. A certificate of deposit is a receipt for money deposited, with a promise to hold it or pay it as may be agreed between the parties. It may or it may not be negotiable. When negotiable, it has in general the effect, if not the form, of a promissory note.

A *duebill* is an acknowledgment of indebtedness with no express promise of payment. It is made a negotiable instrument in some states by statute.

Corporation Bonds—Coupons.

§ 12. A corporation bond is an obligation to pay money given under its corporate seal. It is often made negotiable in form by drawing it payable "to the bearer" or to "the order of A. B." Such instruments are held to be "negotiable" so far as regards their transferability by delivery or indorsement and clear of defenses. They are not, however, within the ordinary rules of commercial paper as to grace, protest, and notice of dishonor. Nor do they ordinarily fall within the statutes providing for special actions on bills or notes.

The interest on such bonds is generally secured by a *coupon*. These are small notes or duebills for the installments of interest as they mature, printed or written on the same paper as the bond, but capable of being severed from it and transferred without it. They are transferable by indorsement or delivery, and have some of the incidents of a negotiable promissory note.

Transfer—Indorsement.

§ 13. Commercial paper is transferred by delivery, if payable to bearer; by indorsement, if payable to the order of the payee. An *indorsement* is a transfer of the instrument written on the paper or (for want of room) on an attached piece of paper called an *allonge*.¹⁵

¹⁵ "Indorsement" Defined.

Chalmers.—"A writing on a bill signed by the holder, ordering the amount to be paid to a person therein designated, or to his order, or to bearer." Benj. Chalm. Dig. Bills & N. art. 111.

Parsons.—"Its exact and legal as well as commercial sense is the transfer

It is generally and properly written on the back of the instrument, as its name implies, but may be written elsewhere.

It is either *in blank* or *in full*. General or blank indorsements are made by the holder's signature written across the back of the instrument, and making it in effect payable generally, i. e. to the bearer. A full or special indorsement is an order by the holder written across the back of the paper directing its payment to the order of another person, e. g. "Pay to the order of A. B. Brown & Co."

An indorsement may also be *conditional*, directing payment on the happening of a certain event; *absolute*, obliging the indorser to pay without regard to presentment or protest, e. g. "Protest waived;" *qualified* as to the indorser's obligation, e. g. "Without recourse;" or *restrictive* as to the indorsee's use, e. g. "Pay to A. B. for the use of C. D." The effect of an indorsement is not merely to transfer the instrument and the power to sue on it. It also contains, by implication of law, an undertaking to pay the instrument on due notice of dishonor, together with certain warranties as to title, genuineness, and validity of the paper as well as capacity and solvency of the parties.¹⁶

of a negotiable note or bill by the indorsement of some person who has a right to indorse." 2 Pars. Notes & B. 1.

Daniel.—"In its literal sense, writing one's name on the back; * * * in its technical sense, writing one's name thereon with intent to incur the liability of a party who warrants payment of the instrument provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to indorser." 1 Daniel, Neg. Inst. 592. As to the meaning of the word and the place for indorsement, see, also, 2 Bish. Cr. Law, § 570a; Clark v. Sigourney, 17 Conn. 511; Hartwell v. Hemmenway, 7 Pick. (Mass.) 117; Com. v. Butterick, 100 Mass. 12; Com. v. Spilman, 124 Mass. 327; Higgins v. Bullock, 66 Ill. 37; Rap. & L. Law Diet., in loco.

¹⁶ "Negotiation means the transfer of a bill in the form and manner prescribed by the law merchant, with the incidents and privileges annexed thereto, i. e.:

"(1) The transferee can sue all the parties to the instrument in his own name.

"(2) The consideration for the transfer is *prima facie* presumed.

"(3) The transferrer can, under certain conditions, give a good title, although he has none himself.

"(4) The transferee can negotiate the bill with the like privileges and incidents." Benj. Chalm. Dig. Bills & N. art. 106.

"To negotiate a bill of exchange, promissory note, check, or other negotiable instrument for the payment of money, is to transfer it for value by delivery or indorsement." Rap. & L. Law Diet.

"The term 'negotiate,' in its enlarged signification, applies to any written

Holder—"Bona Fide Holder for Value."

§ 14. One who rightfully receives a bill or note either by original delivery or subsequent transfer is termed the *holder*.¹⁷ If the transfer is made before the maturity of the paper for valuable consideration to a purchaser having no notice of defenses that existed between the original parties or have subsequently arisen, such holder is called a "bona fide holder for value."¹⁸ As such he takes the instrument free from defenses which were available against his immediate indorser or prior parties.

The holder is generally designated in a bill or note by the word "bearer" or "order," any rightful holder by delivery being intended by the former term, and any rightful holder by indorsement being intended by the latter.

Consideration—Accommodation.

§ 15. Commercial paper requires, in general, such consideration as other contracts. This consideration is usually expressed in the body of the instrument by the words "value received." The law merchant

security which may be transferred by indorsement or delivery so as to vest in the indorsee the legal title, so as to enable him to maintain a suit thereon in his own name." Scott, J., in *Odell v. Gray*, 15 Mo. 342.

¹⁷ Byles.—" 'Holder' is a general word applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it." Byles, Bills, 2.

Parsons.—"By the holder of negotiable paper is meant in law the owner of it, for if it be in his possession without title or interest he is in general considered only as the agent of the owner." 1 Pars. Notes & B. 253.

Daniel.—"Any one who has acquired it in good faith for a valuable consideration from one capable of transferring it." 1 Daniel, Neg. Inst. 716.

Chalmers.—"The person in possession of a bill who by the law merchant is entitled to enforce the payment thereof. It includes equally payee, indorsee, or bearer." Benj. Chalm. Dig. Bills & N. art. 3.

¹⁸ Chalmers.—"A holder for value who at the time he becomes the holder and gives value is really and truly without notice of any facts which, if known, would defeat his title to the bill." Benj. Chalm. Dig. Bills & N. art. 85.

Parsons.—"He who acquires the paper in good faith, without notice or knowledge of defenses or circumstances which should put him on inquiry, for valuable consideration, from one capable of transferring the paper." 1 Pars. Notes & B. 254.

raises a presumption of consideration in favor of bills, notes, checks, acceptances, and indorsements. The consideration may be, and often is, the *accommodation* or procurement of credit for another party to the paper.¹⁹ This is a valid consideration, applicable alike to all parties and binding upon the accommodation maker, drawer, acceptor, or indorser even in favor of a holder who took the paper with full knowledge of its accommodation character. Such knowledge does not affect his character as a "bona fide holder."

Maturity—Grace.

§ 16. The maturity of a bill or note is indicated in the instrument itself either by making it payable a certain number of days or months or "usances" "after date," or "after sight," or "on demand," or "at sight."

Where the bill runs a certain time "*after sight*," it must be presented for acceptance, and, whether accepted or dishonored, the time will run from such presentment. If payable "*on demand*" or "*at sight*," it matures when presented, unless days of grace are allowed. Some states have determined by statute the maturity of bills and notes payable "on demand," fixing it at four or six months. If no time of payment is expressed, the paper is payable on demand. A *usage* is a customary period for payment fixed by custom of the place of drawing and of payment. The term is not used in English or American bills.

Days of grace, generally three in number, are allowed in many countries after the expiration of the time limited for payment in the instru-

¹⁹ Parsons.—"Accommodation paper is the loan of credit for the benefit of the borrower without restriction as to the use." 2 Pars. Notes & B. 27. So. Dunn v. Weston, 71 Me. 270; Lord v. Bank, 20 Pa. St. 384.

Daniel.—"An accommodation bill or note is one to which the accommodating party has put his name without consideration for the purpose of accommodating some other party, who is to use it and is expected to pay it." 1 Daniel, Neg. Inst. 191.

Chalmers.—" 'Accommodation bill' means a bill whereof the acceptor (i. e. the principal debtor on the instrument) is substantially a mere surety for some other person, who may or may not be a party thereto. 'Accommodation party' means a person who has signed a bill as drawer, indorser, or acceptor without receiving value *and* for the purpose of lending his name to some other person as a means of credit." Benj. Chalm. Dig. Bills & N. art. 90.

ment.²⁰ In such case the bill or note falls due, and should be presented for payment, on the last day of grace. The allowance of grace is not made on checks or bank bills.

Presentment for Payment—Payment.

§ 17. A bill or note must be presented for payment promptly at its maturity, and a failure to make such presentment will discharge parties secondarily liable. e. g. the drawer and indorsers, but will not affect those liable in the first instance, i. e. the acceptor of a bill or maker of a note. If the paper is taken up and paid by a party not himself ultimately liable, the payment will not extinguish the instrument, but it will be kept alive as against prior parties.

Dishonor—Protest and Notice.

§ 18. When payment of a bill, note, or check is refused on due presentment at maturity, the paper is said to be dishonored. If it is a foreign bill of exchange, it must then be protested. And in every case notice of the nonpayment of the instrument must be given immediately, as in the case of protest and notice for nonacceptance.²¹

Action—Procedure—Damages.

§ 19. In many countries an action of summary character is given by statute to the holder of a bill of exchange. In many of the United States actions on bills and notes have been simplified by statutes enabling the holder to prosecute all prior parties in one action, and giving the benefit of the judgment rendered in such action to a defendant who pays it off and is entitled to recover against other and prior parties.

²⁰ "In the law of bills, days of grace are a period allowed in many countries to the drawer or acceptor of a bill to pay after the due date, originally as a favor, but now as a matter of right." Rap. & L. Law Dict. So, *Ferris v. Saxton*, 4 N. J. Law, 17; 1 Daniel, Neg. Inst. 550.

Bouvier.—"Certain days allowed to the acceptor of a bill or the maker of a note in which to make payment, in addition to the time contracted for by the bill or note itself." Bouv. Law Dict.

²¹ For forms of protest and notice for nonpayment, see § 6, substituting *payment for acceptance* wherever it occurs.

Special damages are also sometimes allowed, including *re-exchange*.²² And in many states the rate of damages to be allowed over and above interest is fixed by statute.

²² **Re-exchange Defined.**

Kent.—“The purchase of a new bill on the country where the drawer of the protested bill lives.” 3 Kent, Comm. 116.

Story.—In the commercial sense, “the amount for which a bill of exchange can be purchased in the country where the acceptance is made, drawn upon the drawer or indorser in the country where he resides, which will give the holder of the original bill a sum exactly equal to the amount of the bill at the time when it ought to be paid or when he is able to draw the re-exchange bill, together with his necessary expenses and interest.” Story, Bills, § 400.

Byles.—“The difference in the value of a bill occasioned by its being dishonored in a foreign country in which it was payable. The existence and amount of it depend on the rate of exchange between the two countries.” Byles, Bills, 418.

Daniel.—“The amount for which a bill of exchange may be purchased in the country where the original bill is payable, drawn upon the drawer in the country where he resides, which will give the holder a sum exactly equal to the amount of the original bill at the time it ought to be paid, or when he is able to draw the re-exchange bill, together with expenses and interest, for that is precisely the sum which the holder is entitled to receive and which will indemnify him for its nonpayment.” 2 Daniel, Neg. Inst. 452.

Rap. & L. Law Dict.—“The damages which the holder of a bill of exchange sustains by its being dishonored in a foreign country where it was made payable.”

Chalmers.—“The loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed.” Benj. Chalm. Dig. Bills & N. art. 221.

CHAPTER II.

WHAT LAW GOVERNS.

I. GENERAL PRINCIPLES.

II. SPECIAL APPLICATIONS.

I. GENERAL PRINCIPLES.

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- § 20. Law of Place in General—Foreign Bills—Federal Decisions.
 21. Presumption as to Intent of Parties.
 22. Place of Contract Determined by Delivery.
 24. — By Date.
 25. — By Situation of Real Estate—Domicile.
 26. Place of Payment—What.
 27. Presumptions as to Foreign Law.
 28. *Lex Domicilii*.
 29. *Lex Loci Contractus*—Governs Liability—Form.
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 31. *Lex Loci Solutionis*—Governs Nature—Construction.
 32. — Governs Liability.
 33. *Lex Loci Rei Sitæ*.
 34. *Lex Fori*.

Law of Place—In General—Foreign Bills—Federal Decisions.

§ 20. As bills of exchange, and, to some extent, drafts and notes, are intended for circulation from place to place, and are frequently drawn in one place, accepted in another, and indorsed and finally paid in still other and different places, it is natural that the law of place should be of especial importance in these contracts. And in the United States, where the commercial relations are very close and the state laws often widely different, questions frequently arise as to what law governs the instrument in dispute.

A bill of exchange drawn in one of the United States upon another is, in general, treated as a foreign bill.¹ So, a bill drawn in England,

¹ *Bernard v. Barry*, 1 G. Greene (Iowa) 388; *Mason v. Dousay*, 35 Ill. 424; *Donegan v. Wood*, 49 Ala. 242; *Joseph v. Salomon*, 19 Fla. 623; *Townsley v. Sumrall*, 2 Pet. 170; *Buckner v. Finley*, Id. 586; *Dickins v. Beal*, 10 Pet. 572. And see chapter 7, *infra*.

and payable there, if drawn on a Boston firm, is a foreign bill, although accepted in England by a member of the Boston house who was then in England.² But a bill drawn in South Carolina on a citizen of Pennsylvania is a South Carolina contract, although it may be a foreign bill.³ And it is to be remembered that the drawing, accepting, and indorsing of bills and notes are all distinct contracts, and may have separate localities and be governed by various laws.⁴

In general, the federal courts follow the construction of a state constitution or statute given to it by the courts of the state before rights have accrued to bona fide parties,⁵ although such decision is not, of itself, controlling against the citizens of another state.⁶ And a mere decision as to validity will have no effect, where the constitutional question before the federal court was not raised in the state court.⁷ But they do not follow as binding a decision rendered after the issue of the instrument in question,⁸ especially where a different rule prevailed in the state courts at the time of such issue,⁹ although a state decision rendered after the issue may be adopted by the federal courts as a reasonable and proper construction.¹⁰

² *Grimshaw v. Bender*, 6 Mass. 157. But see *Scudder v. Bank*, 91 U. S. 406.

³ *Hazelhurst v. Kean*, 4 Yeates (Pa.) 19. But a note made in Tennessee by a citizen of that state to a citizen of Alabama, at a rate of interest lawful in Alabama and not in Tennessee, has been sustained as an Alabama contract. *Brown v. Gardner*, 4 Lea (Tenn.) 145.

⁴ *Byles, Bills*, 406; *Gibbs v. Fremont*, 9 Exch. 31; *Greathead v. Walton*, 40 Conn. 226. See, too, *Horne v. Rouquette*, 3 Q. B. Div. 514; *Lee v. Selleck*, 33 N. Y. 615; *Oosterhoudt's Estate*, 15 Misc. Rep. 566, 38 N. Y. Supp. 179.

⁵ *Second Nat. Bank v. Basnier*, 12 C. C. A. 517, 65 Fed. 58; *New Providence Tp. v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764; *Taylor v. Ypsilanti*, 105 U. S. 60. So, as to scope of constitutional provision, *Wade v. Travis County*, 26 C. C. A. 589, 81 Fed. 742. So, as to statutory capacity of married woman domiciled and contracting in such state, *First Nat. Bank of Chicago v. Mitchell*, 84 Fed. 90.

⁶ *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539.

⁷ *Quaker City Nat. Bank v. Nolan County*, 59 Fed. 660.

⁸ *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736; *New Buffalo v. Iron Co.*, 105 U. S. 73.

⁹ *Marshal v. Town of Elgin*, 8 Fed. 783; *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. 413.

¹⁰ *People v. Cook*, 148 U. S. 397, 13 Sup. Ct. 645.

Presumption as to Intent of Parties.

§ 21. In general, a contract is presumed to have been made with reference to the laws of the place where it is made and with knowledge of those laws.¹¹ And this rule applies to contracts made in another place as well as to those made in the place where the action is brought.¹²

Delivery Fixes Place of Contract.

§ 22. When a contract in writing is completed, the place of its delivery is the place where it is held to have been made.¹³ The delivery is the completion of the contract. It therefore controls the date, if a different one is expressed, as well as the mere place of drawing the

¹¹ 1 Edw. Bills & N. § 217; 2 Pars. Notes & B. 318.

¹² Chapin v. Dobson, 78 N. Y. 74.

¹³ 1 Daniel, Neg. Inst. 831; 2 Pars. Notes & B. 327; Freese v. Brownell, 35 N. J. Law, 285; Campbell v. Nichols, 33 N. J. Law, 81; Hyde v. Goodnow, 3 N. Y. 266; Bell v. Packard, 69 Me. 105; Gay v. Rainey, 89 Ill. 221; Gallaudet v. Sykes, 1 MacArthur (D. C.) 489; Chapman v. Cottrell, 34 Law J. Exch. 186; Second Nat. Bank v. Smoot, 2 MacArthur (D. C.) 371; Lawrence v. Bassett, 5 Allen (Mass.) 140; Evans v. Anderson, 78 Ill. 558; Wells, Fargo & Co. v. Vansickle, 64 Fed. 944. So, Matthews, J., in Whiston v. Stodder, 8 Mart. (La.) 95, the place "where the final assent may have been given." But where a loan is made in one state, and the note for it given in another, the former may be the place of contract. Sands v. Smith, 1 Neb. 108. The place of contract has been held to be rather the place of delivery and discounting than drawing, Commercial Nat. Bank v. Simpson, 90 N. C. 467; or delivery and discounting, not drawing, indorsing, and payment, Orr v. Lacy, 4 McLean, 243, Fed. Cas. No. 10,589; or delivery and discounting, not indorsement, Briggs v. Latham, 36 Kan. 255, 13 Pac. 393; or drawing, discounting, and payment, not indorsement, Stubbs v. Colt, 30 Fed. 417; or of delivery and payment, not indorsement, Johnston v. Gawtry, 83 Mo. 339; or of discounting and indorsement, not payment, Oosterhoudt's Estate, 15 Misc. Rep. 566, 38 N. Y. Supp. 179; or of delivery and payment, not forum and domicile, Hubble v. Improvement Co., 95 Tenn. 585, 32 S. W. 965; or of indorsement and forum, not of drawing, acceptance, and payment, Douglas v. Bank, 97 Tenn. 133, 36 S. W. 874. So, to sustain a note contested as usurious, the place of date, drawing, and domicile of maker has been held to control the place of delivery, Scott v. Perlee, 39 Ohio St. 63; or the place of mailing the note and receiving the money to control the place of payment, Bascom v. Zediker, 48 Neb. 380, 67 N. W. 148.

instrument.¹⁴ So, if a note is dated and signed in blank in one state and sent into another state to be filled up and delivered, the law of the latter state will govern it.¹⁵ So, if it is dated and signed in one state by one of several makers, and afterwards signed and delivered by the others in another state, it is considered to be a contract of the latter state.¹⁶

In like manner, the delivery may be by mail, sending the paper from one state or country into another. In such case, the place of receiving by mail is the place of delivery and of contract.¹⁷

§ 23. On the other hand, where a note was executed and delivered in South Carolina, and afterwards signed by a surety in North Carolina, no rate of interest being expressed, the rate for which the surety

¹⁴ *In re Conrad*, 1 Leg. Gaz. 284, Fed. Cas. No. 3,126; *Hyde v. Goodnow*, 3 N. Y. 266; *Davis v. Clemson*, 6 McLean, 622, Fed. Cas. No. 3,630; *Davis v. Coleman*, 29 N. C. 424; *Findlay v. Hall*, 12 Ohio St. 610; *Second Nat. Bank v. Smoot*, 2 MacArthur (D. C.) 371; *Connor v. Donnell*, 55 Tex. 167. Especially if payable in the same state where it is delivered. *Cook v. Moffat*, 5 How. 295. So, a bill, payable in Massachusetts and accepted there, for the drawer's accommodation, and discounted in New York at a usurious rate, is really a New York contract, and void by New York law, even though the acceptor held collaterals of the drawer for his security. *Akers v. Demond*, 103 Mass. 318. But if a New York contract and loan, usurious there, is completed in Nebraska by a note given there, payable in New York, and a mortgage on lands in Nebraska, the fact of the delivery of the papers and the situation of the mortgaged lands in Nebraska will not save the note from being rendered void by the law of New York. *Sands v. Smith*, 1 Neb. 108.

¹⁵ *Fant v. Miller*, 17 Grat. (Va.) 47. The place of making need not appear on the face of the note. *Evans v. Anderson*, 78 Ill. 558.

¹⁶ *Hart v. Wills*, 52 Iowa, 56, 2 N. W. 619. So as to the statute requiring actions on foreign contracts to be brought within six months. *Read v. Edwards*, 2 Nev. 262; *Alcalda v. Morales*, 3 Nev. 132.

¹⁷ *Hyde v. Goodnow*, 3 N. Y. 266; *Mott v. Wright*, 4 Biss. 53, Fed. Cas. No. 9,883; *Bell v. Packard*, 69 Me. 105. So, the place of payment and mail delivery, as against the place of drawing and indorsement, *Phipps v. Harding*, 17 C. C. A. 203, 70 Fed. 468; or as against the place of drawing, indorsement, and date, *Carnegie Steel Co. v. Chattanooga Const. Co.* (Tenn. Ch. App.) 38 S. W. 102.

On the other hand, to sustain the instrument against a charge of usury, the place of mail delivery has been subordinated to the place of drawing, *William Glenn Glass Co. v. Taylor* (Ky.) 34 S. W. 711; or to the place of drawing and of the consideration, *Baseon v. Zediker*, 48 Neb. 380, 67 N. W. 148. In both of these cases the place of delivery was also the place of payment. So,

was liable was held to be that of South Carolina, although higher than that of his own state.¹⁸

So, if a surety, after indorsing the note, returns it to the place where it was originally executed and dated, his indorsement will be a contract of that place.¹⁹ So, an accommodation indorsement written in one state and delivered in another is governed by the law of the latter.²⁰ And an acceptance given in Washington to a bill drawn in New York, and returned to New York and negotiated there, is a New York acceptance.²¹ This is true, also, of accommodation acceptances,²² even though the bill be expressly payable in the place of its acceptance.²³

But to this rule as to the place of delivery being the place of contract, official bonds executed in pursuance of an act of congress form an exception, and are considered as executed at the seat of government, and not subject to local law.²⁴

it has been subordinated to the place of drawing, date, and domicile of maker, *Sheldon v. Haxtun*, 91 N. Y. 124, irrespective of place of payment; or of drawing and payment and situation of mortgaged premises, *Pine v. Smith*, 11 Gray (Mass.) 38. In like manner, to render a defense admissible, the place of mail delivery has been subordinated to the place of drawing and payment. *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; or to the place of drawing, notwithstanding it was dated where it was delivered, *Barret v. Dodge*, 16 R. I. 740, 19 Atl. 530.

¹⁸ *Houston v. Potts*, 64 N. C. 33.

¹⁹ *Stanford v. Pruet*, 27 Ga. 243.

²⁰ 1 *Daniel*, Neg. Inst. 833; *Whart. Confl. Laws*, § 459; 2 *Pars. Notes & B.* 380; *Cook v. Litchfield*, 5 Sandf. (N. Y.) 330; *Stanford v. Pruet*, 27 Ga. 243; *Davis v. Clemson*, 6 McLean. 622, Fed. Cas. No. 3,630; *Young v. Harris*, 14 B. Mon. (Ky.) 556; *Gay v. Rainey*, 89 Ill. 221. See, too, *Overton v. Bolton*, 9 Heisk. (Tenn.) 762, which case was, however, decided on the point of warranty of validity of the note by indorsement.

²¹ *Gallaudet v. Sykes*, 1 MacArthur (D. C.) 489.

²² *First Nat. Bank of New York v. Morris*, 1 Hun (N. Y.) 680; *Bank of Georgia v. Lewin*, 45 Barb. (N. Y.) 340; *Bowen v. Bradley*, 9 Abb. Prac. N. S. (N. Y.) 395; *Dickinson v. Edwards*, 77 N. Y. 573, affirming 13 Hun (N. Y.) 405.

²³ *Tilden v. Blair*, 21 Wall. 241. "The place of payment," says Strong, J., page 247, "was doubtless designated for the convenience of the acceptors or to facilitate the negotiation of the draft." The Illinois statute of February 12, 1857, expressly provides for discount of such paper at Illinois rates.

²⁴ *Cox v. U. S.*, 6 Pet. 203; *Andrews v. Pond*, 13 Pet. 77; *Bell v. Bruen*, 1 How. 182; s. c. 9 How. 277; *Fanning v. Consequa*, 17 Johns. (N. Y.) 511.

Place of Contract—Indicated by Date.

§ 24. The place of making of a note or drawing of a bill is generally shown by its date. Thus, where a bill was dated in Philadelphia, leaving day and year blank, and these were filled up in England, it was held that the intention was to make a Pennsylvania contract, and that the Pennsylvania law governed it.²⁵ So, a note made in Connecticut, but dated in Louisiana, is *prima facie* payable there, and is accordingly governed by Louisiana law.²⁶ So, where a note was dated in the state where the maker resided, but made elsewhere, and no place of payment was designated, and the designated rate of interest was legal in the place of date, but usurious in the place of making, the note was presumed to be payable where it was dated, and therefore valid.²⁷ A bona fide holder cannot, of course, be prejudiced by the fact that the note was actually negotiated in a place where it was usurious, if dated in a place where it would have been valid.²⁸

Place of Contract — Indicated by Situation of Land Security—Residence of Parties.

§ 25. Where a loan is secured by mortgage on land lying in another state, a bond or note and mortgage at a rate of interest valid where they are given will not be rendered usurious by the law of the

²⁵ Lennig v. Ralston, 23 Pa. St. 137; Lougee v. Washburn, 16 N. H. 134. See, too, Snaith v. Mingay, 1 Maule & S. 87. The place of date is *prima facie* the place of contract, Parks v. Evans, 5 Houst. (Del.) 576; both of the note and of a collateral mortgage, Stark v. Olsen, 44 Neb. 647, 63 N. W. 37, as well as of those of delivery, *Id.*

²⁶ Tillotson v. Tillotson, 34 Conn. 335. In this case the maker's place of business was also in Louisiana. So, Jones v. Rider, 60 N. H. 452.

²⁷ Bullard v. Thompson, 35 Tex. 313. Especially if discounted as well as dated in such other state, Second Nat. Bank v. Smoot, 2 MacArthur (D. C.) 371. For other cases as to place of date, see §§ 21 n., 22 n.

²⁸ 1 Daniel, Neg. Inst. 833; 1 Pars. Notes & B. 57; Second Nat. Bank v. Smoot, 2 MacArthur (D. C.) 371; Lennig v. Ralston, 23 Pa. St. 139; Barker v. Sterne, 9 Exch. 684; Towne v. Rice, 122 Mass. 67; or that the loan for which it was given was made elsewhere, Potter v. Tallman, 35 Barb. (N. Y.) 182. So as to exclude other defenses, Quaker City Nat. Bank v. Showacre, 26 W. Va. 48.

place where the land lies.²⁹ This is plainly the case where the mortgage is merely collateral for a loan made and used in another state, and not on the land mortgaged.³⁰ But if the money is employed on the land mortgaged, and borrowed for that purpose, it has been held that the *lex loci rei sitæ* should apply.³¹ So far as regards presumptions arising from place of residence or business, it is presumed that a contract is made at the maker's place of business rather than at his residence, where they are in different states.*

Place of Payment—What.

§ 26. The presumption is that a note dated at a certain place is made and payable there, if no other place of payment is expressed.³²

²⁹ *De Wolf v. Johnson*, 10 Wheat. 367; *Dolman v. Cook*, 14 N. J. Eq. 56; *Varick v. Crane*, 4 N. J. Eq. 128; *Andrews v. Torrey*, 14 N. J. Eq. 355; *Tenny v. Porter*, 61 Ark. 329, 33 S. W. 211; *Cotheal v. Blydenburgh*, 5 N. J. Eq. 17; *Chase v. Dow*, 47 N. H. 405. Conversely, a note with collateral mortgage, attached for usury, has been sustained by the law of the place of making, delivery, and situs of land against place of payment, *Stansell v. Trust Co.*, 96 Ga. 227, 22 S. E. 898; *Hill v. Mortgage Co.*, 99 Ga. 87, 24 S. E. 848; or by law of making, date, and situs of land against place of discounting, *Jackson v. Mortgage Co.*, 88 Ga. 756, 15 S. E. 812; or by law of drawing and situs against place of payment and forum, *Thornton v. Dean*, 19 S. C. 583; or by law of drawing, payment, and situs against place of delivery, *Pine v. Smith*, 11 Gray (Mass.) 38. So, even as to usury and computation of interest recoverable, by the law of the place of contract against the place of date, payment, and situs. *Kuhn v. Morrison*, 75 Fed. 81. On the other hand, in a case of plain evasion, situs and forum have been held to prevail over place of contract, payment, and domicile, to defeat the instrument. *U. S. Savings & Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 235.

³⁰ 1 Daniel, Neg. Inst. 850; Whart. Confl. Laws, § 510; *De Wolf v. Johnson*, 10 Wheat. 367, 383; *Newman v. Kershaw*, 10 Wis. 333; *Atwater v. Walker*, 16 N. J. Eq. 42; *Dolman v. Cook*, 14 N. J. Eq. 56; *Andrews v. Torrey*, Id. 355; *Stapleton v. Conway*, 3 Atk. 727, 1 Ves. Sr. 427; *Cope v. Alden*, 53 Barb. (N. Y.) 350.

³¹ 1 Daniel, Neg. Inst. 850; Story, Confl. Laws, § 305; Whart. Confl. Laws, § 510; *Connor v. Earl of Bellamont*, 2 Atk. 382.

* *Varick v. Crane*, 4 N. J. Eq. 128.

³² 1 Daniel, Neg. Inst. 841; 2 Pars. Bills & N. 320; *Wilson v. Lazier*, 11 Grat. (Va.) 477; *Blodgett v. Durgin*, 32 Vt. 361; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Short v. Trabue*, 4 Mete. (Ky.) 299; *Backhouse v. Selden*, 29 Grat. (Va.) 581.

And the place of the date has been held to be *prima facie* the place of payment where it is the maker's residence or place of business, though the note was actually made elsewhere.³³ But a mortgage made in one country on lands lying in another has been held to be payable *prima facie* where the lands lie, and to be governed by the law of that place.³⁴ If no place of payment is named, parol evidence is not admissible to show that some special place of payment was agreed on.³⁵

Where a bill of exchange is specially addressed to the drawee, such address is presumed to be the place intended for its payment.³⁶ So, a general acceptance is presumably payable where it is made;³⁷ and, in Scotland, at the place where the acceptor resides at the maturity of the bill.³⁸ On the other hand the acceptor's liability for interest and damages has been held to be at the rate fixed by the law of the place where the bill was drawn.³⁹

An indorsement has been held to be *prima facie* payable at the residence of the holder, and governed by the law of that place.⁴⁰ An intention, however, to make it payable at the residence of the makers and indorsers, rather than that of the holder, may be in-

³³ *Tillotson v. Tillotson*, 34 Conn. 335; especially if such intendment be necessary to make the instrument valid under the laws against usury, *Bullard v. Thompson*, 35 Tex. 313.

³⁴ *Stapleton v. Conway*, 3 Atk. 727; *Chapman v. Robertson*, 6 Paige (N. Y.) 627.

³⁵ 2 Pars. Notes & B. 334; *Frazier v. Warfield*, 9 Smedes & M. (Miss.) 220. But see, *contra*, *Blodgett v. Durgin*, 32 Vt. 361.

³⁶ 1 Daniel, Neg. Inst. §41; *Worcester Bank v. Wells*, 8 Mete. (Mass.) 107; *Lizardi v. Cohen*, 3 Gill (Md.) 430; *Freese v. Brownell*, 35 N. J. Law. 285.

³⁷ *Musson v. Lake*, 4 How. 262; *Todd v. Bank*, 3 Bush (Ky.) 626. In this case it was held that the acceptor had an implied authority to designate a place of payment, and would then be governed by the laws of that place.

³⁸ *Don v. Lippmann*, 5 Clark & F. 1, 12. So, in Tennessee, an acceptance has been held payable at the acceptor's place of residence. *Frierson v. Galbraith*, 12 Lea (Tenn.) 129.

³⁹ *Bailey v. Heald*, 17 Tex. 102; *Raymond v. Holmes*, 11 Tex. 54; *contra*, *Able v. McMurray*, 10 Tex. 350. And in *Frierson v. Galbraith*, 12 Lea (Tenn.) 129, the acceptor's liability for interest was determined by the law of his residence, the bill being considered payable there.

⁴⁰ *Lee v. Selleck*, 33 N. Y. 615.

ferred from circumstances, and subject the indorsement to the law of the indorser's own residence.⁴¹

Presumptions as to Foreign Law.

§ 27. It is to be remembered that courts of one state take no judicial notice of the laws of another.⁴² And they are not concluded by the decisions of the courts of another state as to the application of the common law or of the *lex mercatoria* in such other state.⁴³ When the laws of another state are relied upon they must be proved affirmatively,⁴⁴ and, if not so proved, they will be presumed to be the same as the *lex fori*.⁴⁵

⁴¹ Vanzant v. Arnold, 31 Ga. 210; Bullard v. Thompson, 35 Tex. 313, 318.

⁴² Byles, Bills, 408; 1 Daniel, Neg. Inst. 847; Story, Confl. Laws, § 637; Legg v. Legg, 8 Mass. 99, 101; Bean v. Briggs, 4 Iowa, 464, 468; Hunt v. Johnson, 44 N. Y. 27; Mostyn v. Fabrigas, Cowp. 174; Male v. Roberts, 3 Esp. 163.

⁴³ National Bank of Michigan v. Green, 33 Iowa, 140.

⁴⁴ Byles, Bills, 408; Story, Confl. Laws, § 638; 1 Daniel, Neg. Inst. 847; 2 Pars. Notes & B. 334; 1 Edw. Bills & N. § 9; Benham v. Earl of Mornington, 3 C. B. 133; Hunt v. Johnson, 44 N. Y. 27, 40; Dunn v. Adams, 1 Ala. 527; Whidden v. Seelye, 40 Me. 247, 253; Bean v. Briggs, 4 Iowa, 464, 467; Harper

⁴⁵ Byles, Bills, 408; 1 Daniel, Neg. Inst. 847; 2 Pars. Notes & B. 334; 1 Edw. Bills & N. § 9; Brown v. Gracey, Dowl. N. P. 41, note; Hunt v. Johnson, 44 N. Y. 27, 40; Dunn v. Adams, 1 Ala. 527, 529; Fouke v. Fleming, 13 Md. 392; Whidden v. Seelye, 40 Me. 247, 254; Legg v. Legg, 8 Mass. 99, 101; Bean v. Briggs, 4 Iowa, 464, 468; Harper v. Hampton, 1 Har. & J. (Md.) 622; Hakes v. Bank, 164 Ill. 273, 45 N. E. 444; Stark v. Olsen, 44 Neb. 647, 63 N. W. 37; Seyfert v. Edison, 45 N. J. Law. 393; Low v. Learned, 13 Misc. Rep. 150, 34 N. Y. Supp. 68; Fifth Nat. Bank v. Woolsey, 21 Misc. Rep. 757, 48 N. Y. Supp. 148; Kuenzi v. Elvers, 14 La. Ann. 391; Hill v. Wilker, 41 Ga. 449; Flato v. Mulhall, 72 Mo. 522; Cooper v. Reaney, 4 Minn. 528 (Gil. 413); Brimhall v. Van Campen, 8 Minn. 13 (Gil. 1); Donegan v. Wood, 49 Ala. 242; Farhni v. Ramsee, 19 Ind. 400; Holmes v. Broughton, 10 Wend. (N. Y.) 75; Leavenworth v. Brockway, 2 Hill (N. Y.) 201; McDougald v. Rutherford, 30 Ala. 253; Allen v. Watson, 2 Hill (S. C.) 319; Crozier v. Hodge, 3 La. 357; Chapin v. Dobson, 78 N. Y. 74. So, as to negotiability, Hakes v. Bank, *supra*; Stark v. Olsen, *supra*; as to protest, Low v. Learned, *supra*; as to validity of a married woman's accommodation indorsement, Johnston v. Gawtry, 83 Mo. 339; as to nonperformance of a parol agreement constituting failure of consideration, Musser v. Stauffer, 178 Pa. St. 99, 35 Atl. 709.

Thus, a third party, indorsing a note before its delivery, is by Massachusetts law an indorser, and this will be presumed to be the Rhode Island law as to an indorsement made there, in an action on it in the courts of Massachusetts.⁴⁶ So, the foreign rate of interest, if not proved, is presumed to be the same as that of the forum.⁴⁷ But this presumption will not be made to render a note void for usury,⁴⁸

v. Hampton, 1 Har. & J. (Md.) 622, 687; *Martin v. Martin*, 1 Smedes & M. (Miss.) 176; *Uhler v. Semple*, 20 N. J. Eq. 288, 294; *Allen v. Watson*, 2 Hill (S. C.) 319; *Crozier v. Hodge*, 3 La. 357; *Kline v. Baker*, 99 Mass. 253; *Knapp v. Abell*, 10 Allen (Mass.) 485; *Bowditch v. Soltyk*, 99 Mass. 136; *Campion v. Kille*, 14 N. J. Eq. 229; *Ball v. Franklinite Co.*, 32 N. J. Law, 102; *Delafield v. Hand*, 3 Johns. (N. Y.) 310; *Francis v. Insurance Co.*, 6 Cow. (N. Y.) 404, 429; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Dollfus v. Frosch*, 1 Denio (N. Y.) 367; *Talbot v. Seeman*, 1 Cranch, 1, 38; *Haven v. Foster*, 9 Pick. (Mass.) 112, 129; *Palfrey v. Railroad Co.*, 4 Allen (Mass.) 55; *Brackett v. Norton*, 4 Conn. 517; *Mostyn v. Fabrigas*, Cowp. 174; *Freemoult v. Dedire*, 1 P. Wms. 429; *Male v. Roberts*, 3 Esp. 163; *Smith v. Blagge*, 1 Johns. Cas. (N. Y.) 238; *Territt v. Woodruff*, 19 Vt. 182; *Taylor v. Bank*, 7 T. B. Mon. (Ky.) 576; *Barrows v. Downs*, 9 R. I. 446; *Bryant v. Kelton*, 1 Tex. 434; *McDeed v. McDeed*, 67 Ill. 545; *Rape v. Heaton*, 9 Wis. 328; *Walsh v. Dart*, 12 Wis. 635; *Nelson v. Bridport*, 8 Beav. 527; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287; *Gardner v. Lewis*, 7 Gill (Md.) 377; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191; *Norris v. Harris*, 15 Cal. 226; 1 Chit. Pl. 219; 1 Phil. Ev. 301, 302, note; *Daniell*, Ch. Prac. (4th Am. Ed.) 95, 864; 1 Greenl. Ev. §§ 486, 488; *Best*, Ev. §§ 33, 513; *Carnegie v. Morrison*, 2 Mete. (Mass.) 381, 404; *Mason v. Dousay*, 35 Ill. 424, 433; *McDougald v. Rutherford*, 30 Ala. 253. So, a local custom as to days of grace. *Goddin v. Shipley*, 7 B. Mon. (Ky.) 575. The proof may be by a volume purporting to be printed by authority, *Tenant v. Tenant*, 110 Pa. St. 478, 1 Atl. 532; but not by a witness unskilled in the law, *City Sav. Bank v. Land Co.* (Tenn. Ch. App.) 37 S. W. 1037; nor by a book without proof of authority or local use, *Bride v. Clark*, 161 Mass. 130, 36 N. E. 745; *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409; *Templeton v. Brown*, 86 Tenn. 51, 5 S. W. 441; *Camp v. Randle*, 81 Ala. 240, 2 South. 287.

⁴⁶ *Dubois v. Mason*, 127 Mass. 37.

⁴⁷ *Cooper v. Reaney*, 4 Minn. 528 (Gil. 413); *Hawley v. Sloo*, 12 La. Ann. 815; *Martin v. Powder Co.*, 2 Colo. 596. And if the contract is governed by the law of another state and rendered usurious by such law, that must be proved. *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118; *Cutler v. Wright*, 22 N. Y. 472. So, of a foreign bond. *Thompson v. Powles*, 2 Sim. 194.

⁴⁸ *Engler v. Ellis*, 16 Ind. 475; *Pugh v. Cameron*, 11 W. Va. 523; *White v. Friedlander*, 35 Ark. 52; *Forsyth v. Baxter*, 3 Ill. 9; *Jones v. Rider*, 60 N. H. 452; *Hubble v. Improvement Co.*, 95 Tenn. 585, 32 S. W. 965; *Craven v.*

or because it was made on Sunday,⁴⁹ or because of the maker's infancy.⁵⁰ In like manner, the foreign law as to rate of damages is *prima facie* the same as the *lex fori*.⁵¹ So, as to days of grace.⁵² So, the *lex loci contractus* will be presumed to allow an indorsee to sue the indorsers before exhausting his remedy against the maker, if this is the *lex fori*.⁵³

A country which has separated from another will generally be presumed, however, to have continued its former laws in force, as in the case of the states formerly governed by the English common law.⁵⁴ But the common law will not be presumed to govern in Texas, as that state was never subject to Great Britain.⁵⁵

The *lex mercatoria*, being of general, if not universal, application, has been held to be *prima facie* the foreign law, as to the allowance of days of grace.⁵⁶ So, as to the negotiability of bonds or coupons drawn in negotiable form.⁵⁷

Bates, 96 Ga. 78, 23 S. E. 202; *Greenwade v. Greenwade*, 3 Dana (Ky.) 497. So, too, where the controlling law is that of the place of payment, the contract will not be presumed usurious, because it would be so by the *lex fori*. *Martin v. Martin*, 1 Smedes & M. (Miss.) 176.

⁴⁹ *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. 531. But see, *contra*, *Hill v. Wilker*, 41 Ga. 449; *Brimhall v. Van Campen*, 8 Minn. 13 (Gil. 1); *Sayre v. Wheeler*, 31 Iowa, 112.

⁵⁰ *Thompson v. Ketcham*, 8 Johns. (N. Y.) 146. But see *Seyfert v. Edison*, 45 N. J. Law, 393, where a transfer from husband to wife made in Pennsylvania was presumed in New Jersey to be illegal as at common law.

⁵¹ *Kuenzi v. Elvers*, 14 La. Ann. 391.

⁵² *Wood v. Corl*, 4 Metc. (Mass.) 203; *Dollfus v. Frosch*, 1 Denio (N. Y.) 367. But in *Lucas v. Ladew*, 28 Mo. 342, the common law as to grace, abolished by statute in Missouri, was presumed in Missouri to remain unchanged in New York.

⁵³ *Bean v. Briggs*, 4 Iowa, 467; *Bernard v. Barry*, 1 G. Greene (Iowa) 388, 391.

⁵⁴ *Dickinson v. Hoomes' Adm'r*, 8 Grat. (Va.) 353, 408; *Arayo v. Currel*, 1 La. 528. Thus, a wife will be presumed in New Jersey incapable by Pennsylvania law, as by the common law, of binding herself as maker of an accommodation note for her husband. *Seyfert v. Edison*, 45 N. J. Law, 393. So, as to common law of *grace*, *Lucas v. Ladew*, 28 Mo. 342; of *negotiability*, *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68; *Dunn v. Adams*, 1 Ala. 527; of admissibility of *want of consideration* as a defense, *Crouch v. Hall*, 15 Ill. 263.

⁵⁵ *Flato v. Mulhall*, 72 Mo. 522. Nor can the common law be presumed to have force in Russia. *Savage v. O'Neil*, 44 N. Y. 298.

⁵⁶ *Reed v. Wilson*, 41 N. J. Law, 29; *Lucas v. Ladew*, 28 Mo. 342.

⁵⁷ *Tyrell v. Railroad Co.*, 7 Mo. App. 294.

Lex Domicilii.

§ 28. In the opinion of foreign jurists, the law of the domicile determines questions of personal capacity,⁵⁸ and this has been held to be the rule in Louisiana.⁵⁹ But the extreme inconvenience and danger of such a rule in the United States, where a large part of the population has or has had a foreign domicile, and where residence and domicile are frequently changed from state to state, have established a different rule, and subordinated the law of the domicile to that of the place of contract, even on the question of personal capacity,⁶⁰ except where such law comes in conflict with the policy of the forum.⁶¹ In a married woman's contract, where this has been held to be the case, the domicile and the forum will control the place of contract,⁶² or of payment.⁶³ So, the domicile and forum and place of contract will control the place of payment.⁶⁴

On all other questions arising out of commercial paper, and relating to its form or validity or to the liability of the parties, the *lex domicilii* does not, in general, come into consideration.⁶⁵

Lex Loci Contractus Governs Liability—Form.

§ 29. In general, the rule of other contracts applies to commercial paper. The law of the place where the contract is made governs the contract, unless such law is against the public morals or policy of the state where it is to be enforced.⁶⁶

⁵⁸ Story, *Confl. Laws*, §§ 66, 73.

⁵⁹ *Garnier v. Poydras*, 13 La. 177.

⁶⁰ Story, *Confl. Laws*, §§ 103, 136. See, too, *Milliken v. Pratt*, 125 Mass. 374.

⁶¹ *Hayden v. Stone*, 13 R. I. 106.

⁶² *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14.

⁶³ *Second Nat. Bank v. Hall*, 35 Ohio St. 158.

⁶⁴ *Hanover Nat. Bank v. Howell*, 118 N. C. 271, 23 S. E. 1005.

⁶⁵ But see *Second Nat. Bank v. Hall*, *supra*, where the domicile of the maker, a foreign corporation, and not the law of the forum, was held to determine the question whether the stockholders were individually liable.

⁶⁶ Byles, *Bills*, 402; 2 *Pars. Notes & B.* 320; Story, *Prom. Notes*, § 155; Story, *Confl. Laws*, § 242; 1 *Daniel, Neg. Inst.* 828. That a married woman may become surety on a note in Illinois, although differing from, is not against, the public policy of New Jersey. *Wright v. Remington*, 41 N. J. Law,

Except where it is itself controlled by the law of the place of payment, this law determines the *liability* of parties to a negotiable bill or note. This is true of the maker of a promissory note⁶⁷ (although afterwards transferred in another state),⁶⁸ the drawer of a bill,⁶⁹ the acceptor⁷⁰ (whose place of contract is the place of acceptance), and the surety.⁷¹ It is also true of the indorser, irrespective of place of payment.⁷²

The law of the place of contract regulates the *formalities* of its execution.⁷³ Thus, the sufficiency of a parol acceptance is governed by the law of the place of acceptance.⁷⁴ In like manner, where a

48, affirmed 43 N. J. Law, 451. On the other hand, a New Jersey court will not enforce a New York contract secured by a New Jersey mortgage against the policy of the New Jersey statutes prohibiting stock gambling. *Flagg v. Baldwin*, 38 N. J. Eq. 219.

⁶⁷ *Davis v. Clemson*, 6 McLean, 622, Fed. Cas. No. 3,630; *Camp v. Randle*, 81 Ala. 240, 2 South. 287.

⁶⁸ *Ory v. Winter*, 4 Mart. N. S. (La.) 277.

⁶⁹ *Thorp v. Craig*, 10 Iowa, 461; *Orr v. Lacy*, 4 McLean, 243, Fed. Cas. No. 10,589; *Carroll v. Upton*, 2 Sandf. (N. Y.) 171. But it has been held that the damages for which the drawer of a bill of exchange is liable must be determined by the place where the bill was drawn, that being presumably the intended place of payment of a bill drawn to his own order in Boston on London, and negotiated by him in New York. *Ex parte Heidelberg*, 2 Low. 526, Fed. Cas. No. 6,322.

⁷⁰ *Boyce v. Edwards*, 4 Pet. 111. So, too, *Scudder v. Bank*, 91 U. S. 406; *In re Gillespie*, 16 Q. B. Div. 702, affirmed 18 Q. B. Div. 286; *In re Marseilles Extension Railway & Land Co.*, 30 Ch. Div. 598; *Roe v. Jerome*, 18 Conn. 138; *Webster v. Machine Co.*, 54 Conn. 394, 8 Atl. 482. But see *Lonsdale v. Bank*, 18 Ohio, 126.

⁷¹ *Long v. Templeman*, 24 La. Ann. 564. And this rule is not affected by a subsequent change of domicile on the part of the principal. *Id.*

⁷² See §§ 38, 39, *infra*.

⁷³ 1 *Daniel*, Neg. Inst. § 830; *Story*, Bills, § 131; *Story*, Prom. Notes, § 158; *Hyde v. Goodnow*, 3 N. Y. 266; *Evans v. Anderson*, 78 Ill. 558; *Dacosta v. Davis*, 24 N. J. Law, 319; *Wood v. Gibbs*, 35 Miss. 559.

⁷⁴ *Mason v. Dousay*, 35 Ill. 424; or a verbal promise to accept, *Exchange Bank v. Hubbard*, 10 C. C. A. 295, 62 Fed. 112; *Hubbard v. Bank*, 18 C. C. A. 525, 72 Fed. 234. So, *Bank of Rutland v. Woodruff*, 34 Vt. 89, where the drawee resided in a state not recognizing such acceptances, but accepted the bill by his agent in a state where such acceptance was valid. So, too, *Scudder v. Bank*, 91 U. S. 406, where the drawee was a Missouri firm, but the bill was accepted by a member of the firm then in Illinois.

person in New York writes to another in Michigan, authorizing the latter to draw on him bills payable in New York, this authority is governed by New York law, and amounts to an acceptance there.⁷⁵ So, an indorsement in blank, made in France and invalid there, is of no force anywhere.⁷⁶

Lex Loci Contractus Governs Validity—Effect.

§ 30. The *validity* of a contract is determined by the law where it is made,⁷⁷ unless the provisions of the foreign law are repugnant to those of the forum, in which case they will not be enforced there.⁷⁸ But an I. O. U., given for a gaming consideration and valid where made, has been enforced as valid in England.⁷⁹ But a contract and note in Massachusetts for the sale and delivery of liquor in New Hampshire are a New Hampshire contract, and illegal and void by the laws of that state.⁸⁰

The rules determining the validity of a bill or note on the score of capacity of parties, and those relating to the conflict of usury laws, are considered in part II. of this chapter.

In like manner, the *effect* of a contract is determined by the law of the place where it is made.⁸¹ This rule has been applied to the

⁷⁵ Bissell v. Lewis, 4 Mich. 450.

⁷⁶ Byles, Bills, 403; Trimby v. Vignier, 1 Bing. N. C. 151, 4 Moore & S. 695, and 6 Car. & P. 25. But see Wynne v. Jackson, 2 Russ. 351. And see, as to the acceptor's liability to such indorsee, In re Marseilles Extension Railway & Land Co., 30 Ch. Div. 598.

⁷⁷ Story, Prom. Notes, § 155; Story, Bills, § 131; Byles, Bills, 403; Atwater v. Walker, 16 N. J. Eq. 42; Id., 15 N. J. Eq. 502; Armour v. McMichael, 36 N. J. Law, 92, 94; Dolman v. Cook, 14 N. J. Eq. 56, 62; Andrews v. Torrey, Id. 355, 357; Cotheal v. Blydenburgh, 5 N. J. Eq. 17, 631; Carnegie v. Morrison, 2 Mete. (Mass.) 381, 397; Bissell v. Lewis, 4 Mich. 450, 459; Fitch v. Remer, 8 Am. Law Reg. 654, Fed. Cas. No. 4,836; Wood v. Gibbs, 35 Miss. 559; McDougald v. Rutherford, 30 Ala. 253.

⁷⁸ King v. Sarria, 69 N. Y. 24.

⁷⁹ Byles, Bills, 404; Quarrier v. Colston, 12 Law J. Ch. 57; Id., 1 Phill. 147. On the other hand, a draft for a lottery prize, which is illegal where made and where sold, is not rendered valid by the laws which validate the lottery in its own state. Roselle v. McAuliffe (Mo. Sup.) 35 S. W. 1135.

⁸⁰ Wilson v. Stratton, 47 Me. 120.

⁸¹ Story, Prom. Notes, § 155; Story, Bills, § 131; 1 Daniel, Neg. Inst. 830; Evans v. Anderson, 78 Ill. 538; Kanaga v. Taylor, 7 Ohio St. 134, 142; Armen-

questions of what grace shall be allowed⁸² and what interest paid,⁸³ as well as to establish its negotiability,⁸⁴ the bona fide character of the holder,⁸⁵ and the damages recoverable.⁸⁶ And the fact that a note made in one state is secured by a mortgage on lands lying in another state will not change this rule.⁸⁷ The acceptor of a bill is governed in his turn, as to interest to be paid, by the law of the place of acceptance.⁸⁸

Lex Loci Solutionis — Governs Nature, Obligation, and Construction.

§ 31. Where a contract is made with reference to the place of performance, as is generally the case, the law of the place of contract yields to the law of the place of performance.⁹² If a place of performance is expressed, it is presumed that the contract was

diaz v. Serna, 40 Tex. 291; Arnold v. Potter, 22 Iowa, 194; Carnegie v. Morrison, 2 Mete. (Mass.) 381, 397; Bissell v. Lewis, 4 Mich. 450, 459; Steele v. Curle, 4 Dana (Ky.) 381; Stevens v. Norris, 30 N. H. 466, 470; Wood v. Gibbs, 35 Miss. 559; McDougald v. Rutherford, 30 Ala. 253. So, as to the admissibility of defenses, Shoe & Leather Nat. Bank v. Wood, 142 Mass. 563, 8 N. E. 753; Barret v. Dodge, 16 R. I. 740, 19 Atl. 530; or the effect of an indorsement after maturity, Alcock v. Smith [1892] 1 Ch. 238.

⁸² Burnham v. Webster, 19 Me. 232.

⁸³ Byles, Bills, 406; Story, Prom. Notes, § 166; Hunter v. Blodgett, 2 Yeates, 480; Varick v. Crane, 4 N. J. Eq. 128; Pugh v. Cameron, 11 W. Va. 523; Second Nat. Bank v. Smoot, 2 MacArthur, 371; Sheldon v. Haxtun, 91 N. Y. 124; Kuhn v. Morrison, 75 Fed. 81; Camp v. Randle, 81 Ala. 240, 2 South. 287.

⁸⁴ Quaker City Nat. Bank v. Showacre, 26 W. Va. 48; Corbin v. Bank, 87 Va. 661, 13 S. E. 98.

⁸⁵ Oliphant v. Vannest, 58 N. J. Law, 162, 33 Atl. 382.

⁸⁶ In re Gillespie, 16 Q. B. Div. 702, affirmed 18 Q. B. Div. 286; Roe v. Jerome, 18 Conn. 138.

⁸⁷ De Wolf v. Johnson, 10 Wheat. 367; Chase v. Dow, 47 N. H. 405; Tenny v. Porter, 61 Ark. 329, 33 S. W. 211. See, too, §§ 25, 33, *infra*.

⁸⁸ Byles, Bills, 406; Cooper v. Earl of Waldegrave, 2 Beav. 282; Allen v. Kemble, 6 Moore, P. C. 314.

⁹² Robinson v. Bland, 2 Burrows, 1077; Andrews v. Pond, 13 Pet. 65; Stricker v. Tinkham, 35 Ga. 176; Prentiss v. Savage, 13 Mass. 21; Goddin v. Shipley, 7 B. Mon. (Ky.) 575; Fanning v. Consequa, 17 Johns. (N. Y.) 511; Hyde v. Goodnow, 3 N. Y. 266; Thorp v. Craig, 10 Iowa, 461; Hunt v. Stand-

made with reference to the law of that place.⁹³ It is presumed, also, that this law was known to the contracting parties.⁹⁴ And this rule applies to commercial paper. The law of the place of payment governs the nature, obligation, and interpretation of such paper.⁹⁵

Where the place of payment is different from the place of making, the parties may stipulate that the contract shall be governed by the law of either place.⁹⁶ Thus, they may make the rate of interest follow the law of their own residence, and, if valid there, it will be sufficient, though usurious by the law of the place of payment.⁹⁷ If part of a contract is to be performed in one state and part in an-

art, 15 Ind. 33; *Freese v. Brownell*, 35 N. J. Law, 285; *Agricultural Nat. Bank v. Sheffield*, 4 Hun (N. Y.) 421; *Shillito v. Reineking*, 30 Hun (N. Y.) 345. So, to render a check an assignment of the fund drawn against, this being not the rule where it was drawn, *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401.

⁹³ 1 Edw. Bills & N. § 217; 2 Pars. Notes & B. 320; Story, Prom. Notes, § 165; 1 Daniel, Neg. Inst. 840; *Short v. Trabue*, 4 Mete. (Ky.) 299; *Arnold v. Potter*, 22 Iowa, 194; *Newman v. Kershaw*, 10 Wis. 333; *Martin v. Martin*, 1 Smedes & M. (Miss.) 176; *City of Aurora v. West*, 22 Ind. 88; *Smith v. Bank*, 29 Ind. 158; *Allen v. Bratton*, 47 Miss. 119; *Fordyce v. Nelson*, 91 Ind. 447. And the expressed place of payment will control the date, *Hanover Nat. Bank v. Johnson*, 90 Ala. 549, 8 South. 42. On the other hand, if a note is made by a resident of Indiana to a resident of Ohio, dated in Indiana and payable at —, the intention of the parties, as to place of performance, is a question for the jury. *Shillito v. Reineking*, 30 Hun (N. Y.) 345.

⁹⁴ 2 Pars. Notes & B. 326; *Freese v. Brownell*, 35 N. J. Law, 287.

⁹⁵ Byles, Bills, 402; 2 Pars. Notes & B. 345; Story, Prom. Notes, § 165; *Robinson v. Bland*, 2 Burrows, 1077, 1 W. Bl. 256; *Rothschild v. Currie*, 1 Q. B. 43; *Allen v. Kemble*, 6 Moore, P. C. 314; *Van Zant v. Arnold*, 31 Ga. 210. So, as to its negotiability, *Fordyce v. Nelson*, 91 Ind. 447; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; or as to a draft not being an assignment of the fund, *Abt v. Bank*, 159 Ill. 467, 42 N. E. 856.

⁹⁶ *Newman v. Kershaw*, 10 Wis. 333; *Arnold v. Potter*, 22 Iowa, 194. Where it is expressly payable in another state at a rate of interest valid there, the law of that state will determine its validity. *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118; *Brown v. Gardner*, 4 Lea (Tenn.) 145. But drawing and dating a bill in Tennessee upon a drawee in Louisiana, under cover of a foreign charter, for the purpose of evading a Tennessee statute against private banking, will not make it a valid bill. *Davidson v. Lanier*, 4 Wall. 447.

⁹⁷ Whart. Confl. Laws, § 510, note; *Richards v. Bank*, 12 Wis. 692; *Vliet v. Camp*, 13 Wis. 198.

other, each part will be governed by the law of the place where it is to be performed.⁹⁸ Thus, an indorsement for the accommodation of the payee of a note may be governed by the law of the place of indorsement, and the maker's contract with the payee by the law of the place where the note was made.⁹⁹

In general, the contract of the maker of a note or the drawer of a bill of exchange is governed by the place where it is made payable.¹⁰⁰ And this is true of bills of exchange,¹⁰¹ municipal bonds,¹⁰² drafts,¹⁰³ and checks.¹⁰⁴ So, the law of the place of payment will determine the acceptor's liability, if such place is expressed in the instrument.¹⁰⁵ But if the bill is payable generally, without designation of a place of payment, this will not be the rule.¹⁰⁶

⁹⁸ *Pomeroy v. Ainsworth*, supra.

⁹⁹ *Greathead v. Walton*, 40 Conn. 226.

¹⁰⁰ 1 Edw. Bills & N. § 228; 2 Pars. Notes & B. 335; Story, Prom. Notes, § 172; *Hunt v. Standart*, 15 Ind. 33; *Allen v. Bratton*, 47 Miss. 119; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Davis v. Clemson*, 6 McLean, 622, Fed. Cas. No. 3,630; *Cook v. Moffat*, 5 How. 295, as to discharge in insolvency; *Sylvester v. Crohan*, 138 N. Y. 494, 34 N. E. 273, as to need of presenting for payment; *In re Commercial Bank of South Australia*, 36 Ch. Div. 522, as to damages recoverable against drawer; *Tenant v. Tenant*, 110 Pa. St. 478, 1 Atl. 532, as to discharge of surety by want of diligence against principal; *Campbell v. Nichols*, 33 N. J. Law, 81, as to usury. So, *Murphy v. Collins*, 121 Mass. 6, where the note was delivered and payable in the same place; and *Little v. Riley*, 43 N. H. 109, where it was secured by a mortgage on lands situate in the place named for payment.

¹⁰¹ *Bright v. Judson*, 47 Barb. (N. Y.) 29; *Mason v. Dousay*, 35 Ill. 424.

¹⁰² *City of Aurora v. West*, 22 Ind. 88.

¹⁰³ *Orono Bank v. Wood*, 49 Me. 26.

¹⁰⁴ *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

¹⁰⁵ Byles, Bills, 405; 1 Daniel, Neg. Inst. 852; 1 Edw. Bills & N. § 228; *Freese v. Brownell*, 35 N. J. Law, 285; *Frazier v. Warfield*, 9 Smedes & M. (Miss.) 220; *Bainbridge v. Wilcocks*, 1 Baldw. 536, Fed. Cas. No. 755; *Don v. Lippmann*, 5 Clark & F. 1; *Cooper v. Earl of Waldegrave*, 2 Beav. 282; *Barney v. Newcombe*, 9 Cush. (Mass.) 46; *Bright v. Judson*, 47 Barb. (N. Y.) 29. So, as to damages recoverable against acceptor, *Bank of U. S. v. Daniel*, 12 Pet. 33.

¹⁰⁶ Byles, Bills, 405; *Don v. Lippmann*, 5 Clark & F. 1; *Sproule v. Legge*, 2 Dowl. & R. 15; *Id.*, 1 Barn. & C. 16, and 2 Starkie, 156; *Kearney v. King*, 2 Barn. & Ald. 301. "When a general authority is given to draw bills from a certain place on account of advances there made, the undertaking is to replace

Lex Loci Solutionis—Governs Liability.

§ 32. The law of the place of payment as to interest is also presumed to be known and intended by the parties.¹⁰⁷ The place intended for performance of a contract is in general the place that determines the rate of interest to be computed on the instrument.¹⁰⁸ But, if the legal rate is higher at the place of payment than at the place of contract, the former may be elected by the parties.¹⁰⁹ And such higher rate, when so chosen by the parties, may be enforced in the state where the contract was made, though the contract would have been usurious if made there.¹¹⁰ A bill of exchange may even be drawn on another state to take advantage of a higher local rate of interest, and be governed by the law of such state.¹¹¹

The question of usury is considered by itself in part II. of this chapter.

The law of the place of payment also governs as to the days of grace to be allowed.¹¹²

The same law determines in what currency a bill or note is to be

the money at that place." *Merchants' Bank v. Griswold*, 72 N. Y. 472; *Lanusse v. Barker*, 3 Wheat. 146.

¹⁰⁷ *Freese v. Brownell*, 35 N. J. Law, 285; *Whart. Confl. Laws*, § 513; *Story, Confl. Laws*, § 307.

¹⁰⁸ *Campbell v. Nichols*, 33 N. J. Law, 81; *Freese v. Brownell*, 35 N. J. Law, 285; *Jacks v. Nichols*, 5 N. Y. 178; *Arnold v. Potter*, 22 Iowa, 194; *Newman v. Kershaw*, 10 Wis. 333; *Fitch v. Remer*, 8 Am. Law Reg. 654, Fed. Cas. No. 4,836; *Healy v. Gorman*, 15 N. J. Law, 328; *Bank of Illinois v. Brady*, 3 McLean, 268, Fed. Cas. No. 888; *Agricultural Nat. Bank v. Sheffield*, 4 Hun (N. Y.) 421. In this case the note was dated and made payable at one place and executed in another. The same rule was held to govern in *Little v. Riley*, 43 N. H. 109, where the note was secured by a mortgage on lands situate where it was payable; and *Goodrich v. Williams*, 50 Ga. 425, where the lands mortgaged for security, as well as the residence of the maker, were in a place other than that named for its payment.

¹⁰⁹ 2 Pars. Notes & B. 337. For cases on this subject, see *infra*.

¹¹⁰ 1 Edw. Bills & N. § 222; *Story, Prom. Notes*, § 166; *Lines v. Mack*, 19 Ind. 223; *Fitch v. Remer*, 8 Am. Law Reg. 654, Fed. Cas. No. 4,836.

¹¹¹ *Smith v. Bank*, 29 Ind. 158. So, too, interest reserved by mortgage. *Hosford v. Nichols*, 1 Paige (N. Y.) 220.

¹¹² *Byles, Bills*, 404; *Blodgett v. Durgin*, 32 Vt. 361.

paid.¹¹³ And it has been held that the law of the place of payment will determine whether the addition of certain words is a material alteration.¹¹⁴

Where the law of a foreign place of payment and indorsement does not require notice of dishonor on refusal to accept a bill of exchange, it is not necessary to enable the holder under a foreign indorsement to look to a remote English indorser, though between such indorser and his indorsee it would be.¹¹⁵ On the other hand, a New York indorser will not be entitled to a discharge by reason of failure to demand payment and protest a bill of exchange for nonpayment after protest for nonacceptance, such second demand and protest being required by the law of France, where the bill was payable, but not by that of New York.¹¹⁶ And the law of the place of payment governs also as to the notice of dishonor that is necessary. Thus the English courts have recognized the French law of protest as governing an English indorser.¹¹⁷ The same rule has been followed in the United States as to the sufficiency of protest.¹¹⁸

Lex Loci Rei Sitæ.

§ 33. This law comes in question principally, if not solely, where paper, made or payable in one state, is secured by mortgage on lands in another state, and its validity is contested for usury or other alleged illegality. A consideration of the usury cases will be found in part II. of this chapter.

¹¹³ Story, Prom. Notes, § 163; Story, Confl. Laws, §§ 270, 308; Whart. Confl. Laws, § 437; *Benners v. Clemens*, 58 Pa. St. 24. In like manner as to weights and measures. *Rosseter v. Cahlmann*, 8 Exch. 361.

¹¹⁴ *Holland v. Hatch*, 15 Ohio St. 464.

¹¹⁵ *Horne v. Rouquette*, 3 Q. B. Div. 514.

¹¹⁶ 2 Pars. Notes & B. 336; Story, Bills, § 176; *Aymar v. Sheldon*, 12 Wend. 439.

¹¹⁷ Byles, Bills, 405; 2 Pars. Notes & B. 336; Story, Prom. Notes, § 177; as to time for sending notice, *Rothschild v. Currie*, 1 Q. B. 43; and as to mode of sending it, *Hirschfeld v. Smith*, L. R. 1 C. P. 340.

¹¹⁸ *Chatham Bank v. Allison*, 15 Iowa, 357.

Lex Fori.

§ 34. The *lex fori*, in general, affects only questions of remedy, which are discussed in part II. of this chapter. It is often, however, of importance, in raising a presumption as to what the foreign law is, as well as in proving it to be consistent or inconsistent with the public policy of the jurisdiction that is invoked.

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II. SPECIAL APPLICATIONS.

- § 35. Capacity—What Law Governs.
 36. Form—What Law Governs.
 37. Nature and Interpretation—What Law Governs.
 38. Liability of Drawer—Acceptor—Surety—Indorser.
 39. Liability—Governed by Place of Payment.
 40. Validity—What Law Governs.
 41. Interest—Implied Rate.
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 48. Transfer—Form—Governed by What Law.
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 55. Parties—Evidence—What Law Governs.
 56. Damages—Interest—Exchange—Set-Off.
 57. Discharge—Payment—What Law Governs.
 58. Insolvent's Discharge—What Law Governs.
 59. Foreign Statutes as to Conflict of Laws.

Capacity—What Law Governs.

§ 35. The capacity of the parties to a contract is in general to be determined by the *lex loci contractus*.¹¹⁹ Thus, an infant's contract will be sustained, if valid by the *lex loci contractus*.¹²⁰ So,

¹¹⁹ 2 Pars. Notes & B. 349; Story, *Conf. Laws*, § 103. So held as to capacity to make a deed. *Hucy's Appeal*, 1 Grant, Cas. 51. But it seems that under the law of France a married woman's capacity to contract is decided according to the law of her domicile. *Garnier v. Poydras*, 13 La. 177. And see § 28, *supra*.

¹²⁰ So, as to an infant's contract for necessities. *Male v. Roberts*, 3 Esp. 163. But see Story, *Conf. Laws*, §§ 66, 73. And the law of the place of forum controls the matter of minority, when it comes in question, only on the point of the minor's authority to maintain his action. *Barrera v. Alpuente*, 6 Mart. (N. S.) 69.

the contract of a married woman.¹²¹ But in Mississippi the note of a married woman for supplies to her plantation has been held enforceable by Mississippi law, although made in another state, where it could not have been enforced.¹²² And, on the other hand, the Mississippi courts have refused to enforce the note of a married woman resident in Mississippi, though dated in Louisiana and valid there.¹²³

A transfer made by an executor or administrator will be sufficient, if it is valid by the law of the place of transfer.¹²⁴ And although it is a well-settled rule, already referred to, that a state will not enforce foreign laws that contravene its own policy, yet a note made to a foreign corporation may be enforced notwithstanding that the law of the forum as to license of such corporation's business has not been complied with.¹²⁵

¹²¹ *Bell v. Packard*, 69 Me. 105; *Bowles v. Field*, 83 Fed. 886. So, the note of a wife for the accommodation of her husband, made and payable in Missouri, will be sustained under Missouri law, although invalid by the law of the forum, *Benton v. Bank*, 45 Neb. 850, 64 N. W. 227; or by the law where the indorsement was written, *Johnston v. Gawtry*, 83 Mo. 339; or where the mortgaged land securing it was situated, *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418. So, a fortiori, where the wife was also domiciled in the foreign state and the note made payable there. *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. 38. But such a note has been sustained by the law of the place of contract, even against that of the domicile and of the landed security. *Bowles v. Field*, 78 Fed. 742. On the other hand, a wife's capacity to contract is decided according to the law of her domicile in Louisiana. *Garnier v. Poydras*, 13 La. 177. And this is the rule generally followed by foreign courts and jurists. *Story, Conf. Laws*, § 66. And where the note of a married woman is invalid by the law of her domicile, the courts of that place will not enforce it, although valid where made. *Hayden v. Stone*, 13 R. I. 106; *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420. See, too, § 28, *supra*.

¹²² *Shacklett v. Polk*, 51 Miss. 378. So, a note made by a wife having a separate estate, as surety for her husband, can be enforced against her property in Mississippi charged with the debt, although it was void by the law of Louisiana, where it was made and where the maker resided. *Frierson v. Williams*, 57 Miss. 451.

¹²³ *Bank of Louisiana v. Williams*, 46 Miss. 618.

¹²⁴ 1 *Daniel, Neg. Inst.* 843; 2 *Pars. Notes & B.* 373, note; *Story, Conf. Laws*, § 350; *Whart. Conf. Laws*, § 457; *Harper v. Butler*, 2 Pet. 239; *Andrews v. Carr*, 26 Miss. 577; *Owen v. Moody*, 29 Miss. 79. But see, *contra*, *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Burnham*, 5 Me. 261.

¹²⁵ *Shook v. Manufacturing Co.*, 61 Ind. 520. But in *Webster v. Machine*

Form—What Law Governs.

§ 36. A contract is also governed as to all questions of formality of execution by the law of the place where it is made.¹²⁶ If defective in form, and therefore invalid there, it is so everywhere.¹²⁷ Thus, a verbal acceptance is valid or otherwise according to the law of the place of acceptance, not of the place of drawing the bill.¹²⁸ But a promise to accept may be enforceable as a valid contract, though not equivalent, where it was given, to an acceptance.¹²⁹

In like manner, an indorsement in blank made in France is void there, and therefore will not be enforced against the indorser in an English court, though valid in England.¹³⁰ But a Bank of

Co., 54 Conn. 400, 8 Atl. 482, the power of a Connecticut corporation to give an accommodation acceptance was determined by the law of New York, where the bill was accepted and made payable.

¹²⁶ Story, Bills, § 131; 1 Daniel, Neg. Inst. 830; 2 Pars. Notes & B. 317; Story, Prom. Notes, § 158; Wood v. Gibbs, 35 Miss. 559; Dacosta v. Davis, 24 N. J. Law, 319; Hyde v. Goodnow, 3 N. Y. 266; Evans v. Anderson, 78 Ill. 558. So, in Great Britain, Bills of Exchange Act 1882, § 72. But if in form it accords with the requirements of English law, it is valid as between all parties to it in Great Britain. *Id.* If the statute of the place of contract requires the words, "Given for a patent right," that law governs. *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198.

¹²⁷ *Thayer v. Elliott*, 16 N. H. 102; *Van Schaick v. Edwards*, 2 Johns. Cas. (N. Y.) 355; *Kanaga v. Taylor*, 7 Ohio St. 134; *Ford v. Insurance Co.*, 6 Bush (Ky.) 133; *Palmer v. Yarrington*, 1 Ohio St. 253.

¹²⁸ *Mason v. Dousay*, 35 Ill. 424; *Bissell v. Lewis*, 4 Mich. 450; *Bank of Rutland v. Woodruff*, 34 Vt. 89. So, a verbal promise to accept, although insufficient by the law of the place of payment. *Exchange Bank v. Hubbard*, 10 C. C. A. 295, 62 Fed. 112; *Hubbard v. Bank*, 18 C. C. A. 525, 72 Fed. 234. But the mere fact of the drawee's being resident in another place will not affect an acceptance given by a member of the drawee's firm in the place where the bill was drawn. *Scudder v. Bank*, 91 U. S. 406. And on the other hand, where the drawee resided in Illinois and the bills were to be drawn on him there against consignments to be sent there, his verbal agreement in Missouri to accept such bills will be governed by Illinois law, although the Missouri statute required written acceptance. *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154.

¹²⁹ *Russell v. Wiggin*, 2 Story, 213, 231, Fed. Cas. No. 12,165; *Carnegie v. Morrison*, 2 Mete. (Mass.) 381; *Bissell v. Lewis*, 4 Mich. 450, 460; *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

¹³⁰ *Trimbey v. Vignier*, 1 Bing. N. C. 151, 4 Moore & S. 695, and 6 Car.

England note transferred by delivery in France, where such transfer is insufficient, has been held in England (the place both of the original contract and of the forum) to have been lawfully transferred, as against the maker.¹³¹ On the other hand, where a note has been transferred according to the law of the place of transfer by delivery, but such transfer is bad for want of indorsement by the law both of the place of the original contract and of the forum, it will not be enforced at suit of the holder in the courts of the latter place.¹³² So, if it is illegal where made for want of a statutory certificate.¹³³

If a bill or note is void for want of a stamp by the *lex loci contractus*, it will be void everywhere.¹³⁴ But if the stamp act relates simply to admissibility in evidence, its effect will be confined to the courts of its own state.¹³⁵

Nature—Interpretation—What Law Governs.

§ 37.. The nature, interpretation, and obligation of contracts are all to be determined by the law of the place of contract.¹³⁶ And,

& P. 25. But a blank indorsement in France of an English bill payable in England will be recognized so far as to enable the indorsee to recover against the acceptor in an English court. *In re Marseilles Extension Railway & Land Co.*, 30 Ch. Div. 598.

¹³¹ *De La Chaumette v. Bank*, 2 Barn. & Adol. 385, 9 Barn. & C. 208.

¹³² *Roosa v. Crist*, 17 Ill. 450.

¹³³ *Moore v. Clopton*, 22 Ark. 125.

¹³⁴ *Alves v. Hodgson*, 7 Term R. 241; *Bristow v. Sequeville*, 5 Exch. 279; *Clegg v. Levy*, 3 Camp. 166. A contrary doctrine was formerly held in *James v. Catherwood*, 3 Dowl. & R. 190; *Wynne v. Jackson*, 2 Russ. 351. And an exception is made to the rule where the bill or note is payable in the place where suit is brought. *Ludlow v. Van Rensselaer*, 1 Johns. (N. Y.) 94. But the contrary is now provided in Great Britain as to bills issued abroad. Bills of Exchange Act 1882, § 12.

¹³⁵ *Fant v. Miller*, 17 Grat. (Va.) 47; *Lambert v. Jones*, 2 Pat. & H. (Va.) 144.

¹³⁶ 2 Pars. Bills & N. 319; Story, Prom. Notes, §§ 159-161; 1 Edw. Bills & N. § 218; 1 Daniel, Neg. Inst. § 30; *Hyde v. Goodnow*, 3 N. Y. 266; *Evans v. Anderson*, 78 Ill. 558; *Bulger v. Roche*, 11 Pick. (Mass.) 36, 38; *Goodman v. Munks*, 8 Port. (Ala.) 84; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Carnegie v. Morrison*, 2 Metc. (Mass.) 381, 397; *Bissell v. Lewis*, 4 Mich. 450, 459; *Fitch v. Remer*, 8 Am. Law Reg. 654. So, as to interpre-

as to the construction of the laws of foreign states, it has been held that the decisions of their own courts are binding upon the courts of other states.¹³⁷

Liability of Drawer—Acceptor—Surety—Indorser.

§ 38. The liability of the drawer of a bill is governed by the *lex loci contractus*, except in cases where the *lex loci solutionis* is intended to control.¹³⁸ The contract of the *drawer* is to pay generally, i. e. at the place where the bill is drawn, if no other place of payment is expressed.¹³⁹ This contract with the payee is governed by that law.¹⁴⁰ Thus, the drawer's liability to an indorsee on nonacceptance

tation alone, *Bell v. Packard*, 69 Me. 105; *Pease v. Pease*, 35 Conn. 131; *Arnold v. Potter*, 22 Iowa, 194; *Armour v. McMichael*, 36 N. J. Law, 92; *Varick's Ex'r v. Crane*, 4 N. J. Eq. 128; *Benners v. Clemens*, 58 Pa. St. 24; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; *Chartres v. Cairnes*, 4 Mart. (N. S.) 1; *Warder v. Arell*, 2 Wash. (Va.) 282; *Smith v. Smith*, 2 Johns. (N. Y.) 235. So, as to nature and interpretation. *Pearsall v. Dwight*, 2 Mass. 84. So, as to interpretation and obligation. *Steele v. Curle*, 4 Dana (Ky.) 381; *Porter v. Munger*, 22 Vt. 191. So, as to obligation alone. *Kanaga v. Taylor*, 7 Ohio St. 134, 143; *Armendiaz v. Serna*, 40 Tex. 291; *Churchill v. Cole*, 32 Vt. 93; *Atwater v. Walker*, 16 N. J. Eq. 42; *Id.*, 15 N. J. Eq. 502; *Thorp v. Craig*, 10 Iowa, 461; *Harrison v. Edwards*, 12 Vt. 648, 652. So, as to nature and obligation. *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *Wood v. Gibbs*, 35 Miss. 559; *Story, Bills*, § 131. So, as to nature only. *Stevens v. Norris*, 30 N. H. 466. The English Bills of Exchange Act of 1882 makes the interpretation to be determined by the law of the place of contract, except as to foreign indorsements of inland bills, which are to be interpreted, "as regards the payer," by English law. Section 72.

¹³⁷ *Hunt v. Hunt*, 72 N. Y. 217; and on the federal courts, *Phipps v. Harding*, 17 C. C. A. 203, 70 Fed. 468.

¹³⁸ 2 Pars. Bills & N. 335; 1 Edw. Bills & N. § 228; *Story, Bills*, § 131; *Story, Prom. Notes*, § 172; *Thorp v. Craig*, 10 Iowa, 461; *Wood v. Gibbs*, 35 Miss. 559. So, the maker of a note, as to interest after maturity. *Camp v. Randle*, 81 Ala. 240, 2 South. 287.

¹³⁹ 1 Daniel, Neg. Inst. 853; *Freese v. Brownell*, 35 N. J. Law, 285; *Everett v. Vendryes*, 19 N. Y. 436; *Hunt v. Standart*, 15 Ind. 33; *Raymond v. Holmes*, 11 Tex. 54; *Kuenzi v. Elvers*, 14 La. Ann. 391; *Lennig v. Ralston*, 23 Pa. St. 137, 140; *Price v. Page*, 24 Mo. 65; *Bouldin v. Page*, *Id.* 594; *Page v. Page*, *Id.* 595; *Smith v. Mead*, 3 Conn. 253; *Blodgett v. Durgin*, 32 Vt. 361.

¹⁴⁰ *Byles, Bills*, 274; 1 Daniel, Neg. Inst. 853; *Story, Bills*, § 131. So, too, if drawer and drawee reside in different places, *Gibbs v. Fremont*, 9 Exch. 25.

is determined by the place of contract, and not by the place of indorsement.¹⁴¹ So, the drawer's right to set up equitable defenses is determined by the law of the place of his contract, and will not be affected by the law of any place where the note may be subsequently transferred.¹⁴² So, failure of consideration may be set up by the drawer of a bill even against a bona fide holder for value under the law of the place where the bill was drawn, though it would not have been admissible by the laws of the drawer's residence.¹⁴³ In like manner, the drawer's liability for damages is determined by the place of his contract, that being his intended place of payment.¹⁴⁴ So, his liability for interest,¹⁴⁵ as well as the question whether a foreign indorsement is sufficient in form to enable the foreign indorsee to maintain an action against him.¹⁴⁶ So, his right to a demand at maturity and to protest and notice of dishonor.¹⁴⁷

So, the *acceptor's* liability for damages is governed, not by the law of the forum, but by the law of the place where the bill was drawn,¹⁴⁸ or drawn and accepted,¹⁴⁹ or accepted and made payable,¹⁵⁰ or by the law of the place of payment, although different from that of the domicile and of the place of drawing.¹⁵¹

¹⁴¹ Everett v. Vendryes, 19 N. Y. 436.

¹⁴² 2 Pars. Bills & N. 338; 1 Edw. Bills & N. § 228; 1 Daniel, Neg. Inst. 851; Wilson v. Lazier, 11 Grat. (Va.) 477, 482; Yeatman v. Cullen, 5 Blackf. (Ind.) 241; Stacy v. Baker, 2 Ill. 417; Brabston v. Gibson, 9 How. 263.

¹⁴³ Wood v. Gibbs, 35 Miss. 559.

¹⁴⁴ Hendricks v. Franklin, 4 Johns. (N. Y.) 119; Crawford v. Bank, 6 Ala. 13; Orr v. Lacy, 4 McLean, 243, Fed. Cas. No. 10,589. But see In re Commercial Bank of South Australia, 36 Ch. Div. 522.

¹⁴⁵ Gibbs v. Fremont, 9 Exch. 25.

¹⁴⁶ Everett v. Vendryes, 19 N. Y. 436. But it seems that between the immediate parties to such indorsement the law where it was made would determine its validity, *Id.*

¹⁴⁷ Story, Bills, § 176. And as to the time and manner of notice, Carroll v. Upton, 2 Sandf. (N. Y.) 171. But the presentment, as against the drawer, will be governed by the law of the place of payment (which was also the forum) rather than the place of drawing. Sylvester v. Crohan, 138 N. Y. 494, 34 N. E. 273.

¹⁴⁸ In re Gillespie, 16 Q. B. Div. 702, affirmed 18 Q. B. Div. 286.

¹⁴⁹ Roe v. Jerome, 18 Conn. 138.

¹⁵⁰ Webster v. Machine Co., 54 Conn. 400, 8 Atl. 482.

¹⁵¹ Bank of the United States v. Daniel, 12 Pet. 33.

So, a principal's liability to his *surety* on a note is governed by the law of the place of contract, and not affected by a subsequent change of domicile.¹⁵²

The *indorser's* liability is governed, as we have seen, by the place where the indorsement is made.¹⁵³ Want of diligence in prosecuting the maker will discharge the indorser, if it does so by the law of his place of indorsement.¹⁵⁴ And the place of contract for the maker of the note often differs from that for the indorser.¹⁵⁵ Moreover, the *lex loci contractus* is to determine whether the holder of a bill is entitled to protection as a bona fide holder against equitable defenses.¹⁵⁶ But an accommodation indorsement written in one state and delivered in another is governed by the law of the latter,¹⁵⁷ especially if written with the intention of delivery in such other state.¹⁵⁸

¹⁵² *Long v. Templeman*, 24 La. Ann. 564. But a surety's right to require suit against the principal is governed, as to form of request to sue, by the law of the place of payment. *Tenant v. Tenant*, 110 Pa. St. 478, 1 Atl. 532.

¹⁵³ *Story*, Prom. Notes, § 171; *Story*, Bills, § 147; 1 *Daniel*, Neg. Inst. 855; 1 *Edw. Bills & N.* § 230; *Cook v. Litchfield*, 9 N. Y. 279; *Id.*, 5 Sandf. (N. Y.) 330; *Davis v. Clemson*, 6 McLean, 622, 624, Fed. Cas. No. 3,630; *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163; *Williams v. Wade*, 1 Metc. (Mass.) 82; *Dow v. Rowell*, 12 N. H. 49; *Dundas v. Bowler*, 3 McLean, 397, 400, Fed. Cas. No. 4,141; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439, 443; *Slacum v. Pomery*, 6 Cranch, 221; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Trabue v. Short*, 4 Metc. (Ky.) 299; *Trabue v. Short*, 18 La. Ann. 257; *Trabue v. Short*, 5 Cold. (Tenn.) 293; *Yeatman v. Cullen*, 5 Blackf. (Ind.) 240; *Greathead v. Walton*, 40 Conn. 226; *Clanton v. Barnes*, 50 Ala. 260; *Dunn v. Adams*, 1 Ala. 527; *Lennig v. Ralston*, 23 Pa. St. 137, 140. So, as to validity of indorsement, *Oliphant v. Vannest*, 58 N. J. Law, 162, 33 Atl. 382. So, as to effect of indorsement by third party before delivery, *Wylie v. Cotter* (Mass.) 49 N. E. 746. And the *lex fori* cannot make an indorser liable as such, if by the *lex loci contractus* the note is nonnegotiable and the assignor not liable as indorser. *Stix v. Matthews*, 75 Mo. 96.

¹⁵⁴ *Williams v. Wade*, 1 Metc. (Mass.) 82; *Lee v. Selleck*, 33 N. Y. 615, affirming 32 Barb. 522. As to demand and notice, see § 52, *infra*.

¹⁵⁵ *Hatcher v. McMorine*, 15 N. C. 122; *Greathead v. Walton*, 40 Conn. 226; *Lee v. Selleck*, 33 N. Y. 615; *Lowry v. Bank*, 7 Ala. 120.

¹⁵⁶ *Allen v. Bratton*, 47 Miss. 119, 129. See, also, § 50, *infra*.

¹⁵⁷ *Young v. Harris*, 14 B. Mon. (Ky.) 556.

¹⁵⁸ *Lee v. Selleck*, 33 N. Y. 615. But see *Lowry v. Bank*, 7 Ala. 120, where the place of execution was held to govern the indorsement, although

Liability—Governed by Place of Payment.

§ 39. The rights and liabilities of the parties are to be controlled, however, as we have seen, by the place of performance, when such appears to have been their intention.¹⁵⁹ And the law of the place where a bill is indorsed and made payable will control that of the place where it is drawn, though the latter be also the place where the action is brought.¹⁶⁰

The contract of the indorser is not in general for payment at the place of payment designated in the bill or note, but for payment at his residence or at the place of his contract, if the maker or acceptor fails to pay at the place of payment. The liability of the indorser is therefore in some respects determined by the law of the place of indorsement, in disregard of the place of payment named in the instrument. This has been held to be so as to the rate of damages for which he is liable,¹⁶¹ and the diligence to which he is entitled on the holder's part in prosecution of the maker,¹⁶² as well as his right to protest and notice of dishonor¹⁶³ and the necessity for a

the note was payable in Georgia, and made and indorsed in Alabama with the intention to negotiate it in Georgia.

¹⁵⁹ *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Musson v. Lake*, 4 How. 262.

¹⁶⁰ *Brabston v. Gibson*, 9 How. 263.

¹⁶¹ 2 Kent, Comm. 460; *Story, Confl. Laws*, § 314; *Slacum v. Pomery*, 6 Cranch, 221; *Graves v. Dash*, 12 Johns. (N. Y.) 17. But see, contra, *Peck v. Mayo*, 14 Vt. 33, as to rate of interest.

¹⁶² *Story, Confl. Laws*, § 316b; *Lee v. Selleck*, 33 N. Y. 615, affirming 32 Barb. 522; *Trabue v. Short*, 4 Mete. (Ky.) 299; *Trabue v. Short*, 5 Cold. (Tenn.) 293; *Trabue v. Short*, 18 La. Ann. 257; *Hunt v. Standart*, 15 Ind. 38, overruling *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Bank of Illinois v. Brady*, 3 McLean, 268, Fed. Cas. No. 888; *Raymond v. Holmes*, 11 Tex. 54; and not the place of making the note, *Williams v. Wade*, 1 Mete. (Mass.) 82; or of the forum, *Burrows v. Hannegan*, 1 McLean 315, Fed. Cas. No. 2206. See, too, *Holbrook v. Vibbard*, 3 Ill. 465; *Conahan v. Smith*, 2 Disn. (Ohio) 9.

¹⁶³ 2 Pars. Notes & B. 343; *Story, Bills*, § 285; *Story, Prom. Notes*, § 177; 1 Edw. Bills & N. § 383; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Artisans' Bank v. Park Bank*, 41 Barb. (N. Y.) 599; *Lowry v. Bank*, 7 Ala. 120; the place of delivery and discount being the real place of indorsement, *Commercial Nat. Bank v. Simpson*, 90 N. C. 467; *Briggs v. Latham*, 36 Kan. 255,

demand.¹⁶⁴ Thus, the English indorser of a bill payable in Spain must contemplate the possibility of a Spanish indorsement, and becomes liable to a remote holder under such indorsement, without notice of nonacceptance (required by English, but not by Spanish law), although the want of such notice might discharge him as against his immediate indorsee.¹⁶⁵ In such case the foreign law would also determine the time for giving notice, when required by it.¹⁶⁶

So, the consideration of a precedent debt will make the indorsee a bona fide holder for value, as against the maker, by the law of the place of making, although this would not have been the case by the law of the place of indorsement.¹⁶⁷

Validity—What Law Governs.

§ 40. The validity of the contract is determined by the *lex loci contractus*,¹⁶⁸ and the consideration necessary to its validity.¹⁶⁹ If the consideration is valid where the instrument is executed, it is valid everywhere.¹⁷⁰ If illegal in whole or in part there, it is illegal every-

13 Pac. 393; that being also the place of payment, *Stubbs v. Colt*, 30 Fed. 417; *Phipps v. Harding*, 17 C. C. A. 203, 70 Fed. 468.

¹⁶⁴ *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874.

¹⁶⁵ *Horne v. Rouquette*, 3 Q. B. Div. 514. And see § 52, *infra*.

¹⁶⁶ *Rouquette v. Overmann*, L. R. 10 Q. B. 525.

¹⁶⁷ *Woodruff v. Hill*, 116 Mass. 310.

¹⁶⁸ *Dolman v. Cook*, 14 N. J. Eq. 56; *Atwater v. Walker*, 16 N. J. Eq. 42, 15 N. J. Eq. 502; *Armour v. McMichael*, 36 N. J. Law, 92; *Ory v. Winter*, 4 Mart. (N. S.) 277; *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214; *Green v. Sarmiento*, 3 Wash. C. C. 17, Fed. Cas. No. 5,760; *Western & A. R. Co. v. Taylor*, 6 Heisk. (Tenn.) 408. So, the question of legality under a statutory prohibition of banking powers, *Davidson v. Lanier*, 4 Wall. 447; or requirement of the words "Given for a patent right," *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198; or prohibiting pool selling, *Bride v. Clark*, 161 Mass. 130, 36 N. E. 745; or requiring the recording of a condition that title should not pass, *Holt v. Knowlton*, 86 Me. 456, 29 Atl. 1113. So, the validity of an accommodation acceptance by a corporation depends on the law of the place of acceptance and payment, and not of its domicile or of the forum. *Webster v. Machine Co.*, 54 Conn. 400, 8 Atl. 482. And see, as to a statutory restriction on the powers of a foreign corporation, *Ellsworth v. Railroad Co.*, 98 N. Y. 553. See, too, § 30, *supra*.

¹⁶⁹ *Hyde v. Goodnow*, 3 N. Y. 266; *Evans v. Anderson*, 78 Ill. 558.

¹⁷⁰ *Fant v. Miller*, 17 Grat. (Va.) 47; *Andrews v. Herriot*, 4 Cow. (N. Y.)

where,¹⁷¹ especially where it is made and payable in the same place.¹⁷² And, even where the consideration was the sale of lottery tickets in a place where it was against the law, a note given for that consideration in a state where the sale would have been valid has been held to be itself valid.¹⁷³

On the other hand, if the place of sale whose law has been violated is that of the forum, its courts will not enforce such note; as in the case of a note given in Massachusetts for liquor sold in violation of law in New Hampshire and sued on in New Hampshire.¹⁷⁴ But the Massachusetts courts have sustained as valid by New York law an executory contract for liquor made in Massachusetts, the liquor having been actually sold and delivered in New York.¹⁷⁵ Where a note is given for a sale of intoxicating liquor, the law of New Hampshire now throws the burden on the holder of proving a license for the sale, but this law will not be applied to a sale made in another state.¹⁷⁶ Nor will it constitute a defense against a bona fide holder that the note was given in another state for liquor illegally sold there.¹⁷⁷

510, note; *Pearsall v. Dwight*, 2 Mass. 84, 88; *Kanaga v. Taylor*, 7 Ohio St. 134; *Frazier v. Fredericks*, 24 N. J. Law. 162; *Pugh v. Cameron's Adm'r*, 11 W. Va. 523; *Carnegie v. Morrison*, 2 Metc. (Mass.) 381, 401; *Colston v. Pemberton*, 20 Misc. Rep. 410, 45 N. Y. Supp. 1034.

¹⁷¹ *Pecker v. Kennison*, 46 N. H. 488.

¹⁷² *Ivey v. Lalland*, 42 Miss. 444; *Collins Iron Co. v. Burkam*, 10 Mich. 283.

¹⁷³ *Jameson v. Gregory*, 4 Metc. (Ky.) 363. And, conversely, a draft for such ticket which is illegal by the law of the forum and place of contract will not be made valid by the law of the state where the lottery is. *Roselle v. McAuliffe* (Mo. Sup.) 35 S. W. 1135.

¹⁷⁴ *Fuller v. Bean*, 30 N. H. 181. So, a note for grain futures, valid where made, but prohibited in, and against the policy of, the forum. *Pope v. Hanke*, 155 Ill. 617, 40 N. E. 839.

¹⁷⁵ *Abberger v. Marrin*, 102 Mass. 70. In this case the purchaser sought by his action in Massachusetts to recover the money paid by him for the goods purchased.

¹⁷⁶ *Doolittle v. Lyman*, 44 N. H. 608.

¹⁷⁷ *Great Falls Bank v. Farmington*, 41 N. H. 32.

Interest—Implied Rate.

§ 41. The interest payable on a contract, if not designated, is to be computed by the *lex loci contractus*.¹⁷⁸ So, an authority by letter written in New York to draw a bill in Louisiana on New York has been held to imply an agreement for interest at the rate which is legal in Louisiana.¹⁷⁹ The indorser is liable in like manner for interest at the rate which is legal at the place of indorsement,¹⁸⁰ and the acceptor for that of the place of acceptance, not that of the place where the bill was drawn.¹⁸¹

But if the place of payment is expressed, and the rate of interest is not designated, it is to be computed at the rate which obtains where it is payable.¹⁸² And this is true although the note be negoti-

¹⁷⁸ Story, Prom. Notes, § 166; Byles, Bills, 406; 2 Edw. Bills & N. § 1009; Story, Bills, § 148; Gibbs v. Fremont, 9 Exch. 31; Stickney v. Jordan, 58 Me. 106; Varick v. Crane, 4 N. J. Eq. 128; Bowles v. Eddy, 33 Ark. 645; Second Nat. Bank v. Smoot, 2 MacArthur (D. C.) 371; Hawley v. Sloo, 12 La. Ann. 815; Kuhn v. Morrison, 75 Fed. Sl. So, too, in other contracts. Consequa v. Willings, Pet. C. C. 225, Fed. Cas. No. 3,128. So, a bond given in England for a debt contracted in Ireland draws interest at the English rate. Ranelagh v. Champante, 2 Vern. 395. And if such rate be express, though higher than that allowed where the debt was contracted, the bond will be valid. Connor v. Bellamont, 2 Atk. 381. But see, contra, Sands v. Smith, 1 Neb. 108, where a note given in Nebraska, and secured by a Nebraska mortgage, but made for a New York loan and payable in New York, was held to be governed by New York law, and to be void, for usury.

¹⁷⁹ Lanusse v. Barker, 3 Wheat. 101.

¹⁸⁰ Mullen v. Morris, 2 Pa. St. 85, 87, the note being in this case payable at the same place.

¹⁸¹ Byles, Bills, 406; Cooper v. Earl of Waldegrave, 2 Beav. 282; Allen v. Kemble, 6 Moore, P. C. 314; Able v. McMurray, 10 Tex. 350; Frierson v. Galbraith, 12 Lea (Tenn.) 129, the place of the acceptor's residence being held in this case to be the place of payment. But see, contra, Raymond v. Holmes, 11 Tex. 54; Bailey v. Heald, 17 Tex. 102.

¹⁸² Story, Prom. Notes, § 166; Story, Confl. Laws, § 292; 2 Edw. Bills & N. § 1009; 2 Pars. Bills & N. 377; Story, Bills, § 148; Cooper v. Earl of Waldegrave, 2 Beav. 282; Jewell v. Wright, 30 N. Y. 259; Dickinson v. Edwards, 77 N. Y. 573; Campbell v. Nichols, 33 N. J. Law, 81; Freese v. Brownell, 35 N. J. Law, 285; Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704; Agricultural Nat. Bank v. Sheffield, 4 Hun (N. Y.) 421; Hawley v. Sloo, 12 La. Ann. 815; Howard v. Branner, 23 La. Ann. 369; Arnold v. Potter, 22 Iowa,

ated elsewhere.¹⁸³ So, if a note is made in one state and intended to be paid in another, the latter fixes the rate of interest, if not expressed.¹⁸⁴ But the interest after maturity will be computed at the rate fixed by the *lex fori*, not by that of the place of payment.¹⁸⁵

In computing interest, the foreign rate will be presumed to be the same as that of the forum.¹⁸⁶ But, if the contract would be usurious by the law of the forum, this will not be presumed to be the law of the place of contract.¹⁸⁷

194; *Newman v. Kershaw*, 10 Wis. 333. But a note made in Illinois in payment of a New York debt, and payable in New York, although bearing a rate of interest valid in Illinois and usurious in New York, has been held valid in New York. *Sheldon v. Haxton*, 24 Hun (N. Y.) 196, affirmed 91 N. Y. 124. So, too, the place of payment will control a bill drawn elsewhere, but made payable in such state for the purpose of getting the higher rate of interest of that place. *Smith v. Bank*, 29 Ind. 158. But a contract by letter written in England for services to be performed in Scotland would not come within this rule. *Arnott v. Redfern*, 2 Car. & P. 88. See, however, *Isaacs v. McAndrew*, 1 Mont. 437.

¹⁸³ *Dickinson v. Edwards*, 77 N. Y. 573; *Hackettstown Bank v. Rea*, 6 Lans. (N. Y.) 455; *Id.*, 64 Barb. (N. Y.) 175, affirmed 53 N. Y. 618; *Clayes v. Hooker*, 4 Hun (N. Y.) 231; *Bank of Illinois v. Brady*, 3 McLean, 268, Fed. Cas. No. 888. But see, contra, *First Nat. Bank v. Morris*, 1 Hun (N. Y.) 680, where an accommodation acceptance in New York, discounted in Massachusetts, was held to be governed by the law of the latter state. And see *Opdyke v. Merwin*, 13 Hun (N. Y.) 401.

¹⁸⁴ *Austin v. Imus*, 23 Vt. 286; nor by the place of making, *Kopelke v. Kopelke*, 112 Ind. 435, 12 N. E. 695. But see, contra, preferring place of making and payment to forum, *Camp v. Randle*, 81 Ala. 240, 2 South. 287.

¹⁸⁵ *Ives v. Bank*, 2 Allen (Mass.) 236; *Ayer v. Tilden*, 15 Gray (Mass.) 178.

¹⁸⁶ *Cooper v. Reaney*, 4 Minn. 528 (Gil. 413); *Lougee v. Washburn*, 16 N. H. 134; *Hawley v. Sloo*, 12 La. Ann. 815. But in *Swett v. Dodge*, 4 Smedes & M. (Miss.) 667, it was held that no interest could be recovered without proof of the foreign rate. See, too, *Martin v. Martin*, 1 Smedes & M. (Miss.) 176. If the rate is expressed, it need not be shown to be authorized by the foreign law. *Dearlove v. Edwards*, 166 Ill. 619, 46 N. E. 1081.

¹⁸⁷ *Martin v. Martin*, 1 Smedes & M. (Miss.) 176; *Engler v. Ellis*, 16 Ind. 475; *Pugh v. Cameron*, 11 W. Va. 523; *White v. Friedlander*, 35 Ark. 52. Sunday laws, however, avoiding a contract where the action is brought, have been presumed to be the law of the place of contract also, *Brimhall v. Van Campen*, 8 Minn. 13 (Gil. 1); *Sayre v. Wheeler*, 31 Iowa, 112; *Hill v. Wilker*, 41 Ga. 449. But see, contra, *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. 531.

Damages—Exchange—Currency.

§ 42. The same law of place which determines what interest is to be paid settles also the rule of damages for nonpayment,¹⁸⁸ as well as the rate of exchange,¹⁸⁹ the exchange between place of payment and place of suit being taken into account.¹⁹⁰ And, if the currency of the place of payment has depreciated since the contract was made, the holder may recover damages equivalent to its original value at the time of contracting.¹⁹¹

Usury—Election between Different Rates.

§ 43. In determining whether a bill or note is usurious, the courts have leaned noticeably to decisions sustaining the instrument, if valid by the law of any place, whether of contract or of payment, and this somewhat in disregard of any general rule. If a different rate of interest is fixed by law in the place of contract and of payment, the parties may elect either rate to govern their contract.¹⁹² Thus,

¹⁸⁸ Whart. Confl. Laws, § 512; Story, Confl. Laws, § 307; *Courtois v. Carpentier*, 1 Wash. C. C. 376, Fed. Cas. No. 3,286; *Slacum v. Pomery*, 6 Cranch, 221; *Hazelhurst v. Kean*, 4 Yeates (Pa.) 19; *Bank of U. S. v. U. S.*, 2 How. 711. Thus, as against the drawer, the damages will be governed rather by the place of payment than that of drawing or of the forum, *In re Commercial Bank of South Australia*, 36 Ch. Div. 522; as against the acceptor, by the place of drawing rather than the forum, whether the place of acceptance is the former, *Roe v. Jerome*, 18 Conn. 138; or the latter, *In re Gillespie*, 16 Q. B. Div. 702, affirming 18 Q. B. Div. 286 (the foreign damage being proved as specially sustained); or by the place of payment rather than of drawing, *Bank of U. S. v. Daniel*, 12 Pet. 33; and an indorsee's rights will not be affected by the laws of the original place of contract (a different place from that of indorsement) authorizing payment in bank bills, *Dundas v. Bowler*, 3 McLean, 397, Fed. Cas. No. 4,141.

¹⁸⁹ *Lee v. Wilcocks*, 5 Serg. & R. (Pa.) 48; *Smith v. Shaw*, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; *Marburg v. Marburg*, 26 Md. 9, 20; *Grant v. Healey*, 3 Sumn. 523, Fed. Cas. No. 5,696; *Cash v. Kennion*, 11 Ves. 314. And see English Bills of Exchange Act 1882, § 72.

¹⁹⁰ *Scott v. Bevan*, 2 Barn. & Adol. 78; *Delegal v. Naylor*, 7 Bing. 460; *Ekens v. East India Co.*, 1 P. Wms. 396; *Cockerell v. Barber*, 16 Ves. 461.

¹⁹¹ *Warder v. Arell*, 2 Wash. (Va.) 282.

¹⁹² *Arnold v. Potter*, 22 Iowa, 194; *Newman v. Kershaw*, 10 Wis. 333; *Smith v. Bank*, 29 Ind. 158; *Fitch v. Remer*, 8 Am. Law Reg. 654, Fed. Cas. No.

they may choose the rate of the place of payment, that being the higher;¹⁹³ or the rate of the place of contract, if that is the higher.¹⁹⁴ So, where the rate of interest differs in the place of contract and the residence of the parties, they may elect the higher rate,¹⁹⁵ unless such choice is a mere cover for usury.¹⁹⁶

Usury—Place of Contract.

§ 44. In the absence of an election, as a general rule, the *lex loci contractus* governs the question of usury; and in general, in

4,836. In like manner, a renewal note dated and payable in Illinois at a rate of interest valid there, but usurious in New York, whither it was sent by mail, and where the original loan was made and the original note given, payable in Illinois, has been enforced in the courts of New York as valid there. *Sheldon v. Haxtun*, 91 N. Y. 124.

¹⁹³ *Sharp v. Davis*, 7 Baxt. (Tenn.) 607; *Freese v. Brownell*, 35 N. J. Law, 285; *New England Mortg. Sec. Co. v. Vader*, 28 Fed. 265. And where no place of payment was named, but the payee was a citizen of another state, and the interest stipulated for was at the rate allowed there, it was held that this was a contract payable there, and valid, although it would have been usurious where made. *Brown v. Gardner*, 4 Lea (Tenn.) 145. So, too, *Scott v. Perlee*, 39 Ohio St. 63. And naming the higher rate is itself evidence of an election. *New England Mortg. Sec. Co. v. Vader*, *supra*.

¹⁹⁴ *Richards v. Bank*, 12 Wis. 692; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Peck v. Mayo*, 14 Vt. 33; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Atwater v. Roelofson*, 4 Am. Law Reg. 549, 1 Disn. (Ohio) 346; *Kilgore v. Dempsey*, 25 Ohio St. 413; *Vliet v. Camp*, 13 Wis. 198; 2 Kent, Comm. 460; *Depau v. Humphreys*, 8 Mart. N. S. (La.) 1; *Balme v. Wombough*, 38 Barb. (N. Y.) 352; *Bank of Georgia v. Lewin*, 45 Barb. (N. Y.) 340. But, to the effect that the rate agreed on must not exceed that of the place of payment, see *Andrews v. Pond*, 13 Pet. 77; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Robb v. Halsey*, 11 Smedes & M. (Miss.) 146. The statute in Michigan provides expressly for such election. 1 How. Ann. St. §§ 1600, 1602.

¹⁹⁵ *Story*, Bills, § 148; *Story*, Prom. Notes, § 166; 2 Edw. Bills & N. § 1011; *Whart. Confl. Laws*, § 510; 2 Pars. Notes & B. 376, 378; *Richards v. Bank*, 12 Wis. 692; *Vliet v. Camp*, 13 Wis. 198; *Depau v. Humphreys*, 8 Mart. (N. S.) (La.) 1; *Balme v. Wombough*, 38 Barb. (N. Y.) 352. But where a loan is made in New York, and a note for a usurious amount there given, it will not be valid, though payable in Alabama and valid by Alabama law. *Hanrick v. Andrews*, 9 Port. (Ala.) 9.

¹⁹⁶ 2 Pars. Notes & B. 377.

determining whether a note is usurious, the actual place of the contract is to be considered rather than the place where the papers were drawn or delivered. Thus, a note made in the District of Columbia in payment of a Pennsylvania note, at a rate valid in Pennsylvania but usurious in the District of Columbia, has been held to be governed by Pennsylvania law and sustained as valid.¹⁹⁷ So, too, a note payable in Alabama for a New York loan, at a rate of interest usurious in New York, has been held to be governed by New York law and to be void for usury.¹⁹⁸ So, a note and mortgage drawn in Massachusetts in pursuance of an agreement in New York for a loan, and mailed to New York, the money being returned to Massachusetts, is a Massachusetts contract, and sustained by Massachusetts law, although void by that of New York.¹⁹⁹ So, an accommodation note made, dated, and signed in Texas, but actually discounted and payable in New York, will be usurious if made so by New York law.²⁰⁰ And where an accommodation acceptance is given payable in Boston, but discounted in New York at a usurious rate, and void by New York law for usury, the acceptor will not be liable to a holder under a void New York indorsement, though he holds security for his acceptance.²⁰¹ If a note is made and signed in one state, but dated and discounted in another, the latter determines the question of usury.²⁰² If dated and signed by one maker in Missouri, and signed by another and delivered in Iowa, the

¹⁹⁷ *Rhawn v. Grant*, 1 MacArthur (D. C.) 31. So, *Wallis v. Lehman*, 36 Ark. 569.

¹⁹⁸ *Hanrick v. Andrews*, 9 Port. (Ala.) 9.

¹⁹⁹ *Pine v. Smith*, 11 Gray (Mass.) 38.

²⁰⁰ *Conner v. Donnell*, 55 Tex. 167.

²⁰¹ *Akers v. Demond*, 103 Mass. 318.

²⁰² *Second Nat. Bank v. Smoot*, 2 MacArthur (D. C.) 371. So, too, irrespective of the date, *Davis v. Clemson*, 6 McLean. 622, Fed. Cas. No. 3,630. So, where a bill is accepted and payable in one state, but made to be discounted, and actually discounted, in another, the law of the latter will control. *Benners v. Clemens*, 58 Pa. St. 24. And a note executed, dated, and payable in New York, and mailed by the maker to Pennsylvania to renew his note held there by a Pennsylvania corporation, may be lawfully discounted by such corporation at a Pennsylvania rate, which would be usurious in New York. *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566. But the mere fact that a note was given for a debt due to a citizen of another state will not render it valid, if made, delivered, and payable in New York, and

Iowa usury law will govern it.²⁰³ But if made and dated in Georgia, and given in settlement of a Georgia contract, it will be governed by Georgia law, though signed by one maker in North Carolina.²⁰⁴ If made in South Carolina at the rate which is lawful there, to be signed, and subsequently signed, by a surety in North Carolina, he will be liable for that rate, though higher than that of North Carolina.²⁰⁵

If it is valid where it bears date, it cannot be defeated by evidence that the money for which it was given was really loaned in another state, where the stipulated rate of interest would be illegal;²⁰⁶ so far, at least, as to affect a bona fide purchaser for value before maturity.²⁰⁷ But if a note is made, dated, and payable in the same state, it has been held that it will be governed by the usury law of that state, though negotiated elsewhere.²⁰⁸ On the other hand, if made to be negotiated, and actually negotiated, in another state, the law of that state will govern as to interest, and not the law where the bill was made, though accepted and payable there.²⁰⁹

For the purpose of sustaining a bill or note, contested for usury, the law of the place of contract has been preferred to that of the place of payment.²¹⁰ So, a bill or note has been sustained by the

void by the usury laws of New York. *Merchants' Bank v. Southwick*, 19 Cent. Law J. 316.

²⁰³ *Hart v. Wills*, 52 Iowa, 56, 2 N. W. 619. But a note given in consideration of a Florida contract dated in Florida, and drawn at a rate of interest valid in that state, but usurious in New York, will not be held void by reason of its delivery in New York. *Berrien v. Wright*, 26 Barb. (N. Y.) 208.

²⁰⁴ *Findlay v. Hall*, 12 Ohio St. 610; *Davis v. Coleman*, 29 N. C. 424.

²⁰⁵ *Houston v. Potts*, 64 N. C. 33.

²⁰⁶ *Potter v. Tallman*, 35 Barb. (N. Y.) 182.

²⁰⁷ *Towne v. Rice*, 122 Mass. 67.

²⁰⁸ *Clayes v. Hooker*, 4 Hun (N. Y.) 231; *Jewell v. Wright*, 30 N. Y. 259; *Dickinson v. Edwards*, 77 N. Y. 573; *Hackettstown Bank v. Rea*, 6 Lans. (N. Y.) 455. But see, contra, *First Nat. Bank of New York v. Morris*, 1 Hun (N. Y.) 680.

²⁰⁹ *Opdyke v. Merwin*, 13 Hun (N. Y.) 401.

²¹⁰ *Bank of Georgia v. Lewin*, 45 Barb. (N. Y.) 340; *Balme v. Wombough*, 38 Barb. (N. Y.) 352; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; *Pratt v. Adams*, 7 Paige (N. Y.) 615; *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214; *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; although it was delivered by mail in the place where it was payable, *William Glenny Glass Co. v. Taylor*

law of the place of contract and of payment against the law of the forum and the domicile.²¹¹

On the other hand, a bill or note has been rejected as usurious by the law of the place of contract, in opposition to that of the place of payment.²¹²

Usury—Situs of Landed Security.

§ 45. The fact that a note or bill is secured by a mortgage of lands lying in another state will not take it out of the operation of

(Ky.) 34 S. W. 711; especially where it is also valid by the law where the landed security lies. *Balme v. Wombough*, 38 Barb. (N. Y.) 352; *Stansell v. Trust Co.*, 96 Ga. 227, 22 S. E. 898; *Underwood v. Mortgage Co.*, 97 Ga. 238, 24 S. E. 847; *Kuhn v. Morrison*, 75 Fed. 81; *Pryse v. Association* (Ky.) 41 S. W. 574; or by the law of the forum, *Thorton v. Dean*, 19 S. C. 583. So, by the law of contract and forum against that of place of payment, as between indorser and his indorsee. *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103. But it may be sustained by the law of contract even against the law of the forum and of the place where the landed security lies. *Tenny v. Porter*, 61 Ark. 329, 33 S. W. 211. So, the law of the foreign place of contract may be invoked to exclude the defense of usury by a domestic corporation, as against the law of its own domicile and forum, *Lane v. Watson*, 51 N. J. Law, 186, 17 Atl. 117, affirmed 52 N. J. Law, 550, 20 Atl. 894; or the law of the contract and forum against that of the corporation's foreign domicile. *Freie v. Saving Union*, 166 Ill. 128, 46 N. E. 784.

²¹¹ *Hubble v. Improvement Co.*, 95 Tenn. 585, 32 S. W. 965; or against the law of the place where the security lies and of the domicile, *Goodrich v. Williams*, 50 Ga. 425; or where it was signed and bore date, *Buchanan v. Bank*, 5 C. C. A. 83, 55 Fed. 223; or by the law of the place of date, presumed to be that of payment, as against the place of contract, which was also the payee's domicile, *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. 104; *Id.*, 90 Iowa, 300, 57 N. W. 865.

²¹² *Le Baron v. Van Brunt*, 9 Daly (N. Y.) 349, the statute making it void; *Mix v. Insurance Co.*, 11 Ind. 117, in evasion of a statute making it void. Or in opposition to that of the situs of the landed security, *Central Trust Co. of New York v. Burton*, 74 Wis. 329, 43 N. W. 141; or of the place of payment and the forum, *Akers v. Demond*, 103 Mass. 318. Or it may be rejected by the law of the place of contract and of domicile against that of the place of payment, *Tilden v. Blair*, 21 Wall. 241; or by the law of the place of contract and of payment against that of the locus rei sitæ and forum, *Sands v. Smith*, 1 Neb. 108; or by the law of the place of contract and payment against that of the date and of the locus rei sitæ, *Commercial Bank v. Auze*, 74 Miss. 609, 21 South. 754.

the *lex loci contractus*, as we have already seen.²¹³ But, if the law of the place of contract would render the instrument void for usury, it may still be sustained if valid by the law of the place where the land lies.²¹⁴ On the other hand, where the purpose is to evade the local usury law, the law of the situs and domicile of the parties will prevail over that of the contract and place of payment to defeat the instrument.²¹⁵

In general, if a note is made in one state, but payable in another, and secured by mortgage of lands in such other state, the laws of the latter state should govern the computation of interest.²¹⁶ So, a note made and payable in New York for a New York loan, but secured by a mortgage on Nebraska lands, and dated in Nebraska, has been held to be a New York contract, and governed by New York law as to usury, although it may be void by that law.²¹⁷ So, a note made and payable in South Carolina is governed by the law of that state, although made by a resident of another state, and secured by a mortgage of lands lying in the latter state.²¹⁸ But where a note is made between citizens of different states, and secured

²¹³ *De Wolf v. Johnson*, 10 Wheat. 367; *Chase v. Dow*, 47 N. H. 405; *Andrews v. Torrey*, 14 N. J. Eq. 355; *Dolman v. Cook*, Id. 58; *Mix v. Insurance Co.*, 11 Ind. 117; although void for usury by the law of the place of contract, and valid by the *lex rei sitæ*, *Sands v. Smith*, 1 Neb. 108. So, to sustain recovery of stipulated interest by law of place of contract and payment, which was not recoverable by the laws of the place where the land was situated and the action brought, *Long v. Long* (Mo. Sup.) 44 S. W. 341. But, if the note is made payable in the same state where the security lies, the law of that state will regulate the rate of interest. *Little v. Riley*, 43 N. H. 109.

²¹⁴ *Stapleton v. Conway*, 3 Atk. 727, 1 Ves. Sr. 427; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; *Hill v. Mortgage Co.*, 99 Ga. 87, 24 S. E. 848. So, without regard to domicile, *Arnold v. Potter*, 22 Iowa, 194; *Newman v. Kershaw*, 10 Wis. 333.

²¹⁵ *United States Savings & Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 235. In this case the prevailing law was that of the forum also. So, *Locknane v. United States Savings & Loan Co.* (Ky.) 44 S. W. 977, where place of making, security, and action prevailed against nominal place of payment.

²¹⁶ *Little v. Riley*, 43 N. H. 109. But see *Kuhn v. Morrison*, 75 Fed. 81.

²¹⁷ *Sands v. Smith*, 1 Neb. 108. On the other hand, a mortgage which is usurious where made has been held to be valid if in conformity with the law of the place where the land lies. *Stapleton v. Conway*, 3 Atk. 727; *Chapman v. Robertson*, 6 Paige (N. Y.) 627.

²¹⁸ *Goodrich v. Williams*, 50 Ga. 425.

by a mortgage on lands in the place where the maker resided, the parties may lawfully contract for a rate of interest valid there, although the note was both made and payable in a third state.²¹⁹ So, a note held by a Wisconsin corporation, and secured by a Wisconsin mortgage, will be governed as to usury by Wisconsin law, though attached as collateral to one of the company's own bonds payable in New York and negotiated there.²²⁰

Usury—Place of Payment.

§ 46. On the other hand, it may be sustained as valid by the *lex loci solutionis*, though usurious by the law of the maker's residence and of the place where the lands lie.²²¹ So, the *lex loci solutionis* will prevail against the *lex fori* to sustain a note usurious by the law of the latter place.²²² And a note dated and payable in New York, and discounted in New Jersey at a rate usurious there but valid in New York, is governed by New York law and is valid.²²³ We have seen, however, that a bill given in New York for a New York loan, and usurious there, will not be sustained against the acceptor in Massachusetts, though accepted and payable in Massachusetts and valid there.²²⁴ So, a note made and discounted in Pennsylvania under a Pennsylvania contract, but dated, indorsed, and payable in

²¹⁹ *Arnold v. Potter*, 22 Iowa, 194; *Newman v. Kershaw*, 10 Wis. 333.

²²⁰ *Lyon v. Ewings*, 17 Wis. 63.

²²¹ *Goodrich v. Williams*, 50 Ga. 425. So, if valid by the law of the maker's residence and where the land lies, but usurious by the law of the place of payment. *Thompson v. Edwards*, 85 Ind. 414.

²²² *Lines v. Mack*, 19 Ind. 223.

²²³ *Hackettstown Nat. Bank v. Rea*, 64 Barb. (N. Y.) 175, affirmed 53 N. Y. 618. So, the law of the place of payment has been held to govern and render void for usury the following instruments: A note drawn and payable in New York, and discounted in Connecticut at a rate usurious in New York, *Jewell v. Wright*, 30 N. Y. 259; a bill accepted and payable in New York, discounted in Massachusetts at a rate usurious by New York law, *Hildreth v. Shepard*, 65 Barb. (N. Y.) 265; an accommodation note dated and payable in New York, negotiated by the payee in Massachusetts at a rate usurious by New York law, *Dickinson v. Edwards*, 77 N. Y. 573, affirming 13 Hun, 405. and distinguishing *Tilden v. Blair*, 21 Wall. 241, where the original intention was to negotiate the note in another state. See, too, § 30, *supra*.

²²⁴ *Akers v. Demond*, 103 Mass. 318. So, too, *Tilden v. Blair*, 21 Wall. 241.

New York, will be sustained as valid by the Pennsylvania law, though it would have been usurious by New York law.²²⁵

As to usury, an acceptance is governed in general by the law of the place of payment, or, if accepted generally, by that of the acceptor's residence.²²⁶ If a note is dated at the maker's residence and valid there, it will be presumed to be payable there, and therefore valid, though it would be usurious where it was actually made.²²⁷

Negotiability—What Law Governs.

§ 47. The negotiability of commercial paper is to be determined, in general, not by the *lex fori*, but by the *lex loci contractus*,²²⁸ or the *lex loci solutionis*.²²⁹ If it is negotiable by the *lex mercatoria*, it is so *prima facie* by the law of the place of contract.²³⁰

But where there is a conflict as to the negotiability of the instrument between the place of making and that of payment, and the law of the forum corresponds with that of either place, its courts have enforced that law.²³¹ So, if the law of the place of indorsement is in conflict with that of the place where the note was made or the bill drawn, and the law of the forum agrees with either, its

²²⁵ Wayne Co. Sav. Bank v. Low, 81 N. Y. 566.

²²⁶ Coffman v. Bank of Kentucky, 41 Miss. 212. But a bill drawn in Canada under a given authority from a New York drawee will be sustained in New York, if valid in Canada, though void by the usury law of New York. Merchants' Bank v. Griswold, 72 N. Y. 472.

²²⁷ Bullard v. Thompson, 35 Tex. 313.

²²⁸ Elderkin v. Elderkin, 1 Root (Conn.) 139; Bowne v. Olcott, 2 Root (Conn.) 353; Goff v. Billingham, Id. 527. So, in Stix v. Matthews, 75 Mo. 96, an indorser was held discharged in the forum for want of the note being made payable at a bank in Indiana (the *locus contractus*), as required by the law of that state. So, where the law of the place of contract made faro a crime, and declared all transfers of paper for such consideration void. Savings Bank of Kansas v. National Bank of Commerce, 38 Fed. 800.

²²⁹ Stix v. Mathews, 63 Mo. 371; Fordyce v. Nelson, 91 Ind. 447; State v. Cobb, 64 Ala. 127. And, as to a bill payable in Massachusetts, this will be presumed to be the common law. Id.

²³⁰ Tyrell v. Railroad Co., 7 Mo. App. 294.

²³¹ *Lex loci contractus* and *lex fori* controlling *lex loci solutionis*, in Howenstein v. Barnes (Kan. Sup.) 9 Cent. Law J. 48. *Lex loci solutionis* and *lex fori* controlling *lex loci contractus* in Freeman's Bank v. Ruckman, 16 Grat. 126.

courts have enforced that law.²³² And a fortiori, where the *lex fori* agrees with the law both of the place of making and of payment, it will control the law of the place of indorsement as to the negotiability of the paper.²³³

Transfer—Form—Governed by What Law.

§ 48. The indorsement of a bill is a separate contract from the drawing, and to be governed, as other contracts are, by the law of the place where it is made.²³⁴ And this principle applies to each separate indorsement, and each may have a distinct *locus contractus*.²³⁵

As against the maker, the form of an indorsement is governed by the law of the original place of contract, if that is also the forum,

²³² *Lex loci contractus* and *lex fori* controlling the law of the place of indorsement in *Roosa v. Crist*, 17 Ill. 450, as to negotiability by delivery; and in *Reddick v. Jones*, 28 N. C. 107, as to negotiability in general. So, *Story*, *Prom. Notes*, § 173; *Story*, *Conf. Laws*, § 346. But see, contra, *Clanton v. Barnes*, 50 Ala. 260, as to transfer by a married woman. *Lex loci contractus* controlled by the law of the place of indorsement and of the forum in *Grace v. Hannah*, 51 N. C. 94. So, 2 *Pars. Notes & B.* 353. But the place of drawing and of payment was allowed to control the forum and place of discount in favor of negotiability in *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98; and the place of payment to control the forum and place of making in *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; and the place of making to control the forum, rendering the note nonnegotiable, *Hatcher v. National Bank*, 79 Ga. 542, 5 S. E. 109. But see, contra, as determining who may sue, *Roads v. Webb* (Me.) 40 Atl. 128.

²³³ *President & Selectmen of Natchez v. Minor*, 9 Smedes & M. (Miss.) 544.

²³⁴ 1 *Edw. Bills & N.* § 383; *Musson v. Lake*, 4 How. 262; *Slacum v. Pomery*, 6 Cranch, 221; *Dundas v. Bowler*, 3 McLean, 397, Fed. Cas. No. 4,141; *Towne v. Smith*, 1 Woodb. & M. 115, Fed. Cas. No. 14,115; *Cook v. Litchfield*, 9 N. Y. 279, 5 Sandf. (N. Y.) 330; *Lennig v. Ralston*, 23 Pa. St. 137; *Trabue v. Short*, 18 La. Ann. 257; *Dow v. Rowell*, 12 N. H. 49; *Williams v. Wade*, 1 Metc. (Mass.) 82; *Greathead v. Walton*, 40 Conn. 226; *Hunt v. Standart*, 15 Ind. 33; *Hyatt v. Bank*, 8 Bush (Ky.) 193; *Huse v. Hamblin*, 29 Iowa, 501; *National Bank of Michigan v. Green*, 33 Iowa, 140; *Rose v. Bank*, 20 Ind. 94; *Short v. Trabue*, 4 Metc. (Ky.) 299; *Hatcher v. McMorine*, 15 N. C. 122; *Bernard v. Barry*, 1 Greene (Iowa) 388; *Burrows v. Hannegan*, 1 McLean, 315, Fed. Cas. No. 2,206; *McClintick v. Cummins*, 3 McLean, 158, Fed. Cas. No. 8,699.

²³⁵ *Rose v. Bank*, 20 Ind. 94; *Carlisle v. Chambers*, 4 Bush (Ky.) 268.

as in the case of a Bank of England note transferred by delivery in France (where such transfer is insufficient) and afterwards sued on in England.²³⁶ If the indorsement is in accordance with the law of the place of contract and of payment, although not valid by the law of the place of transfer, the acceptor will be liable where the bill was made, as in the case of a blank indorsement in France of an English accepted bill.²³⁷

If the transfer is void both by the law of the place where the instrument was made and by that of the place where it was transferred, it will be void everywhere.²³⁸ On the other hand, there may be a valid transfer of an instrument which was illegal in the original place of contract because made between alien enemies.²³⁹ If a note or bill is payable generally, and made to be negotiated in another state, the place of indorsement will govern the transfer.²⁴⁰ So, the place of indorsement will control, although the note is expressly payable where it is made.²⁴¹ In like manner a general assignment for the benefit of creditors will be good, if valid where made, and not contrary to the local law and policy of the forum, it having been made in the place of the assignor's residence.²⁴²

²³⁶ *De La Chaumette v. Bank*, 2 Barn. & Adol. 385; *Id.*, 9 Barn. & C. 208, *quere*.

²³⁷ *Lebel v. Tucker*, L. R. 3 Q. B. 77; *Bradlaugh v. De Rin*, L. R. 5 C. P. 473, reversing L. R. 3 C. P. 538. In *re Marseilles Extension Railway & Land Co.*, 30 Ch. Div. 598. But *quere* as to the indorser's liability in such case. *Lebel v. Tucker*, *supra*. And see *Trimbey v. Vignier*, 1 Bing. N. C. 151, 6 Car. & P. 25, 4 Moore & S. 695; *Everett v. Vendryes*, 19 N. Y. 436. But one who draws a bill in a foreign country upon a New York corporation is liable in New York to one holding the bill under a blank indorsement made in such foreign country, although a blank indorsement is not sufficient to transfer title by the law of such country. *Everett v. Vendryes*, *supra*. See English Bills of Exchange Act, § 72.

²³⁸ 2 Pars. Notes & B. 356.

²³⁹ *Morrison v. Lovell*, 4 W. Va. 346.

²⁴⁰ *Braynard v. Marshall*, 8 Pick. (Mass.) 194.

²⁴¹ *Carlisle v. Chambers*, 4 Bush (Ky.) 268; *Short v. Trabue*, 4 Mete. (Ky.) 299; *Trabue v. Short*, 18 La. Ann. 257; *Hyatt v. Bank*, 8 Bush (Ky.) 193; *Rose v. Bank*, 20 Ind. 94. So, of a bill payable generally, but drawn on a person resident in another place from that of its transfer. *Powers v. Lynch*, 3 Mass. 77. But see *Vanzant v. Arnold*, 31 Ga. 210.

²⁴² *Frazier v. Fredericks*, 24 N. J. Law, 162. So, an assignment by act of law to the receiver of an insolvent corporation carries a note actually held

Transfer by Executor—Suit by Assignee.

§ 49. If by the law of the place of transfer a personal representative of a deceased holder can transfer an instrument so as to enable his transferee to bring suit, the transfer will carry the power of suit everywhere.²⁴³ So, it has been held that a foreign administrator holding a note payable to and indorsed by his intestate may sue on it subject to defenses existing against his intestate.²⁴⁴ And, even where the law of the place of transfer does not allow the assignee to sue in his own name, he may generally do so, if permitted by the *lex fori*.²⁴⁵ But it seems that he could not sue in his own name by force of the law of the place of transfer, if not permitted so to sue by the law of the forum.²⁴⁶

Bona Fide Holder—Admissibility of Defenses.

§ 50. Again, the *lex loci contractus*, and not the *lex fori*, determines whether a bona fide holder before maturity should be subject to a defense available against a prior holder.²⁴⁷ The law of the

and payable in the state where the receiver was appointed as against a subsequent attachment in the state where the maker resided. *Osgood v. Maguire*, 61 N. Y. 524. But a foreign assignment has been held ineffectual against an attachment of a debt payable in the place of the forum and attached there. *Goodsell v. Benson*, 13 R. I. 225; *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113.

²⁴³ 1 *Daniel*, Neg. Inst. 843; *Harper v. Butler*, 2 Pet. 239; *Andrews v. Carr*, 26 Miss. 577; *Grace v. Hannah*, 51 N. C. 94; *Leake v. Gilchrist*, 13 N. C. 73. But see, contra, *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Burnham*, 5 Me. 261.

²⁴⁴ *Barrett v. Barrett*, 8 Me. 353.

²⁴⁵ *Foss v. Nutting*, 14 Gray (Mass.) 484. Especially if the place of forum is also the place where the contract was made. *Lodge v. Phelps*, 1 Johns. Cas. (N. Y.) 139, 2 *Caines*, Cas. (N. Y.) 321.

²⁴⁶ *Fisk v. Brackett*, 32 Vt. 798. But see, contra, as to a nonnegotiable note, *Owen v. Moody*, 29 Miss. 79.

²⁴⁷ *Harrison v. Edwards*, 12 Vt. 648; or to confer the same immunity on an indorsee after maturity, *Alcock v. Smith* [1892] 1 Ch. 238. So, to determine whether the holder is a bona fide holder. *Oliphant v. Vannest*, 58 N. J. Law, 162, 33 Atl. 382. So, *Woodruff v. Hill*, 116 Mass. 310, as to sufficiency of a precedent debt as consideration for such holder.

place of transfer will not, in general, affect the maker's liability or his right to set up equitable defenses.²⁴⁸ But an accommodation acceptor will be governed by the law of the place where the bill is first negotiated, that being in reality the place of the original contract.²⁴⁹

Grace—What Law Governs.

§ 51. The law of the place of contract determines what grace, if any, is to be allowed, where a note is payable generally, and therefore, *prima facie*, at the place where it was made.²⁵⁰ But if a bill or note is payable at a designated place, the law of that place will determine whether it is entitled to grace;²⁵¹ and what this law is need not be known to the parties at the time.²⁵²

Demand—Protest—What Law Governs.

§ 52. The presentment of a note or bill is governed by the *lex loci solutionis*.²⁵³ And whether it can be made by a notary's clerk, or must be made by the notary himself, is to be determined by that law.²⁵⁴ But the necessity of demand for payment after presentment

²⁴⁸ *Brabston v. Gibson*, 9 How. 263; *Wilson v. Lazier*, 11 Grat. (Va.) 477; *Stacy v. Baker*, 2 Ill. 417; *Yeatman v. Cullen*, 5 Blackf. (Ind.) 241; *Allen v. Bratton*, 47 Miss. 119.

²⁴⁹ *Gallaudet v. Sykes*, 1 MacArthur (D. C.) 489.

²⁵⁰ *Burnham v. Webster*, 19 Me. 232; although the note was afterwards signed in Vermont by another joint maker, *Bryant v. Edson*, 8 Vt. 325; or was dated in another state, *Blodgett v. Durgin*, 32 Vt. 361.

²⁵¹ *Chit. Bills*, 376; 1 *Edw. Bills & N.* § 710; 2 *Pars. Notes & B.* 324, note; *Story, Bills*, § 334; *Story, Prom. Notes*, § 216; *Thorp v. Craig*, 10 Iowa. 461; *Bowen v. Newell*, 13 N. Y. 290; *Skelton v. Dustin*, 92 Ill. 49; *President & Directors of Bank of Washington v. Triplett*, 1 Pet. 25; *Goddin v. Shipley*, 7 B. Mon. (Ky.) 575; *Dollfus v. Frosch*, 1 Denio (N. Y.) 367. So, English Bills of Exchange Act 1882, § 72. So, a certificate of deposit payable in New York City on Sunday was held by the local usage of that place to be due without grace on Saturday. *Kilgore v. Bulkley*, 14 Conn. 362.

²⁵² 2 *Pars. Notes & B.* 324, note.

²⁵³ *Ellis v. Bank*, 7 How. (Miss.) 294; 2 *Edw. Bills & N.* § 796; *Snow v. Perkins*, 2 Mich. 238; and not by the *lex fori*, *Byles, Bills*, 408. So, *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. 418.

²⁵⁴ *McClane v. Fitch*, 4 B. Mon. (Ky.) 600. So, presentment for acceptance and protest for nonacceptance, by the local usage where the drawee resides. *Nelson v. Fotterall*, 7 Leigh (Va.) 179. But this is contrary to the general

for acceptance and refusal to accept is to be settled, *as against the indorser*, by the law of the place of indorsement.²⁵⁵

The law of the place of payment governs the protest of a bill or note as well as its presentment.²⁵⁶ And if that law requires the protest to be sealed, as in Alabama, an unsealed protest has been held inadmissible in evidence in the courts of another state.²⁵⁷ So, the notice of dishonor is governed by the *lex loci solutionis*.²⁵⁸ And this is true in England as regards the indorser, it being considered part of the indorser's contract.²⁵⁹ Thus, if notice of protest is not required by the law of Spain (where the bill is payable) on nonacceptance, an English indorser will be liable to a remote Spanish indorsee on receiving due notice from his immediate indorsee after he had received notice, although he had received no notice of dishonor from the holder until 20 days after the maturity of the bill.²⁶⁰ But the authority of this rule has been questioned by Judge Story, and American cases have held that the notice of dishonor is to be given according to the law of the place of indorsement, so far as it concerns the indorser.²⁶¹ And,

rule. *Onondaga Bank v. Bates*, 3 Hill (N. Y.) 53. In such case the foreign usage must be proved. *McClane v. Fitch*, *supra*; *Chenoweth v. Chamberlin*, 6 B. Mon. (Ky.) 60.

²⁵⁵ *Story*, *Prom. Notes*, § 171; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Powers v. Lynch*, 3 Mass. 77; *Stubbs v. Colt*, 30 Fed. 417; *Douglas v. Bank*, 97 Tenn. 133, 36 S. W. 874.

²⁵⁶ 2 Pars. *Notes & B.* 336; *Ellis v. Bank*, 7 How. (Miss.) 294; *Chatham Bank v. Allison*, 15 Iowa, 357; *Carter v. Bank*, 7 Humph. (Tenn.) 547; *Snow v. Perkins*, 2 Mich. 238; *Simpson v. White*, 40 N. H. 540; *Ross v. Bedell*, 5 Duer (N. Y.) 462. See, too, *In re Pulsifer*, 14 Fed. 247. And see English Bills of Exchange Act 1882, § 72.

²⁵⁷ *Tickner v. Roberts*, 11 La. 14.

²⁵⁸ *Byles*, *Bills*, 408; 2 Edw. *Bills & N.* § 796; *Matthewson v. Carman*, U. C. 1 Q. B. 259; irrespective of the indorser's residence, *Smith v. Hall*, U. C. 3 Q. B. 315.

²⁵⁹ *Rothschild v. Currie*, 1 Q. B. 43; *Hirschfeld v. Smith*, L. R. 1 C. P. 340. So, too, where time for demand, protest, and notice have been extended on account of the outbreak of war by law of such place of payment passed after the bill was drawn and before its maturity. *Rouquette v. Overmann*, L. R. 10 Q. B. 525.

²⁶⁰ *Horne v. Rouquette*, 3 Q. B. Div. 514. And see § 39, *supra*.

²⁶¹ *Story*, *Bills*, § 285; *Story*, *Prom. Notes*, § 177; *Snow v. Perkins*, 2 Mich. 238; *Simpson v. White*, 40 N. H. 540.

where no place of payment is designated, the indorser will be entitled to notice of dishonor if it is required by the *lex loci contractus*.²⁶²

Remedy—Governed by *Lex Fori*.

§ 53. The remedy and its form are governed, of course, by the *lex fori*.²⁶³ And as to this, the foreigner must take the law, where he brings his action, as he finds it.²⁶⁴ The *lex fori* determines the extent of the remedy,²⁶⁵ as well as the form of action, e. g. debt or *assumpsit*,²⁶⁶ and the jurisdiction of its own courts.²⁶⁷ So, too, the method

²⁶² *Wright v. Andrews*, 70 Me. 86, the place of making the contract requiring in this case notice to be given to an indorser in blank.

²⁶³ Whart. Confl. Laws, § 747; Byles, Bills, 407; 1 Daniel, Neg. Inst. 842; 1 Edw. Bills & N. 220; 2 Pars. Notes & B. 366; *Don v. Lippmann*, 5 Clark & F. 1; *Melan v. Duke de Fitzjames*, 1 Bos. & P. 138; *Porter v. Munger*, 22 Vt. 191; *Douglas v. Oldham*, 6 N. H. 150; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338; *Bank of U. S. v. Donnally*, 8 Pet. 361; *Van Reimsdyk v. Kane*, 1 Gall. 371, Fed. Cas. No. 16,871; *Smith v. Spinolla*, 2 Johns. (N. Y.) 198; *Taberrer v. Brentnall*, 18 N. J. Law, 262, 265; *Garr v. Stokes*, 16 N. J. Law, 403, 405; *Gulick v. Loder*, 13 N. J. Law, 68; *Bulger v. Roche*, 11 Pick. (Mass.) 36, 38; *Goodman v. Munks*, 8 Port. (Ala.) 84; *Davis v. Morton*, 5 Bush (Ky.) 160; *Armour v. McMichael*, 36 N. J. Law, 92, 94; *Varick v. Crane*, 4 N. J. Eq. 128; *Grimshaw v. Bender*, 6 Mass. 157; *Burrows v. Hannegan*, 1 McLean, 315, Fed. Cas. No. 2,206. A statute of New York prohibiting indorsement to an attorney for suit will not affect a suit brought in Connecticut under such an indorsement made in New York. *Roe v. Jerome*, 18 Conn. 138.

²⁶⁴ Whart. Confl. Laws, § 529; 1 Daniel, Neg. Inst. 842; *De La Vega v. Vianna*, 1 Barn. & Adol. 284; *Taberrer v. Brentnall*, 18 N. J. Law, 262. And this applies to the citizens of the different states. *Williams v. Haines*, 27 Iowa, 251.

²⁶⁵ *Hinkley v. Marean*, 3 Mason, 88, Fed. Cas. No. 6,523; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *Steele v. Curle*, 4 Dana (Ky.) 381; *Porter v. Munger*, 22 Vt. 191, 197. But see, contra, *Urton v. Hunter*, 2 W. Va. 83.

²⁶⁶ 1 Daniel, Neg. Inst. 844; *Bank of U. S. v. Donnally*, 8 Pet. 361; *Le Roy v. Beard*, 8 How. 451; *Williams v. Haines*, 27 Iowa, 251; *Andrews v. Herriot*, 4 Cow. (N. Y.) 508, overruling *Meredith v. Hiusdale*, 2 Caines (N. Y.) 362; *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Steele v. Curle*, 4 Dana (Ky.) 381. And see *Trasher v. Everhart*, 3 Gill & J. (Md.) 234.

²⁶⁷ *Hunt v. Hunt*, 72 N. Y. 217. But in the construction of the statute the rulings of the state courts will control the federal courts. *Phipps v. Harding*, 17 C. C. A. 203, 70 Fed. 468.

of process, by arrest or otherwise, is a question for the *lex fori* to determine.²⁶⁸

Limitation of Action—What Law Governs.

§ 54. The time within which an action shall be brought is also a question for the *lex fori*.²⁶⁹ And an action may be brought by the *lex fori*, although it has not accrued yet by the *lex loci contractus*.²⁷⁰ So far as statutes of limitation are mere laws of procedure, the *lex fori* governs the case;²⁷¹ but, if the statute goes to the extinguish-

²⁶⁸ Byles, Bills, 407; *De La Vega v. Vianna*, 1 Barn. & Adol. 284, overruling *Melan v. Duke de Fitzjames*, 1 Bos. & P. 138; *Shaw v. Harvey*, Moody & M. 526.

²⁶⁹ Byles, Bills, 407; 1 Edw. Bills & N. § 220; 2 Pars. Notes & B. 385; 1 Daniel, Neg. Inst. 843; *British Linen Co. v. Drummond*, 10 Barn. & C. 903; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Taberrer v. Brentnall*, 18 N. J. Law, 262, 265; *Jones v. Hook*, 2 Rand. (Va.) 303; *Pearsall v. Dwight*, 2 Mass. 84, 89; *Barbour v. Erwin*, 14 Lea (Tenn.) 716; *Home Life Ins. Co. v. Elwell* (Mich.) 70 N. W. 334; *Miller v. Brenham*, 68 N. Y. 83; *Urton v. Hunter*, 2 W. Va. 83; *Hoggett v. Emerson*, 8 Kan. 262; *Smith v. Spinolla*, 2 Johns. (N. Y.) 198; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263; *Peck v. Hozier*, 14 Johns. (N. Y.) 346; *Decouche v. Savetier*, 3 Johns. Ch. (N. Y.) 190; *Gans v. Frank*, 36 Barb. (N. Y.) 320; *Power v. Hathaway*, 43 Barb. (N. Y.) 214; *Paine v. Drew*, 44 N. H. 306; *Thibodeau v. Levassuer*, 36 Me. 362; *Medbury v. Hopkins*, 3 Conn. 472; *Bruce v. Luck*, 4 G. Greene (Iowa) 143; *Nash v. Tupper*, 1 Caines (N. Y.) 402; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Fletcher v. Spaulding*, 9 Minn. 64 (Gil. 54); *Brown v. Stone*, 4 La. Ann. 235; *Murray v. Fisher*, 5 Lans. (N. Y.) 98. Especially where it is also the defendant's domicile, and that irrespective of the plaintiff's domicile being in another state. *Fletcher v. Spaulding*, supra.

²⁷⁰ *Clark v. Conner*, 2 Strob. (S. C.) 346.

²⁷¹ *Whart. Conf. Laws*, § 535; *Williams v. Jones*, 13 East, 439; *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippmann*, 5 Clark & F. 1; *Ruckmaboys v. Mottichund*, 8 Moore, P. C. 4; *De La Vega v. Vianna*, 1 Barn. & Adol. 284; *British Linen Co. v. Drummond*, 10 Barn. & C. 903; *Van Reimsdyk v. Kane*, 1 Gall. 371, Fed. Cas. No. 16,871; *Le Roy v. Crowninshield*, 2 Mason, 151, Fed. Cas. No. 8,269; *Hinkley v. Marean*, 3 Mason, 88, Fed. Cas. No. 6,523; *Titus v. Hobart*, 5 Mason, 378, Fed. Cas. No. 14,063; *Bank of U. S. v. Donnelly*, 8 Pet. 361; *McElmoyle v. Cohen*, 13 Pet. 312; *Pearsall v. Dwight*, 2 Mass. 84; *Woodbridge v. Wright*, 3 Conn. 523; *Atwater's Adm'r v. Townsend*, 4 Conn. 47. So, as to the sufficiency of an unsigned entry of payment, to bar the statute. *Obear v. First Nat. Bank*, 97 Ga. 587, 25 S. E. 335.

ment of the right itself, the *lex loci contractus* may be the rule that controls.²⁷² The courts of one state may entertain an action that would be barred by the law of another (the place of contract), if the statute of limitations has never attached in the former state.²⁷³ But if an action is barred by the statute of limitations in the place of the debtor's domicile, the courts of another state will generally treat it as barred in their state also,²⁷⁴ although the statute never began to run at the forum, and the debtor, who never resided there, appeared to be excepted from the bar of the statute as a nonresident.²⁷⁵

The statute of limitation of the forum will be enforced, although by the law of the place of contract there is a different limitation proved.²⁷⁶ So, too, although the place of contract has no such statute.²⁷⁷ On the other hand, the *lex fori* will not permit a judgment of the courts of another state to be enforced within its limits against the

²⁷² Byles, Bills, 407; 1 Daniel, Neg. Inst. 844; 2 Pars. Bills & N. 385; Lord Ellenborough, C. J., in *Williams v. Jones*, 13 East, 439. See, too, *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippmann*, 5 Clark & F. 1; *Harris v. Quine*, L. R. 4 Q. B. 653. The place of contract and indorsement will control the place of payment. In *re Oosterhoudt's Estate*, 38 N. Y. Supp. 179. But if not barred by the law of the place of contract, which was the maker's domicile then, it will not be barred by the law of a domicile subsequently acquired. *McCann v. Randall*, 147 Mass. 81, 17 N. E. 75.

²⁷³ *Power v. Hathaway*, 43 Barb. (N. Y.) 214; *Bulger v. Roche*, 11 Pick. (Mass.) 36; *Putnam v. Dike*, 13 Gray (Mass.) 535; *Estes v. Kyle*, Meigs (Tenn.) 34; *Byrne v. Crowninshield*, 17 Mass. 55; *Brown v. Parker*, 28 Wis. 21. Contra, *Harrison v. Stacy*, 6 Rob. (La.) 15; *Goodman v. Munks*, 8 Port. (Ala.) 84.

²⁷⁴ *Wernse v. Hall*, 101 Ill. 423.

²⁷⁵ *Beardsley v. Southmayd*, 15 N. J. Law, 171; *Taberrer v. Brentnall*, 18 N. J. Law, 262; *Wood v. Leslie*, 35 N. J. Law, 472. See, too, *Hale v. Lawrence*, 21 N. J. Law, 741; *Howe v. Lawrence*, 22 N. J. Law, 107. But see *Ridge v. Cowley*, 6 Lea (Tenn.) 166, where the payee's residence was the place of the action, and the Tennessee statute was held to run only from the debtor's removal into Tennessee, although the debt was then barred by the *lex loci contractus*.

²⁷⁶ *British Linen Co. v. Drummond*, 10 Barn. & C. 903. So, *Jones v. Hook*, 2 Rand. (Va.) 303, decided under the Virginia statute.

²⁷⁷ *Nicolls v. Rodgers*, 2 Paine, 437, Fed. Cas. No. 10,260; *Pearsall v. Dwight*, 2 Mass. 84, 90. And the United States courts apply the statute of limitations of the state in which they are sitting. *Nicolls v. Rodgers*, supra.

bar of its own statute, but will restrain such suit by perpetual injunction.²⁷⁸

Parties—Evidence—What Law Governs.

§ 55. Who is the proper person to bring an action is to be determined by the *lex fori*.²⁷⁹ Thus, the *lex fori* may require an assignor who has transferred a bill without indorsement, to bring the action in his own name, although the *lex loci contractus* requires that the action be brought by the real party in interest.²⁸⁰

So, the *lex fori* determines the competency of a witness.²⁸¹ And the incompetency of a witness in another state by reason of his conviction for crime in that place does not affect him, unless he is rendered incompetent by the *lex fori* also.²⁸²

The admissibility of evidence is also a question for the *lex fori*, e. g. admissibility of parol evidence to explain a blank indorsement.²⁸³ So, the admissibility of a foreign certificate of protest to prove demand and notice of dishonor.²⁸⁴ So, a note which is not admissible in the courts of the place of contract, for want of a stamp required by the local law (but not made void for want of such stamp), may still be admissible elsewhere.²⁸⁵ But, if the question is as to the effect of the evidence, it is said that the law of the place of contract should prevail.²⁸⁶ The English courts have, however, refused to admit in evi-

²⁷⁸ *Brown v. Parker*, 28 Wis. 21.

²⁷⁹ Whart. Conf. Laws, § 457; 1 Daniel, Neg. Inst. 843; 2 Pars. Bills & N. 368; *Bradlaugh v. De Rin*, L. R. 5 C. P. 473, reversing L. R. 3 C. P. 538; *Mayhew v. Pentecost*, 129 Mass. 332. See, too, *O'Callaghan v. Thomond*, 3 Taunt. 82; *Fisk v. Brackett*, 32 Vt. 798.

²⁸⁰ *Foss v. Nutting*, 14 Gray (Mass.) 484.

²⁸¹ 1 Daniel, Neg. Inst. 846; Whart. Conf. Laws, § 768; Story, Conf. Laws, § 635; *Bain v. Railway Co.*, 3 H. L. Cas. 1.

²⁸² *Sims v. Sims*, 75 N. Y. 466.

²⁸³ *Downer v. Chesebrough*, 36 Conn. 39.

²⁸⁴ *Kirtland v. Wanzer*, 2 Duer (N. Y.) 278; or its sufficiency as evidence of dishonor, *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98; or of notice of dishonor, *Dunnigan v. Stevens*, 122 Ill. 396, 13 N. E. 651.

²⁸⁵ *Fant v. Miller*, 17 Grat. (Va.) 47; *Lambert v. Jones*, 2 Pat. & H. (Va.) 144.

²⁸⁶ *Mason v. Dousay*, 35 Ill. 424.

dence a verbal contract, made in France and valid there, but void in England by the statute of frauds.²⁸⁷

Damages—Interest—Exchange—Set-Off.

§ 56. The damages to be recovered, like interest, are in general to be determined by the *lex loci contractus*.²⁸⁸ But courts will not enforce the law of a foreign place of contract authorizing deduction as a penalty for usury of triple the sum taken.²⁸⁹

What law shall determine the rate of interest after maturity has been variously decided. Thus, it has been held that in this respect the law of the forum and place of contract yields to that of the place of payment;²⁹⁰ that the law of the place of contract yields to that of the forum and place of payment;²⁹¹ and that the law of the place of payment and contract yields to that of the forum.²⁹²

The currency, weights, and measures intended will be determined by the *lex loci solutionis*.²⁹³ The existing rate of exchange also forms part of the holder's recovery.²⁹⁴ But this has been fixed at times by statute, which will in such case control the market rate.²⁹⁵

²⁸⁷ *Leroux v. Brown*, 12 C. B. 801.

²⁸⁸ *Story*, *Confl. Laws*, § 307; 2 *Pars. Bills & N.* 372; *Whart. Confl. Laws*, § 512; *Courtois v. Carpentier*, 1 Wash. C. C. 376, Fed. Cas. No. 3,286; *Slacum v. Pomery*, 6 Cranch, 221; *Bank of U. S. v. U. S.*, 2 How. 711; *Hazelhurst v. Kean*, 4 Yeates (Pa.) 19. The drawer is governed by the law of the place of drawing, *Astor v. Benn*, 1 Stu. (Can.) 69; *Gibbs v. Fremont*, 9 Exch. 25; the indorser by that of indorsing, *Slacum v. Pomery*, *supra*. So, the acceptor is governed as to the rate of interest and damages by the law of the place where the bill was drawn, although different from the law of his domicile. *Raymond v. Holmes*, 11 Tex. 54; *Bailey v. Heald*, 17 Tex. 102. But see, *contra*, *Able v. McMurray*, 10 Tex. 350. And the law of the forum has been held to control that of the place of contract, to exclude the recovery of attorney's fees. *Clark v. Tanner* (Ky.) 38 S. W. 11.

²⁸⁹ *Wright v. Bartlett*, 43 N. H. 548.

²⁹⁰ *Peek v. Mayo*, 14 Vt. 33.

²⁹¹ *Healy v. Gorman*, 15 N. J. Law, 328. So, with no express place of payment. *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695.

²⁹² *Ives v. Bank*, 2 Allen (Mass.) 236.

²⁹³ *Whart. Confl. Laws*, §§ 437, 514; *Story, Confl. Laws*, §§ 270, 308; *Ben-ners v. Clemens*, 58 Pa. St. 24; *Rosseter v. Cahlmann*, 8 Exch. 361.

²⁹⁴ *Story, Confl. Laws*, § 309; *Whart. Confl. Laws*, § 515; *Cash v. Ken-*

²⁹⁵ See note 295 on following page.

On the other hand, the *lex fori* determines what defenses are admissible (so far as they are not expressly excluded by the contract itself),²⁹⁶ and regulates all questions of set-off,²⁹⁷ and pleas of want of consideration.²⁹⁸ But if a payment made before maturity is no defense against a bona fide holder for value before maturity by the *lex loci contractus*, that law will control the law of the forum and exclude the defense.²⁹⁹

Discharge—Payment—What Law Governs.

§ 57. The same law that determines the validity and construction of a contract determines, in general, what will avail to discharge the parties.³⁰⁰ If a discharge is good by the *lex loci solutionis*, it is sufficient everywhere.³⁰¹ But if it is not valid either by the law of the place of contract or of payment, it will only avail in the place where it was granted.³⁰² If the law of the place of payment makes part pay-

nion, 11 Ves. 314; *Smith v. Shaw*, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; *Lee v. Wilcocks*, 5 Serg. & R. (Pa.) 48; *Marburg v. Marburg*, 26 Md. 9; *Grant v. Healey*, 3 Sumn. 523, Fed. Cas. No. 5,696.

²⁹⁵ Whart. Confl. Laws, § 516; Story, Prom. Notes, § 163; *Scofield v. Day*, 20 Johns. (N. Y.) 102; *Adams v. Cordis*, 8 Pick. (Mass.) 260. But the actual rate may be allowed as damages. *Adams v. Cordis*, supra.

²⁹⁶ *Stevens v. Norris*, 30 N. H. 466; *Green v. Sarmiento*, 3 Wash. C. C. 17, Fed. Cas. No. 5,760.

²⁹⁷ Byles, Bills, 408; 1 Edw. Bills & N. § 220; 2 Pars. Notes & B. 375; 1 Daniel, Neg. Inst. 847; Story, Confl. Laws, § 575; *Gibbs v. Howard*, 2 N. H. 296; *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599; *Mineral Point R. Co. v. Barron*, 83 Ill. 365. But see *Bliss v. Houghton*, 13 N. H. 126, where a note made, indorsed, and payable in Vermont was held not to be subject to the set-off of a note of the payee purchased by the maker of the first note before its transfer, the purchaser of the first note having no knowledge of the set-off, and the law of Vermont governing the case.

²⁹⁸ *Williams v. Haines*, 27 Iowa, 251.

²⁹⁹ *Harrison v. Edwards*, 12 Vt. 648.

³⁰⁰ *Stevens v. Norris*, 30 N. H. 466; *Green v. Sarmiento*, 3 Wash. C. C. 17, Fed. Cas. No. 5,760.

³⁰¹ Story, Prom. Notes, § 168; Story, Confl. Laws, § 331; 2 Pars. Notes & B. 359.

³⁰² Byles, Bills, 404; 2 Pars. Notes & B. 360; 1 Daniel, Neg. Inst. 837; Story, Bills, § 165; Story, Prom. Notes, § 168; *Bartley v. Hodges*, 30 L. J. Q. B. 352; *Smith v. Buchanan*, 1 East, 6; *McMillan v. McNeill*, 4 Wheat. 209; *Ogden v. Saunders*, 12 Wheat. 213; *Green v. Sarmiento*, Pet. C. C. 74, Fed. Cas. No.

ment a discharge, it will be a sufficient discharge everywhere.³⁰³ So, the sufficiency of payment by a note or bill is to be determined by the law of the place of payment.³⁰⁴ But it has been held that the effect of a payment made in another state must be determined by the law of that state rather than of the place of contract or of the forum.³⁰⁵ Exemptions from levy and sale are questions for the *lex fori*.³⁰⁶

Insolvency Discharge—What Law Governs.

§ 58. An insolvent's discharge by the law of another state will be recognized everywhere as binding on the citizens of that state,³⁰⁷ and upon their subsequent assignees.³⁰⁸ So, if a bill drawn abroad upon an English house and payable to a foreign payee is, after nonacceptance, discharged as to the foreign drawer by the law of his place of contract, he will be discharged in an action brought against him by the payee in England.³⁰⁹ Such a discharge will also be binding on a party to the contract, who was (at the time the contract was made)

5,760; *Smith v. Smith*, 2 Johns. (N. Y.) 235; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103; *Pratt v. Chase*, 44 N. Y. 597; *Frey v. Kirk*, 4 Gill & J. (Md.) 509; *Betts v. Bagley*, 12 Pick. (Mass.) 572; *Baldwin v. Hale*, 1 Wall. 223; *Urton v. Hunter*, 2 W. Va. 83. Scotch bankruptcy discharges form an exception to this rule by force of the statute in England. Byles, Bills, 404; *Smith v. Buchanan*, *supra*; *Phillips v. Allan*, 8 Barn. & C. 477.

³⁰³ Byles, Bills, 403; *Ralli v. Dennistoun*, 6 Exch. 483.

³⁰⁴ *Story*, Prom. Notes, § 168; *Bartsch v. Atwater*, 1 Conn. 409. So, a bill payable in France is governed by the law of France as to the sufficiency of payment in assignats. *Searight v. Calbraith*, 4 Dall. 325.

³⁰⁵ *Winslow v. Brown*, 7 R. I. 95.

³⁰⁶ *Mineral Point R. Co. v. Barron*, 83 Ill. 365.

³⁰⁷ 2 Pars. Notes & B. 361; Whart. Conf. Laws, § 524; *Ogden v. Saunders*, 12 Wheat. 213; *Stone v. Tibbetts*, 26 Me. 110; *Clark v. Cousins*, 65 Me. 42 (controlling subsequent domicile and forum); *Stevens v. Norris*, 30 N. H. 466; *Brigham v. Henderson*, 1 Cush. (Mass.) 430; *Smith v. Parsons*, 1 Ohio, 236; *Stoddard v. Harrington*, 100 Mass. 87; *Einer v. Beste*, 32 Mo. 240; *Boyle v. Zacharie*, 6 Pet. 348, 635; *Towne v. Smith*, 1 Woodb. & M. 115, Fed. Cas. No. 14,115. Contra, *Farmers' & Mechanics' Bank v. Smith*, 6 Wheat. 131; *Sturges v. Crowninshield*, 4 Wheat. 122.

³⁰⁸ *Baker v. Wheaton*, 5 Mass. 509.

³⁰⁹ Byles, Bills, 403; 1 Edw. Bills & N. § 538; *Potter v. Brown*, 5 East, 124; *Hicks v. Brown*, 12 Johns. (N. Y.) 142.

a citizen of the state where the discharge was granted, but who moved into another state before the discharge took place.³¹⁰

But such discharge will not be binding upon the citizens of another state, even though the contract was made in the state where the discharge was granted;³¹¹ or was made in the state discharging it, payable generally;³¹² or although the bill, from which discharge is sought, was drawn and accepted in the discharging state, and payable generally;³¹³ or was drawn in the place of the forum, payable in the state where it was discharged.³¹⁴ But if made and payable in the place where it was discharged, it has been held to be a sufficient discharge,³¹⁵ especially if the person discharged was a citizen of that state.³¹⁶ But a discharge under insolvent laws will have no effect on the citizens of another state, if the contract was neither made nor to be performed in the state discharging it.³¹⁷ It will, however, be binding

³¹⁰ *Stoddard v. Harrington*, 100 Mass. 87. And the drawer of such bill, being afterwards discharged as a bankrupt by the laws of the country where the bill was drawn and where both drawer and payee lived, is not liable in the country where it was presented for acceptance upon its nonacceptance there. *Potter v. Brown*, 5 East, 124.

³¹¹ *Whitney v. Whiting*, 35 N. H. 457; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Ogden v. Saunders*, 12 Wheat. 213, 358; *McMillan v. McNeill*, 4 Wheat. 209; *Watson v. Bourne*, 10 Mass. 337; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589, 24 N. E. 917; *Agnew v. Platt*, 15 Pick. (Mass.) 417; *Glenn v. Humphreys*, 4 Wash. C. C. 424, Fed. Cas. No. 5,480; *Hobblethwaite v. Batturs*, 1 Miles (Pa.) 82; *White v. Canfield*, 7 Johns. (N. Y.) 117; *Peck v. Hozier*, 14 Johns. (N. Y.) 346; *Baldwin v. Hale*, 1 Wall. 223; *Chase v. Flagg*, 48 Me. 182; *James v. Allen*, 1 Dall. (Pa.) 188; *Felch v. Bugbee*, 48 Me. 9; *Smith v. Smith*, 2 Johns. (N. Y.) 235; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367. But see *Blanchard v. Russell*, 13 Mass. 1.

³¹² *Green v. Sarmiento*, 3 Wash. C. C. 17, Fed. Cas. No. 5,760; *Ilseley v. Merriam*, 7 Cush. (Mass.) 242; *Clark v. Hatch*, Id. 455.

³¹³ *Whitney v. Whiting*, 35 N. H. 457.

³¹⁴ *Donnelly v. Corbett*, 7 N. Y. 500.

³¹⁵ *Betts v. Bagley*, 12 Pick. (Mass.) 572; *Brown v. Collins*, 41 N. H. 405; *Stone v. Tibbetts*, 26 Me. 110.

³¹⁶ *Scribner v. Fisher*, 2 Gray (Mass.) 43; *Blanchard v. Russell*, 13 Mass. 1, overruled by *Baldwin v. Hale*, 1 Wall. 223. But see *Kelley v. Drury*, 9 Allen (Mass.) 27.

³¹⁷ *Palmer v. Goodwin*, 32 Me. 535; *Stevenson v. King*, 2 Cliff. 1, Fed. Cas. No. 13,417; *Savoie v. Marsh*, 10 Mete. (Mass.) 594; *Fiske v. Foster*, Id. 597; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Sherrill v. Hopkins*, 1 Cow.

on foreign citizens who assent to it by participating in dividends under it.³¹⁸

Every *assignment* of a contract is a new contract, and the assignee takes it free from the defense arising out of such discharge in the place where the original contract was made.³¹⁹ So, the indorsee of a bill or note will not be affected by a foreign discharge, though granted where the contract was originally made.³²⁰ So, where a bill drawn and indorsed in France, but accepted and payable in England, has been canceled by mistake, and the parties decreed to be discharged in France, the indorser will still be held liable in England to his indorsee.³²¹

In like manner, an *acceptance* is a new contract, and will not be discharged by an insolvent discharge granted under the law of the place where the bill was drawn.³²² But a foreign discharge of the drawer in the place of acceptance will be enforced by injunction in England in the acceptor's defense.³²³

(N. Y.) 103; *Smith v. Smith*, 2 Johns. (N. Y.) 235, 241; *Beer v. Hooper*, 32 Miss. 246; *Cook v. Moffat*, 5 How. 295; *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacharie*, 6 Pet. 348, 635; although the maker of the note afterwards became a resident of the state where the discharge was granted, and judgment was obtained against him in that state on the note, *Moore v. McMillan*, 54 Vt. 27.

³¹⁸ Whart. Confl. Laws, § 524; 1 Edw. Bills & N. § 538; *Clay v. Smith*, 3 Pet. 411; *Gardner v. Bank*, 11 Barb. (N. Y.) 558; *Phelps v. Borland*, 30 Hun (N. Y.) 362.

³¹⁹ *Potter v. Kerr*, 1 Md. Ch. 275; *Easterly v. Goodwin*, 35 Conn. 279; *Very v. McHenry*, 29 Me. 206; *Banks v. Greenleaf*, 6 Call (Va.) 271; *Worthington v. Jerome*, 5 Blatchf. 279, Fed. Cas. No. 18,054. But see, contra, *Parkinson v. Scoville*, 19 Wend. (N. Y.) 150.

³²⁰ Whart. Confl. Laws, § 528; *Baldwin v. Hale*, 1 Wall. 223; *Munroe v. Guillaume*, *42 N. Y. 30; *Poe v. Duck*, 5 Md. 1; *Frey v. Kirk*, 4 Gill & J. (Md.) 509; *Gilman v. Lockwood*, 4 Wall. 409; *Woodhull v. Wagner*, Baldw. 296, Fed. Cas. No. 17,975; *Springer v. Foster*, 2 Story, 383, Fed. Cas. No. 13,266; *Towne v. Smith*, 1 Woodb. & M. 115, Fed. Cas. No. 14,115; *Bancher v. Fisk*, 33 Me. 316; *Urton v. Hunter*, 2 W. Va. 83; *Houghton v. Maynard*, 5 Gray (Mass.) 552; *President, Directors & Company of Producers' Bank v. Farnum*, 5 Allen (Mass.) 10. See, too, *Brighton Market Bank v. Merick*, 11 Mich. 405; *Anderson v. Wheeler*, 25 Conn. 603.

³²¹ *Novelli v. Rossi*, 2 Barn. & Adol. 757.

³²² *Lewis v. Owen*, 4 Barn. & Ald. 654.

³²³ *Byles, Bills*, 403; *Burrows v. Jemino*, 2 Strange, 733. And see *Wynne v. Callander*, 1 Russ. 295.

Where the action is brought in the place of contract, its law will determine, *as to that forum*, the validity of an insolvent discharge, and not the law of the party's domicile.³²⁴ So, on this question, the law of the forum (which was also the place of payment) will control the law of the place of contract and of date.³²⁵

Foreign Statutes as to Conflict of Laws.

§ 59. It is provided by statute in some states that the *lex loci contractus* of foreign contracts shall govern them.³²⁶ But some of them except contracts between subjects of the enacting state, who are to be governed by their home law.³²⁷ Some states provide that the *lex loci contractus* shall govern as to demand, acceptance, payment, protest, notice of dishonor, and formal requisites of bills and notes.³²⁸ Others provide that formal defects, under the *lex loci contractus*, in a foreign bill, shall be no defense against a subsequent domestic indorsement.³²⁹ The Spanish law subjects Spanish bills payable abroad to the law of the place of payment as to demand and protest.³³⁰ The Swiss law permits the law of a foreign domicile to determine whether

³²⁴ *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103, overruling *Penniman v. Meigs*, 9 Johns. (N. Y.) 325, so far as it held that a discharge under the *lex fori* would govern in that forum all contracts, *wherever made*.

³²⁵ *Cook v. Moffat*, 5 How. 295.

³²⁶ ARGENTINE REPUBLIC (Code Com. art. 914); AUSTRIA (Exch. Law 1850, art. 85); BRAZIL (Code Com. art. 424); GERMANY (Exch. Law 1848, art. 85); NICARAGUA (Code Com. art. 269); SWEDEN (Exch. Law 1851, § 82); URUGUAY (Code Com. art. 931); SWITZERLAND (Oblig. R. 823, 824); but, as to bills between Swiss citizens and later liabilities incurred on the bill in Switzerland, it is sufficient if the foreign acts conform to Swiss law.

³²⁷ AUSTRIA (Exch. Law 1850, art. 85); DENMARK (Exch. Law 1825, § 9); GERMANY (Exch. Law 1848, art. 85); SWEDEN (Exch. Law 1851, art. 82).

³²⁸ ARGENTINE REPUBLIC (Code Com. art. 914); AUSTRIA (Exch. Law 1850, art. 85); BRAZIL (Code Com. art. 424); GERMANY (Exch. Law 1851, art. 85); NICARAGUA (Code Com. art. 269); SWEDEN (Exch. Law 1851, § 82); BERNE (Exch. Law 1859, § 94); URUGUAY (Code Com. art. 931).

³²⁹ ARGENTINE REPUBLIC (Code Com. art. 914); AUSTRIA (Exch. Law 1850, art. 85); GERMANY (Exch. Law 1848, art. 85); SWEDEN (Exch. Law 1851, § 82); URUGUAY (Code Com. art. 931).

³³⁰ COLOMBIA (Code Com. art. 440); SPAIN (Code Com. art. 486).

the party to a contract is legally capable of contracting.³³¹ While the German and Swedish laws permit questions of capacity to be governed by the foreign law of the domicile, unless the contract is made in their own territory and the parties are capable by its law.³³² Questions of procedure are, however, to be determined by the *lex fori*.³³³

The English statute, which will be found in the Appendix, stated in full, in general refers questions of validity, interpretation, and form to the place of contract, and presentment, protest, and notice to the place of payment.³³⁴

³³¹ SWITZERLAND (Oblig. R. 822), except as to Swiss citizens and contracts in Switzerland.

³³² AUSTRIA (Exch. Law 1850, art. 84); GERMANY (Exch. Law 1848, art. 84); SWEDEN (Exch. Law 1851, art. 81).

³³³ AUSTRIA (Exch. Law 1850, art. 86); GERMANY (Exch. Law 1848, art. 86); SWEDEN (Exch. Law 1851, art. 80).

³³⁴ See Append. vol. 3; Bills of Exchange Act, art. 72. But this does not apply to a foreign indorsement between indorser and indorsee. *Alcock v. Smith* [1892] 1 Ch. 238.

CHAPTER III.

FORMAL REQUISITES.

I. WRITING AND SIGNATURE AND ATTESTATION.

II. SEALED INSTRUMENTS.

III. DATE.

I. WRITING, SIGNATURE AND ATTESTATION.

- § 60. Writing and Printing.
61. Material.
62. Signature—Necessary.
63. — What Name.
64. — Seal—Mark—Stamp—Printing.
65. — Position.
66. — Irregular Indorsements.
67. — Pleading—Evidence.
68. Attestation—Statutes.
69. — Proof of Attesting Witness.

Writing and Printing.

§ 60. Every form of commercial paper implies a written instrument by its very definition. It must be *in writing*.¹ And it is conceived that this is universally true. It is the case in the civil law states and in Germany.² It is also implied, if not expressly required, by the use of such words as “writing,” “written,” etc., in the statutes of many, if not all, of the United States,³ and in the definitions contained in many foreign statutes.⁴

¹ Chit. Bills, 147; 1 Daniel, Neg. Inst. § 2; 1 Edw. Bills & N. § 168; Story, Bills, § 33; Story, Prom. Notes, § 9; Thomas v. Bishop, Cas. t. Hardw. 2; Id., 2 Strange, 955.

² 1 Pard. Droit Comm. 344; Thöl, Wechselrecht, p. 141.

³ ARKANSAS (Sand. & H. Dig. § 475); CALIFORNIA (Civ. Code, § 3087);

⁴ Bills of Exchange Act, 45 & 46 Vict. c. 61, § 3; BELGIUM (Code Napoleon, § 110); BOLIVIA (Cod. Merc. § 349); CHILI (Cod. Com. art. 632); FRANCE (Code Com. § 110); HOLLAND (Code Com. § 100); HUNGARY (Law 1860, c. 1, § 1); LOWER CANADA (Civil Code, § 2279); ITALY (Cod. Com. art. 196).

Writing does not, however, necessarily imply ink. It may be in *pencil*,⁵ or any other material capable of making a legible writing. "Writing" must moreover be held to include *printing*,⁶ at least as regards the body of the instrument, for which it is not unusual to

DELAWARE (Rev. Code, c. 63, § 8); GEORGIA (Code, § 3677); IDAHO (Rev. St. § 3465); ILLINOIS (Hurd's Rev. St. c. 98, § 3); INDIANA (Horner's Rev. St. § 5501); IOWA (McClain's Code, § 2043); MICHIGAN (How. Ann. St. § 1577); MISSISSIPPI (Ann. Code, § 3502); NEW JERSEY (Gen. St. p. 2604, § 1); PENNSYLVANIA (Dig. p. 731, §§ 1, 2); WISCONSIN (Sanb. & B. Ann. St. § 1675). So, by the Negotiable Instrument Law in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 1), MARYLAND and NEW YORK (§ 20).

⁵ Byles, Bills, 79; Chit. Bills, 147; 1 Daniel, Neg. Inst. 83; 1 Edw. Bills, § 169; 1 Pars. Notes & B. 21; Story, Prom. Notes, § 11. This was first held as to notes in 1826 in Geary v. Physic, 5 Barn. & C. 234; Id., 7 Dowl. & R. 653, all the judges concurring. It has been followed in Closson v. Stearns, 4 Vt. 11; Brown v. Bank, 6 Hill (N. Y.) 443; Reed v. Roark, 14 Tex. 329. See, too, Thöl, W. R. 141, for recognition of the same principle in Germany. Mr. Parsons, however, speaks of the decision in Geary v. Physic as rendered "incautiously" (1 Pars. Notes & B. 22), and Mr. Justice Story regrets the establishment of the doctrine (Story, Prom. Notes, § 11).

Writing in pencil has been held sufficient in case of a *deed* of settlement, McDowel v. Chambers, 1 Strob. Eq. (S. C.) 347; a *contract*, Merritt v. Clason, 12 Johns. (N. Y.) 102; Id., 14 Johns. (N. Y.) 484; Jeffery v. Walton, 1 Starkie, 267; Draper v. Pattina, 2 Speers (S. C.) 292 (under the statute of frauds); a *will*, Green v. Skipworth, 1 Phillim. Ecc. 53; Dickenson v. Dickenson, 2 Phillim. Ecc. 173; or a *codicil* to a will, Rymes v. Clarkson, 1 Phillim. Ecc. 22.

⁶ 1 Daniel, Neg. Inst. 84; so, Story, Prom. Notes, § 11, and Thöl, W. R. 141 (as to the body of the instrument, but contra as to the signature). And a memorandum printed on the margin of a note is part of it, Zimmerman v. Rote, 75 Pa. St. 188; or even on the back, Farmers' Bank v. Ewing, 78 Ky. 264. In Pennington v. Baehr, 48 Cal. 565, a printed fac simile of an autograph was held to be a sufficient signature to a coupon. So, to a duebill. Weston v. Myers, 33 Ill. 424. In Commonwealth v. Ray, 3 Gray (Mass.) 447, an indictment for forgery of a printed railroad ticket was sustained on the ground that "printing" was included in the term "writing." And in Indiana writing is declared by statute to include "printing, lithographing, or other mode of representing words or letters." 2 Rev. St. (Davis' Ed.) p. 316, c. 2, § 1, subsec. 9. In Massachusetts, by statute of 1804 (chapter 58, § 1), all bills, notes, checks, drafts, or obligations whatsoever under the amount of five dollars were required to be wholly in writing, and, if made or issued after April 1, 1805, bearing the impression of types, plates, or printing, they were to be utterly void. This act was held to apply to notes issued after April 1, 1805, but fraudulently antedated to evade the statute, even in the hands of bona fide holders. Bayley v. Taber, 5 Mass. 286.

employ a printed form. Printing, in its turn, of course, includes lithography, engraving, and every means by which letters are impressed in ink or color on the surface of paper or other like material.

Material.

§ 61. Bills, notes, and other instruments of exchange, although often spoken of as commercial paper, and usually written or printed *on paper*, are not necessarily so.⁷ Unusual form and material are clearly to be avoided as subjecting the instrument to suspicion and endangering the good faith of the holder's title. No question, however, has been raised in English or American courts as to notes on other material than paper or parchment, and the doubt, if there is one, can hardly be deemed of any practical importance.

Signature—Necessary.

§ 62. Signature is the writing of a person's name in order thereby to give effect to the contract signed. The signature of maker or drawer, therefore, as the case may be, is essential to the completeness and efficacy of a note, bill, or other negotiable instrument.⁸ And, even where several have signed as sureties for a principal, the note has been held incomplete until signed by the principal also.⁹

⁷ Byles, Bills, 78, 167; 1 Daniel, Neg. Inst. 86; 1 Edw. Bills, § 169; 1 Pars. Notes & B. 23; Story, Prom. Notes, § 11.

Metallic tokens have never been recognized at common law as more than simple evidence of debt. Byles, Bills, 260. In England, tokens made partly of gold or silver formerly made the issuer liable to the holder by 53 Geo. III. c. 114, repealed now by 24 & 25 Vict. c. 101; but, if wholly or in part of copper, the issuer is liable only to the original taker, by 57 Geo. III. c. 46.

⁸ Byles, Bills, 89; Chit. Bills, 187; 1 Edw. Bills & N. § 143; Story, Prom. Notes, § 34; 1 Daniel, Neg. Inst. 83; Thöl, W. R. 148; Vyse v. Clarke, 5 Car. & P. 403; Tevis v. Young, 1 Metc. (Ky.) 199; May v. Miller, 27 Ala. 515. So, bills of Exchange Act, 45 & 46 Vict. c. 61, § 23. And the forgery of acceptance on an instrument in the form of a bill of exchange, with no drawer named and no drawer's signature, is not the forgery of a bill of exchange. Reg. v. Harper, 15 Am. Law Rev. 553. But a mortgage reciting and securing a note will not be rendered invalid by want of signature on the note. McFadden v. Dykins, 82 Ind. 558.

⁹ Knight v. Hurlbut, 74 Ill. 133. And he may set up such defense against one who held it until maturity for the payee, and then had it indorsed for the purpose of bringing suit. Stricklin v. Cunningham, 58 Ill. 293.

In like manner a note signed by A., and delivered to the payee's agent under an agreement that he was not to be holden unless another person "signed ahead of him," is not binding on A., in the hands of the payee at least, without the other person's signature.¹⁰ And without the signature of the drawer a bill payable "to my order," though accepted, was formerly held to be of no force either as a bill of exchange or as a promissory note.¹¹ It has, however, been held, in a recent case in the United States, that a promissory note signed by an indorser, and delivered with a blank for the maker's signature, authorized the holder to fill such blank like any other.¹²

The statutes of some of the United States require that negotiable instruments shall be signed by the person to be holden thereby.¹³ The statute of 3 & 4 Anne, c. 9, applies only to "notes in writing signed by the party who makes the same." And in general the statutes of foreign states require the signature of the maker or drawer both to notes and bills of exchange.¹⁴ Where corporation by-laws

¹⁰ *Miller v. Gambie*, 4 Barb. (N. Y.) 148. But such defense is in general unavailable against a bona fide holder for value. *Smith v. Moberly*, 10 B. Mon. (Ky.) 266. See, also, the question of conditional delivery, discussed *infra*.

¹¹ *Byles, Bills*, §9; *Stoessiger v. Railway Co.*, 3 El. & Bl. 553; *Goldsmid v. Hampton*, 5 C. B. (N. S.) 108. See, also, *M'Call v. Taylor*, 34 Law J. C. P. 365; *Id.*, 19 C. B. (N. S.) 301. The contrary is provided by statute in the ARGENTINE REPUBLIC (Com. Code, art. 776, § 6), and in URUGUAY (Com. Code, art. 789). And in *Harvey v. Cane*, 24 W. R. 400, 34 Law T. (N. S.) 64, the acceptor's signature of a bill, leaving the drawer's name blank, was held to amount to an authority to a bona fide purchaser for value to write his own name as drawer.

¹² *Whitmore v. Nickerson*, 125 Mass. 496. And this may, of course, be done by the payee as the maker's agent by express authority. *Haven v. Hobbs*, 1 Vt. 238.

¹³ COLORÁDO (Neg. Inst. Law, § 1); CONNECTICUT (Neg. Inst. Law, § 1); FLORIDA (Neg. Inst. Law, § 1); INDIANA (Horner's Rev. St. § 5501); IOWA (Code, § 3043); NEW JERSEY (2 Gen. St. p. 2604, § 1); NEW YORK (Neg. Inst. Law, § 20); TENNESSEE (Ann. Code, § 3508). Under the Indiana statute, a signature made for the maker, by his direction and in his presence, is sufficient. *Crumrine v. Crumrine's Estate*, 14 Ind. App. 641, 43 N. E. 322.

¹⁴ This is the case in the ARGENTINE REPUBLIC (Code Commerce, art. 776, § 6); AUSTRIA (Exch. Law, art. 4); BOLIVIA (Mercantile Code, art. 362, § 8, as to bills of exchange; and article 463, § 7, as to drafts); CHILI (Code Commerce, art. 633, as to bills of exchange; and article 771, § 7, as to drafts and notes); COLOMBIA (Code Commerce, arts. 384, 517); ECUADOR (same

require the signature of a particular officer, the company may still be bound by a different execution.¹⁵ But execution in a manner different from that called for by the blank note will be notice to holders, and subject them to defenses.¹⁶

Signature—What Name.

§ 63. In general, however, unless otherwise provided by statute, the full name of the signer is not essential to a good signature. Thus, a signature by initials has been held sufficient.¹⁷ So, too, even an indorsement in figures, "1, 2, 8," the intention of the indorser to bind himself as such being clearly shown.¹⁸ So, too, a maker or indorser

as Spain); GERMANY (Exch. Law, art. 4); GUATEMALA (as to notes, Ordinances of Bilbao, c. 14, § 1); HOLLAND (Commercial Code, arts. 100, 208, 210); HONDURAS (same as Guatemala); HUNGARY (Law 1860, c. 1, § 14); LOWER CANADA (Civ. Code, §§ 2280, 2346); MEXICO (Code Commerce, art. 223, as to bills of exchange; article 447, as to drafts and notes); NICARAGUA (Code Commerce, art. 241, as to bills of exchange; article 312, as to drafts and notes); PARAGUAY (same as Guatemala); PERU (Code Commerce, arts. 381, 522); PORTUGAL (Commercial Code, arts. 321, 424); RUSSIA (Exch. Law, art. 541); SALVADOR (Code Commerce, arts. 381, 510); SPAIN (Code Commerce, arts. 426, 563); SWEDEN AND NORWAY (Exch. Law, c. 1, § 1); SWITZERLAND (Oblig. R. 722); URUGUAY (Code Commerce, art. 789); VENEZUELA (Code Commerce, art. 1). The Code Napoleon, which in this respect governs France, Belgium, Greece, Hayti, San Domingo, and Turkey, is silent as to the question of signature. Code art. 110. It is maintained, however, by M. Bedarride, that this is necessarily implied from the proof, which can only be made by proof of the signature. *Droit Commercial*, bk. 1, tit. 8, art. 42.

¹⁵ *Milbank v. De Riesthal*, 82 Hun, 537, 31 N. Y. Supp. 522, treasurer signing instead of secretary.

¹⁶ *Davis Sewing-Mach. Co. v. Best*, 105 N. Y. 59, 11 N. E. 146, president not signing, although called for in company's printed blank, which was used.

¹⁷ 1 Daniel, Neg. Inst. 84; 1 Edw. Bills & N. § 170; 1 Pars. Notes & B. 23; Thom. Bills, 40; *Merchants' Bank v. Spicer*, 6 Wend. (N. Y.) 443; *Palmer v. Stephens*, 1 Denio (N. Y.) 479; *Weston v. Myers*, 33 Ill. 424. But see *Benj. Chalmers' Dig.* art. 49n, where the first of these cases is cited with the comment that "in America the rule is lax." See, too, *Caton v. Caton*, L. R. 2 H. L. 143. And it is immaterial that the name be misspelled, if it can be clearly identified. *Bank of Lassen County v. Sherer*, 108 Cal. 513, 41 Pac. 415.

¹⁸ *Brown v. Bank*, 6 Hill (N. Y.) 443. But see *Benj. Chalmers' Dig.* Bills & N. art. 49, note, as to extending this rule to England.

may be bound by the signature of an assumed or fictitious name; by a corporate, official, or partnership name; or even by the name of a factory or of a steamboat, the owners being held as makers. The reader is referred for the consideration of such signatures to a later chapter on maker's and drawer's names. It is, however, advisable in all possible cases that the signature should contain the entire surname, and at least the initials of the Christian names. This, or more, is required by many foreign statutes.¹⁹

Seal—Mark—Stamp—Printing.

§ 64. And it seems that in the civil law a *seal* is no equivalent for a signature, whatever the signer's intention may be.²⁰ Nor is a seal alone sufficient at common law,²¹ except perhaps in the case of a corporation note or bill.²² But, where the person signing cannot write, his *mark* will be a sufficient signature.²³ And this is ex-

¹⁹ The maker's own name or the name of his house or of the person who signs for him under a sufficient power of attorney is requisite to a good signature in the ARGENTINE REPUBLIC (Code Commerce, arts. 776, 916). The maker's name is required in AUSTRIA (Exch. Law, arts. 4, 96); BRAZIL (Com. Code, arts. 354, 426); CHILI (Com. Code, art. 771, as to notes and drafts); GERMANY (Gen. Exch. Law, arts. 4, 96); HUNGARY (Law 1860, c. 1, § 14, the last name in full and initials at least of first name); MEXICO (Code Com. arts. 323, 447); GUATEMALA, HONDURAS, and PARAGUAY (Ordc. Bilbao, c. 14, § 1, as to notes); LOWER CANADA (Civ. Code, §§ 2280, 2344, "signature or name"); RUSSIA (Exch. Law, art. 541, "full name"); SPAIN (Code Com. art. 426. So, too, COLOMBIA, COSTA RICA, ECUADOR). So, also, the indorser's name is required in BRAZIL (Com. Code, art. 362); COLOMBIA (Com. Code, art. 424); COSTA RICA (Code Com. art. 414); ECUADOR (see Spain); GERMANY (Exch. Law, art. 12); MEXICO (Code Com. art. 360); GUATEMALA, HONDURAS, and PARAGUAY (Ordc. Bilbao, c. 13, § 3); SALVADOR (Code Com. art. 421); SPAIN (Code Com. art. 467).

²⁰ Heinec. de Camb. c. 4, § 18; Story, Prom. Notes, § 35.

²¹ Benj. Chalmers' Dig. art. 49.

²² Benj. Chalmers' Dig. art. 278; Crouch v. Credit Foncier, L. R. 8 Q. B. 382.

²³ Byles, Bills, 79; 1 Daniel, Neg. Inst. 84; 1 Edw. Bills & N. §§ 146, 170; 1 Pars. Notes & B. 23; Story, Prom. Notes, § 34; Benj. Chalmers' Dig. art. 49; George v. Surrey, 1 Moody & M. 516; Willoughby v. Moulton, 47 N. H. 205; Hilborn v. Alford, 22 Cal. 482; Shank v. Butsch, 28 Ind. 19; Shiver v. Johnson, 2 Brev. (S. C.) 397; Handyside v. Cameron, 21 Ill. 588. But under the Revised Code of Alabama the mark must be accompanied by the signer's name written near it, and attested by a witness. Flowers v. Bitting, 45 Ala. 448.

pressly provided by statute in some states,²⁴ and also by some foreign statutes.²⁵

Printing a signature with a *hand stamp* is probably sufficient,²⁶ although such act necessarily impairs the means of proof. And such signature for the Bank of England by a clerk has been specially legalized by statute.²⁷ It is, however, more doubtful whether a sig-

²⁴ In CALIFORNIA, "signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." Pol. Code, § 17; Civ. Code, § 5014; Code Civ. Proc. § 17; Pen. Code, § 7. In INDIANA, "in all cases where the written signature of a person is requisite, either the proper handwriting of such person or his mark shall be intended." Horner's Rev. St. § 240. In TENNESSEE, orders by any one for the payment of money must be "signed by his proper hand." Ann. Code, § 3508. In KENTUCKY (Civ. Code, § 732), the statute providing for signature by mark and attestation does not require attestation, but the mark may be proved otherwise. *Vanover v. Murphy's Adm'r* (Ky.) 115 S. W. 61.

²⁵ A signature by mark is invalid unless attested by a court or a notary, in GERMANY (Exch. Law, art. 94); AUSTRIA (Exch. Law, art. 94); HUNGARY (Exch. Law, c. 1, § 14); but since 1863 no person unable to write can make a bill of exchange, *Id.*). The signature of the maker "with his own name" is required in the ARGENTINE REPUBLIC (Com. Code, art. 776, § 6); URUGUAY (Com. Code, art. 789). So, as to both drafts and notes in CHILI (Com. Code, art. 771, § 7). In HONDURAS, GUATEMALA, and PARAGUAY (Ordc. Bilbao, c. 13, § 2) both *name* and *residence* of drawer are requisite to a bill of exchange, and full signature of the maker to a promissory note (*Id.* c. 14, § 1). In LOWER CANADA bills and notes must contain "the signature or name" of the drawer (Civ. Code, §§ 2280, 2344). The signature of the maker or drawer is required to be written by his own hand in COLOMBIA (Com. Code, art. 384, as to bills); COSTA RICA (Cod. Com. art. 373); ECUADOR (same as Spain since 1829); MEXICO (Cod. Com. art. 223; and as to drafts and notes, subscription of maker's or drawer's name is requisite, *Id.* art. 447); PERU (Cod. Com. art. 381, § 7); SPAIN (Cod. Com. art. 426). Indorsement must be in the indorser's own hand in BRAZIL (Com. Code, art. 362); and must contain his name and entire signature in HONDURAS, GUATEMALA, and PARAGUAY (Ordc. Bilbao, c. 13, § 3).

²⁶ A person stamping his own name has been held to have sufficiently complied with a statute requiring a paper to be "signed." *Bennett v. Brumfitt*, L. R. 3 C. P. 28. The statute of Indiana seems to exclude signature by stamp, printing, etc., as it provides that "writing" shall include printing, etc., "but in all cases where the written signature of a person is requisite either the proper handwriting of such person or his mark shall be intended." Horner's Rev. St. § 2407.

²⁷ Act 1 Geo. IV. c. 92, § 3.

nature *printed* in the ordinary manner, without any manual act of the maker, is sufficient.²⁸ Cases of this sort are not likely to occur. When they do, they will probably fall under the rule laid down as to other contracts in *Saunderson v. Jackson*, and be upheld if clearly proved to be the act of the maker.

Signature—Position.

§ 65. The signature of the maker or drawer is generally at the bottom of the instrument, in the lower right-hand corner. Its position, however, is immaterial, unless the statute provides to the contrary.²⁹ "It is a point settled," says Chancellor Kent, "that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom."³⁰

²⁸ Signature of this sort has been held sufficient in England for a bill of parcels. *Saunderson v. Jackson*, 2 Bos. & P. 239; *Schneider v. Norris*, 2 Maule & S. 286, Lord Ellenborough, C. J., saying of this case: "Here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, and it is the same in substance as if he had written 'N. & Co.' with his own hand." So, of a lithographed signature on coupon notes, *McKee v. Vernon Co.*, 3 Dill. 210, Fed. Cas. No. 8,851; or coupons, *Town Council v. Bank* (Miss.) 22 South. 291. But its sufficiency for bills, notes, and other instruments of a commercial character has been denied by many writers, Story, Prom. Notes, § 11; 1 Pars. Notes & B. 21; 1 Edw. Bills & N. § 168; Thöl, W. R. 141; and is not supported by direct authority in England or in this country, except in *Pennington v. Baehr*, 48 Cal. 565, where such signature of a coupon was held sufficient. See, too, the remark of Sir W. Page Wood, L. J., in *Ex parte Birmingham Banking Co.*, 3 Ch. App. 654, where, however, hand printing seems to be referred to. And see 1 Daniel, Neg. Inst. 84; Chit. Bills, 187, note; Story, Bills, § 53.

²⁹ Byles, Bills, 89; Chit. Bills, 187; 1 Daniel, Neg. Inst. 83; 1 Edw. Bills & N. § 143; Story, Bills, § 53; Thöl, W. R. 148; *Palmer v. Grant*, 4 Conn. 389; *Quin v. Sterne*, 26 Ga. 223; *Lincoln v. Hinzey*, 51 Ill. 435. So, in *Hunt v. Adams*, 5 Mass. 358, where beneath one maker's signature there was written, "I acknowledge myself holden as surety," signed by B., who was thereupon held as a joint promisor with the first signer. So, where A. drew a bill to his own order, and wrote his name across the face, he was held liable as maker of a note. *Patillo v. Mayer*, 70 Ga. 715.

³⁰ *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Saunderson v. Jackson*, 2 Bos. & P. 238; *Welford v. Beazely*, 3 Atk. 503; *Knight v. Crockford*, 1 Esp. 90; *Ogilvie v. Foljambe*, 3 Mer. 53; Chit. Bills, 187.

Thus, "I, A. B., promise," etc., is a sufficient signature, if so intended.³¹ So, too, above the printed name of the bank designated as the place for payment of the bill.³² But where one signs with a seal in the lower right-hand corner, and the other without a seal in the left-hand corner, they are not *prima facie* joint makers.³³

Signature—Irregular Indorsements.

§ 66. The maker's or drawer's signature may even be placed on the back of the paper.³⁴ As the back is, however, the usual place of signature of an indorser or guarantor, a signature in that place by the maker is open to misunderstanding, and is differently construed in different states. Thus, it has been held that such signature is *per se* no contract, and depends wholly on the signer's intention.³⁵ And it has been held to be, at least *prima facie*, an indorsement, subject to be proved by parol a contract of suretyship.³⁶ In other states an indorser before the delivery of the instrument to the payee has been held to be a joint maker,³⁷ subject, however, to parol evidence

³¹ Byles, Bills, 89; Chit. Bills, 187; 1 Daniel, Neg. Inst. 83; 1 Edw. Bills & N. § 143; 1 Pars. Notes & B. 23; Story, Bills, § 53; Taylor v. Dobbins, 1 Strange, 399. The same is true of a contract under the statute of frauds, Knight v. Crockford, 1 Esp. 90; Ogilvie v. Foljambe, 3 Mer. 53; and of a will, Lemayne v. Stanley, 3 Lev. 1, prior to the statute requiring *subscription*.

³² Turnbull v. Thomas, 1 Hughes (Ky.) 172, Fed. Cas. No. 14,243.

³³ Steinger v. Hoch, 39 Pa. St. 263.

³⁴ Rodocanachi v. Buttrick, 125 Mass. 134, where Lord, J., says: "It is immaterial upon what part of the paper a party places his name, if his purpose in placing it upon the paper is the execution of the contract." So, too, National Pemberton Bank v. Lougee, 108 Mass. 373. So, too, Palmer v. Grant, 4 Conn. 389, where the note read, "We, A. and B., as principals, and C. and D., as sureties, promise," etc., and C. and D., though signing on the back, were held as joint makers. See, too, Quin v. Sterne, 26 Ga. 223; Schmidt v. Schmaelter, 45 Mo. 502; National Pemberton Bank v. Lougee, 108 Mass. 371. If the maker is also payer, and indorses as such, it does not admit his liability as maker. Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094. And see Ryan v. Bank, 148 Ill. 349, 35 N. E. 1120, where A.'s signature as a guarantor was first placed below the maker's, and then shifted to the back of the note.

³⁵ Crozer v. Chambers, 20 N. J. Law, 256. The intention in such case may be proved by parol. Watkins v. Kirkpatrick, 26 N. J. Law, 84.

³⁶ Sill v. Leslie, 16 Ind. 236.

³⁷ Semple v. Turner, 65 Mo. 696; Hardy v. White, 60 Ga. 454; Ackerman v.

of a different intention.³⁸ In other states he has been held to be a maker notwithstanding the payee's knowledge that he intended to bind himself as a surety.³⁹ Such signer has been also held to be a surety *prima facie*, subject to parol evidence of a contrary intention,⁴⁰ or a guarantor.⁴¹

For further illustration of the difficulties and ambiguities attending all signatures on the back of a negotiable instrument made for other purpose than transfer by indorsement, the reader is referred to a fuller discussion of the subject in a later part of this work. Sufficient has been said here to put the cautious upon their guard against all irregular signatures on the back of such instruments.

Sometimes, on the other hand, a signature which should be on the back appears by inadvertence on the face of the instrument below the name of the maker. This may occur in the case of an indorser⁴² or a guarantor⁴³ without changing his intended contract.

Westervelt, 26 N. J. Law, 92, note; Chaddock v. Van Ness, 35 N. J. Law, 517; Luqueer v. Prosser, 1 Hill (N. Y.) 256; Powell v. Thomas, 7 Mo. 440; Lewis v. Harvey, 18 Mo. 74; Baker v. Block, 30 Mo. 225; Schmidt v. Schmaelter, 45 Mo. 502; Cahn v. Dutton, 60 Mo. 297; Matthewson v. Sprague, 1 R. I. 8; Perkins v. Barstow, 6 R. I. 505; Manufacturers' & Merchants' Bank v. Follett, 11 R. I. 92; Carpenter v. McLaughlin, 12 R. I. 270; Samson v. Thornton, 3 Mete. (Mass.) 275; Riley v. Gerrish, 9 Cush. (Mass.) 104; Bryant v. Eastman, 7 Cush. (Mass.) 111; Wright v. Morse, 9 Gray (Mass.) 337; Essex Co. v. Edmonds, 12 Gray (Mass.) 273; Clapp v. Rice, 13 Gray (Mass.) 403; Union Bank v. Willis, 8 Mete. (Mass.) 504; Barrows v. Lane, 5 Vt. 161; Knapp v. Parker, 6 Vt. 642; Flint v. Day, 9 Vt. 345; Strong v. Riker, 16 Vt. 554. But see Bigelow v. Colton, 13 Gray (Mass.) 309; National Pemberton Bank v. Lougee, 108 Mass. 371. And in MASSACHUSETTS such signer is now by statute entitled like an indorser to notice of dishonor. Pub. St. c. 77, § 15.

³⁸ Sandford v. Norton, 14 Vt. 228; Strong v. Riker, 16 Vt. 554; Barrows v. Lane, 5 Vt. 161; Knapp v. Parker, 6 Vt. 642; Flint v. Day, 9 Vt. 345. But see, *contra*, Union Bank v. Willis, 8 Mete. (Mass.) 504; Wright v. Morse, 9 Gray (Mass.) 337.

³⁹ Carpenter v. McLaughlin, 12 R. I. 270.

⁴⁰ Good v. Martin, 95 U. S. 90. So, by statute in NORTH CAROLINA. Battle's Revisal, c. 10, § 10; Hoffman v. Moore, 82 N. C. 313. Joint principal or surety according to intention. Baker v. Robinson, 63 N. C. 191.

⁴¹ Rivers v. Thomas, 1 Lea (Tenn.) 649; Huntington v. Harvey, 4 Conn. 128. So, of a nonnegotiable note. Richards v. Warring, *40 N. Y. 576, affirming 39 Barb. (N. Y.) 42.

⁴² Haines v. Dubois, 30 N. J. Law, 259.

⁴³ Cason v. Wallace, 4 Bush (Ky.) 388.

In the absence, however, of statutory requirements, the maker's signature need not be on the same paper that contains the instrument signed, but may be on another paper or "allonge," pinned or otherwise attached to it.⁴⁴ But it must be either on the same paper or on such "allonge."⁴⁵ Where "subscription" is required, as it is by many foreign statutes,⁴⁶ it is apparently necessary that the maker or drawer should place his signature on the paper containing the instrument and at the bottom of it.

Signature—Pleading—Evidence.

§ 67. In declaring upon a note or bill, the "signing" of it need not be averred in precise words, but it is a sufficient averment that A. "made" his certain note, etc.⁴⁷ The execution must, however, be proved as a fact.⁴⁸ In general, there is no subscribing witness to make such proof. If there be one, it may be otherwise proved in

⁴⁴ *Heister v. Gilmore*, 5 Phila. (Pa.) 62. So, too, in SWEDEN and NORWAY an indorsement by express statute (Cod. Com. c. 1, § 13); GERMANY (Exch. Law, art. 11); AUSTRIA (Exch. Law, art. 11). But in PARAGUAY, HONDURAS, and GUATEMALA it must be on the back (Ord. Bilbao, c. 13, § 3).

⁴⁵ *French v. Turner*, 15 Ind. 59.

⁴⁶ The maker's or drawer's name must be "subscribed" in AUSTRIA (Law 1850, art. 4; but in GERMANY and in AUSTRIA the word has been construed to have no relation to the place of signature, Thöl, W. R. 148 note); BOLIVIA (Com. Code, art. 362, § 8, as to bills; article 463, as to drafts); CHILI (Com. Code, art. 633, as to bills; article 767, as to drafts and notes); COLOMBIA (Com. Code, art. 384, as to bills; article 517, as to drafts and notes); COSTA RICA (Code Com. art. 373, as to bills; article 510, as to drafts and notes); GERMANY (Gen. Exch. Law 1848, art. 4, § 5; Id. art. 96); HOLLAND (Code Com. arts. 100, 208, 210); HUNGARY (Exch. Law 1860, c. 1, § 14); ECUADOR (same as Spain); MEXICO (Cod. Com. art. 223, as to bills; article 447, as to drafts and notes); NICARAGUA (Cod. Com. art. 241, as to bills; article 261, as to indorsements; article 312, as to drafts); PERU (Com. Code, art. 381, as to bills; article 522, as to drafts and notes); PORTUGAL (Cod. Com. art. 321, defining a bill as "an instrument by which the subscriber," etc.); RUSSIA (Cod. Com. art. 541); SALVADOR (Cod. Com. art. 510); SPAIN (Code Com. art. 426, as to bills; article 563, as to drafts and notes); SWEDEN and NORWAY (Cod. Com. 1851, c. 1, § 1); SWITZERLAND (Oblig. R. 722); URUGUAY (Cod. Com. art. 789, as to drafts); VENEZUELA (Cod. Com. art. 1, as to bills).

⁴⁷ *Elliot v. Cooper*, 2 Ld. Raym. 1376; *Smith v. Jarves*, Id. 1484; *Ereskin v. Murray*, Id. 1542.

⁴⁸ *Colbath v. Jones*, 28 Mich. 280.

case of the witness' absence, forgetfulness, or incapacity.⁴⁹ Moreover, the act of signing need not be specifically proved, but delivery by the maker, and probably other actions of his, are sufficient evidence of his signature.⁵⁰

So, too, the maker's own admission is sufficient proof of his signature.⁵¹ But such admission must clearly identify the instrument. Thus an admission of "a note to A." is not sufficient.⁵² Nor is the mere failure of the maker's executor to deny the signature, on presentation of the note to him, equivalent to an admission.⁵³ But in New Hampshire, at least, by present rules of pleading, the want of an affidavit of denial is presumably an admission.⁵⁴ An admission of his signature made by the maker to a bona fide purchaser before delivery of the note estops him from all subsequent denial.⁵⁵ And like effect has been given to an admission made to an indorsee even after delivery, but before maturity.⁵⁶

Perhaps proof by means of witnesses acquainted with the maker's handwriting is the most usual and convenient method, if there is no evidence of the maker's actions or admissions.⁵⁷ Evidence of the maker's handwriting may likewise be obtained from comparison of the signature to be established with other signatures already admitted or proved in the case to be genuine,⁵⁸ but not by comparison with other disputed papers not in the case.⁵⁹ In the absence of a

⁴⁹ *Quimby v. Buzzell*, 16 Me. 470.

⁵⁰ *Melvin v. Hodges*, 71 Ill. 422.

⁵¹ *Hilborn v. Alford*, 22 Cal. 482; *Nichols v. Allen*, 112 Mass. 23; *Willoughby v. Moulton*, 47 N. H. 205; *Hall v. Phelps*, 2 Johns. (N. Y.) 451; *Mauri v. Hefferman*, 13 Johns. (N. Y.) 57, 74; *Casco Bank v. Keene*, 53 Me. 103; *Fall River Nat. Bank v. Buffington*, 97 Mass. 498; *Hodges v. Eastman*, 12 Vt. 358. Although made to a third person, *Smith v. Witton*, 69 Mo. 458.

⁵² *Shaver v. Ehle*, 16 Johns. (N. Y.) 201; *Palmer v. Manning*, 4 Denio (N. Y.) 131. See, too, *Smith v. Witton*, 69 Mo. 458.

⁵³ *Filley v. Angell*, 102 Mass. 67.

⁵⁴ *Great Falls Bank v. Farmington*, 41 N. H. 32 (under Rules of 1860, No. 44).

⁵⁵ *Casco Bank v. Keene*, 53 Me. 103.

⁵⁶ *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498.

⁵⁷ *George v. Surrey*, 1 Moody & M. 516; *Chaffee v. Taylor*, 3 Allen (Mass.) 598.

⁵⁸ *First Nat. Bank of Houghton v. Robert*, 41 Mich. 709; *Homer v. Wallis*, 11 Mass. 309; *Hardy v. Norton*, 66 Barb. 527; contra, *Hanley v. Gandy*, 28 Tex. 211.

⁵⁹ *Vinton v. Peck*, 14 Mich. 287.

subscribing witness, his handwriting may be proved as in other cases.⁶⁰

Attestation—Statutes.

§ 68. Bills and notes do not require an attesting witness, and it is not customary, nor in general desirable, to have them witnessed. Even if a note is signed by a mark, a witness is unnecessary (however desirable it might then be), unless required by statute.⁶¹

In some of the states a distinction is made by statute between attested promissory notes and others, the former being excepted from the six-year limitation of actions and made actionable for a longer period.⁶² To bring a note within these statutes, the witness must be a legally competent witness at the date of the attestation.⁶³ And one who, on receiving a note as the agent of the payee, signs it in the usual place for attestation without request or explanation, has been held not to be an attesting witness.⁶⁴ Neither is an acknowledgment of a note indorsed on it, and witnessed, within the statute;⁶⁵ nor a surety's undertaking written after and without knowledge of the attestation of the maker's signature.⁶⁶ So, one of several joint makers whose signature had not been really seen or attested by the witness may avail himself of the statute of limitations even against a bona fide holder, who supposed all the signatures were attested.⁶⁷

If a note is attested, and therefore within the exception of the statute of limitations, it has been held that this should be specially pleaded.⁶⁸ But it need not appear that the attestation was in any

⁶⁰ *Shiver v. Johnson*, 2 Brev. (S. C.) 397.

⁶¹ *Shank v. Butsch*, 28 Ind. 19. The Alabama statute requires attestation in such case, *Flowers v. Bitting*, 45 Ala. 448; and (formerly) attestation by two witnesses for a transfer of note by a married woman, *Walker v. Struve*, 70 Ala. 167; Code, § 2707, repealed Laws 1887, p. 82.

⁶² MAINE (Rev. St. c. 81, § 86); MASSACHUSETTS (Pub. St. 1882, c. 197, § 6; Id. c. 133, § 5); VERMONT (V. S. § 1201). The Massachusetts acts only apply to suits by the payee or his personal representative, or a purchaser from such representative under order of the probate court.

⁶³ *Jenkins v. Dawes*, 115 Mass. 599. Thus, the signature of the maker's wife is of no avail as an attestation. *Alexander v. Hanley*, 64 Vt. 361, 24 Atl. 242.

⁶⁴ *Farnsworth v. Rowe*, 33 Me. 263.

⁶⁵ *Gray v. Bowden*, 23 Pick. (Mass.) 282.

⁶⁶ *Walker v. Warfield*, 6 Metc. (Mass.) 466.

⁶⁷ *Trustees of Solon v. Rowell*, 49 Me. 330.

⁶⁸ *Carpenter v. McClure*, 38 Vt. 375.

particular position on the paper. Thus, a renewal indorsed and attested on the back of a note is within the statutory exception.⁶⁹ And the signature of a witness written above the date, instead of at the foot of a note, may be shown to have been intended for an attestation of the note.⁷⁰ But it has been questioned whether an attestation on the face of a bill is sufficient for a signature on the back.⁷¹ And it has been held that the sufficiency of an attestation written four years after the note was signed, at the maker's request and on his acknowledgment of his signature, is a question for the jury to determine.⁷²

In England the statute, until 1863, required bills, notes, and drafts, other than checks on bankers, and the indorsement of them, to be attested, if drawn for less than five pounds and more than one pound.⁷³

Attestation—Proof by Attesting Witness.

§ 69. If there is an attesting witness, he must, in general, be called to prove the instrument,⁷⁴ especially in the case of a sealed note.⁷⁵ This is, of course, dispensed with if the witness is dead,⁷⁶ or has become insane,⁷⁷ or cannot be found in the state.⁷⁸ In all such cases the handwriting of the witness may be proved. So, too, if the witness cannot tell whether he signed as witness or not;⁷⁹

⁶⁹ *Daggett v. Daggett*, 124 Mass. 149.

⁷⁰ *Warren v. Chapman*, 115 Mass. 584.

⁷¹ *Black v. Rogers*, 68 Me. 574.

⁷² *Swazey v. Allen*, 115 Mass. 594. And the adding of an attestation without fraud after delivery is not a material alteration. *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764.

⁷³ 17 Geo. III. c. 30, temporarily repealed by 26 & 27 Vict. c. 105, 41 & 42 Vict. c. 70. Repealer continued from year to year to present time.

⁷⁴ *Stone v. Metcalf*, 1 Starkie, 53; *Kinney v. Flynn*, 2 R. I. 319. But now such witness need only be called in England where the attestation is necessary to the validity of the instrument, 17 & 18 Vict. c. 125, § 26; and where the witness is a competent witness, *Kinney v. Flynn*, *supra*.

⁷⁵ *January v. Goodman*, 1 Dall. (Pa.) 208.

⁷⁶ *Nelson v. Whittall*, 1 Barn. & Ald. 22, note.

⁷⁷ *Currie v. Child*, 3 Camp. 283.

⁷⁸ *Shiver v. Johnson*, 2 Brev. (S. C.) 397; *Dunbar v. Marden*, 13 N. H. 311. And this is true, although the note be signed by the maker's mark. *Bussey v. Whitaker*, 2 Nott. & McC. (S. C.) 374; *Shiver v. Johnson*, *supra*.

⁷⁹ *Quimby v. Buzzell*, 16 Me. 470.

or if he did not see the maker sign;⁸⁰ or only saw one of several makers sign the paper.⁸¹ Or, if the maker has admitted his signature, this may be proved, and the subscribing witness not called.⁸²

⁸⁰ *Lemon v. Dean*, 2 Camp. 636, note.

⁸¹ *Tuten v. Stone*, 12 Rich. Law (S. C.) 448.

⁸² *Hall v. Phelps*, 2 Johns. (N. Y.) 451; *Williams v. Floyd*, 11 Pa. St. 499. But see contra, in the case of a sealed note, *Fox v. Reil*, 3 Johns. (N. Y.) 477. Nor will the admission by the maker that he had given a note to the payee, the note in suit not having been produced and being in fact forged, render it unnecessary to call the subscribing witness. *Shaver v. Ehle*, 16 Johns. (N. Y.) 201.

II. SEALED INSTRUMENTS.

§ 70. Sealed Instruments not Negotiable.

71. Civil Law—Statutes.

72. What is a Seal—Scrolls—Stamps.

73. Evidence—Presumptions.

74. Corporation Seals—Coupon Bonds.

Sealed Instruments not Negotiable.

§ 70. The statute of Queen Anne, to which promissory notes owe their negotiability, did not extend to instruments under seal. Sealed notes, therefore, as well as sealed bills and corporation and other bonds, were formerly held to be nonnegotiable.⁸³ And this rule has been generally recognized in the United States, except where it is changed by statute.⁸⁴ An indorsement or guaranty under seal will not, however, affect the negotiable character of a bill or note not under seal.⁸⁵ The addition of a seal is at common law a material alteration, as it affects, among other things, the statutory limitation;⁸⁶ but if added by consent, after the paper has been barred by

⁸³ Byles, Bills, 5; Chit. 190; 1 Edw. Bills & N. § 296; 1 Daniel, Neg. Inst. 37; 1 Pars. Notes & B. 26; Story, Bills, § 62; Story, Prom. Notes, § 55; Glyn v. Baker, 13 East, 509. But see Buller v. Crips, 6 Mod. 29.

⁸⁴ Brown v. Lockhart, 1 Mo. 289; Conine v. Railroad Co., 3 Hbust. (Del.) 288; Clark v. Manufacturing Co., 15 Wend. (N. Y.) 256; Foster v. Floyd, 4 McCord (S. C.) 159; Frevall v. Fitch, 5 Whart. (Pa.) 325; Hall v. Hickman, 2 Del. Ch. 318; Helfer v. Alden, 3 Minn. 332 (Gil. 232); Brown v. Jordhal, 32 Minn. 135, 19 N. W. 650; Merritt v. Cole, 9 Hun (N. Y.) 98, 14 Hun (N. Y.) 324; January v. Goodman, 1 Dall. (Pa.) 208; Parker v. Kennedy, 1 Bay (S. C.) 398; Sayre v. Lucas, 2 Stew. (Ala.) 259; Sidle v. Anderson, 45 Pa. St. 464; Tucker v. English, 2 Speer (S. C.) 673; Rawson v. Davidson, 49 Mich. 607, 14 N. W. 565; Barden v. Southerland, 70 N. C. 528; Murrell v. Jones, 40 Miss. 565; Lewis v. Wilson, 5 Blackf. (Ind.) 369; Osborn v. Kistler, 35 Ohio St. 99; Osborne & Co. v. Hubbard, 20 Or. 318, 25 Pac. 1021; Talbott v. Suit, 68 Md. 443, 13 Atl. 356. And it has been held that the indorsee of such a note cannot sue on it although the seal is not referred to in the note. Conine v. Railroad Co., supra. But a note under a corporation seal was held to be negotiable in South Carolina in Central Nat. Bank v. Charlotte, C. & A. R. Co., 5 S. C. 156. As to corporation bonds, negotiable in form, see § 74, infra.

⁸⁵ Ege v. Kyle, 2 Watts (Pa.) 222; Rand v. Dovey, 83 Pa. St. 280, this indorsement being under a corporate seal.

⁸⁶ Davidson v. Cooper, 11 Mees & W. 778, affirmed 13 Mees & W. 343;

the statute as a simple contract, the statute will be extended to the limit fixed for specialties.⁸⁷

Without being fully "negotiable," sealed bills have been held to be transferable by delivery, if payable to bearer.⁸⁸ But the transfer, whether by delivery, indorsement, or other form of assignment, is subject to existing equities.⁸⁹ And the assignor or indorser is not liable to his assignee or a subsequent holder without an express contract to that effect.⁹⁰

Neither is a sealed note entitled to grace like one that is without seal.⁹¹ And it does not fall within the statutes authorizing joinder in one suit of the maker and indorser of commercial paper,⁹² nor within the act of congress of 1875 regulating the jurisdiction of the fed-

Vaughan v. Fowler, 14 S. C. 355. So, too, United States v. Linn, 1 How. 104, if properly pleaded. But see, contra, Fullerton v. Sturges, 4 Ohio St. 530.

⁸⁷ Hangei v. Dodge, 24 Ark. 205.

⁸⁸ Merritt v. Cole, 9 Hun (N. Y.) 98, 14 Hun (N. Y.) 324; Porter v. McCollum, 15 Ga. 528. But in ALABAMA, by statute, indorsement is necessary to a transfer. Sayre v. Lucas, 2 Stew. (Ala.) 259. And so in OHIO, Avery v. Latimer, 14 Ohio, 542, by an early statute (Swan St. p. 587). But, to the effect that a bond cannot be made payable to bearer, see Clarke v. City of Janesville, 1 Biss. C. C. 98, Fed. Cas. No. 2,854; Marsh v. Brooks, 33 N. C. 409. The contrary is now well established, however. McCoy v. Washington Co., 3 Wall. Jr. 381, Fed. Cas. No. 8,731.

⁸⁹ Hall v. Hickman, 2 Del. Ch. 318; Hill v. Caillovel, 1 Ves. Sr. 122; Matthews v. Wallwyn, 4 Ves. 118; Coles v. Jones, 2 Vern. 692; Turton v. Benson, Id. 765; Clute v. Robison, 2 Johns. (N. Y.) 595, 612; Barrow v. Bispham, 11 N. J. Law, 116; Shannon v. Marselis, 1 N. J. Eq. 424; Wheeler v. Hughes, 1 Dall. (Pa.) 23; Hopkins v. Railroad Co., 3 Watts & S. (Pa.) 410. But, contra, as to his immediate indorsee, Helfer v. Alden, 3 Minn. 332 (Gil. 232).

⁹⁰ Frevall v. Fitch, 5 Whart. (Pa.) 325; Helfer v. Alden, 3 Minn. 332 (Gil. 232); Parker v. Kennedy, 1 Bay (S. C.) 398; Pratt v. Thomas, 2 Hill (S. C.) 654; Tucker v. English, 2 Speers (S. C.) 673; Dilts v. Trimmer, 2 N. J. Law, 951; Garretsie v. Van Ness, Id. 20; Boylan v. Dickerson, Id. 431; Parks v. Duke, 2 McCord (S. C.) 380. By statute, however, the assignor is liable in case of due diligence on the part of the assignee in COLORADO (Gen. Laws, p. 111, § 94; DISTRICT OF COLUMBIA (Comp. St. c. 6, § 3); IDAHO (Rev. St. § 3601); ILLINOIS (Rev. St. c. 98, § 7); INDIANA (Horner's Rev. St. § 5504); IOWA (Code, § 3048); MARYLAND (Pub. Gen. Laws, art. 8, § 9); MISSISSIPPI (Ann. Code, § 3503); NEBRASKA (Comp. St. § 3381); OHIO (Rev. St. § 3172); VIRGINIA (Code, § 2861).

⁹¹ Skidmore v. Little, 4 Tex. 301.

⁹² Mann v. Sutton, 4 Rand. (Va.) 253.

eral courts over "promissory notes negotiable by the law merchant."⁹³ In the case of a sealed note, a blank indorsement can be explained by parol evidence, unlike the indorsement of a negotiable note not under seal.⁹⁴ But in New Jersey it has been held that a sealed bill cannot be transferred at all by a blank indorsement.⁹⁵ And the drawer of a sealed bill is not entitled to be discharged by the holder's want of due diligence.⁹⁶

Civil Law—Statutes.

§ 71. A seal is neither expressly required nor prohibited by statute in any European or American state.⁹⁷ The civil law makes no distinction between sealed and unsealed bills,⁹⁸ nor is such distinction made by the statutes of any foreign state. In some of the United States the distinction is done away by statute.⁹⁹ In these states the

⁹³ *Coe v. Railroad*, 8 Fed. 534, Blatchford, J., saying: "The instrument without the corporate seal will be a promissory note negotiable by the law merchant, and the instrument with the corporate seal will be a specialty, and not a promissory note negotiable by the law merchant. If the capacity to make the instrument without as well as with the seal exists, it cannot, when made with the seal, be a promissory note negotiable by the law merchant."

⁹⁴ *Gist v. Drakely*, 2 Gill (Md.) 330.

⁹⁵ *Speer v. Post*, 3 N. J. Law, 1032.

⁹⁶ *Force v. Craig*, 7 N. J. Law, 272.

⁹⁷ But in MISSISSIPPI the statute formerly restricted the character and effect of promissory notes to promises in writing "not under seal." 1871 Rev. Code, c. 47, § 2227. This was omitted in the Revised Code of 1880. Sealed notes, however, were assignable subject to equities. Ann. Code, §§ 3503, 4080; *Murrell v. Jones*, 40 Miss. 565; *Lamkin v. Nye*, 43 Miss. 241; *Smith v. Clopton*, 48 Miss. 66.

⁹⁸ Story, Prom. Notes, § 55.

⁹⁹ Private seals are abolished in KANSAS (Gen. St. c. 115, § 8), corporate seals excepted; NEBRASKA (Comp. St. § 4951); and TENNESSEE (Thomp. & S. Code, § 1804); also in ARKANSAS, by the constitution of 1868 (article 15, § 16). As to the effect of this provision on the statute of limitations, see *Dyer v. Gill*, 32 Ark. 410; *Foster v. Jett*, 20 C. C. A. 670, 74 Fed. 678. All distinction between sealed and unsealed instruments is done away in CALIFORNIA (Civ. Code, § 1629; Code Civ. Proc. § 1932); INDIANA (Horner's Rev. St. §§ 450-453); KENTUCKY (St. § 471; *Norton v. Allen*, 3 A. K. Marsh. [Ky.] 284; *Maxwell v. Goodrum*, 10 B. Mon. [Ky.] 286); MICHIGAN (How. Ann. St. § 7345; *McKinney v. Miller*, 19 Mich. 142, 151); MISSISSIPPI, so far as to give sealed bills a commercial character (*Murrell v. Jones*, supra,

affixing of a seal at the time of executing a note or bill, especially where it is not recited in the instrument, may be disregarded as mere surplusage.¹⁰⁰ And the sealed bill, if in other respects negotiable, is governed by the rules of commercial paper.¹⁰¹ By statute sealed bills and bonds are made negotiable in many states.¹⁰² In other

and other notes to this section); OHIO (Ann. St. §§ 3171, 3172; *Bain v. Wilson*, 10 Ohio St. 14; *Bank of St. Clairsville v. Smith*, 5 Ohio, 222); TEXAS (Rev. St. § 4487; *Courand v. Vollmer*, 31 Tex. 397); and WASHINGTON (St. § 4523); and SOUTH DAKOTA (Comp. Laws, § 3549); and by the Negotiable Instrument Law in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 6), MARYLAND and NEW YORK (§ 25); *Anthony v. Harrison*, 74 N. Y. 613, affirming 14 Hun, 198; *New York Security & Trust Co. v. Storm*, 81 Hun, 33, 30 N. Y. Supp. 605).

¹⁰⁰ *Mackay v. St. Mary's Church*, 15 R. I. 121; *Jones v. Homer*, 60 Pa. St. 214.

¹⁰¹ *Bank of St. Clairsville v. Smith*, 5 Ohio, 222.

¹⁰² This is the case in CALIFORNIA (Civ. Code, § 3095); COLORADO (Gen. Laws, p. 110, § 91); DAKOTA (Rev. Code, § 1829); ILLINOIS (Rev. St. [Hurd's Ed.] c. 98, §§ 3, 4); KANSAS (Gen. St. c. 115, § 1); MASSACHUSETTS (Pub. St. c. 77, § 4), as to corporate bonds; MISSOURI (Rev. St. § 733); NEBRASKA (Gen. St. c. 32, § 1), if payable to "order" or "bearer"; NEVADA (Comp. Laws, c. 5, § 9), as to "all notes in writing." In OHIO bonds are made negotiable, if payable to "order" or "bearer" (P. L. 217, §§ 1, 2; Rev. St. §§ 3171, 3172), but by indorsement only. *Osborn v. Kistler*, 35 Ohio St. 99; *Cushman v. Welsh*, 19 Ohio St. 536; *Avery v. Latimer*, 14 Ohio, 542. In DELAWARE, specialties, "payable to any person or order or assigns" are made assignable, if attested by two witnesses, and the assignee may bring suit in his own name. Rev. Code, amended, c. 63, § 8. But the indorsement of a sealed instrument gives the indorsee no right to sue. *Conine v. Railroad Co.*, 3 Houst. (Del.) 288. In the DISTRICT OF COLUMBIA, instruments under seal are assignable, so that the assignee may sue in his own name, and the assignor is liable thereon as a surety. Comp. St. c. 6, § 3. In GEORGIA, "all bonds, specialties, or other contracts in writing for the payment of money or any articles of property are negotiable by indorsement or written assignment in the same manner as bills of exchange and promissory notes." Code, § 3682. In MARYLAND, sealed instruments for the payment of money are assignable, subject to defense, the assignor being only liable in case of due diligence on the part of the assignee. Pub. Gen. Laws, art. 8, § 9. In MASSACHUSETTS, it is enacted that "bonds and other obligations for the payment of money purporting to be payable to the bearer or some person designated or bearer, or payable to order issued by any corporation or joint stock company, shall be negotiable in the same manner and to the same extent as promissory

states such instruments are made assignable at law, subject, however, to equities existing against the assignor.¹⁰³ And in some states the

notes. Pub. St. c. 77, § 4. In MISSISSIPPI it was formerly provided that notes should be "not under seal." Rev. Code, § 2227. This has been omitted, however, in the corresponding section of the statute now in force. Ann. Code, § 3502. In NEBRASKA, bonds are made negotiable in like manner with promissory notes and bills of exchange, foreign or inland, and subject to like requirements. Gen. St. § 3380; Rev. St. c. 27. As to municipal bonds, there is in NEW YORK, by act of 1870 (2 Rev. St. p. 406, § 13), provision for a special indorsement to put an end to their negotiable character. In NORTH CAROLINA, negotiable instruments may be with or without seals. Code, § 41; *Pate v. Brown*, 85 N. C. 166; *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855. In OHIO, bonds are negotiable like promissory notes and bills, inland and foreign. Rev. St. § 3171. In PENNSYLVANIA, bonds, specialties, and notes were made assignable, subject to equities by the act of 1715. *Purd. Dig.* 224, § 1. In TENNESSEE, bills, bonds, and notes for money only are made negotiable whether sealed or not. Ann. Code, § 3506.

¹⁰³ This is the case in ALABAMA (Code, § 1765; *Muse v. Dantzler*, 85 Ala. 359, 5 South. 178); ARKANSAS (*Gantt's Dig.* §§ 563, 565); DELAWARE (Rev. Codes 1874, c. 63, § 8); DISTRICT OF COLUMBIA (Comp. St. c. 6, § 3); GEORGIA (Code, § 3077, but see section 3682); IOWA (Code, §§ 3044, 3461); KANSAS (Gen. St. c. 115, § 2), as to nonnegotiable instruments; KENTUCKY (St. § 475); MARYLAND (Pub. Gen. Laws, art. 8, § 3); MICHIGAN (How. Ann. St. § 7345), as to nonnegotiable bonds and notes; MINNESOTA (Gen. St. § 4190); MISSISSIPPI (Ann. Code, § 3503); NEW JERSEY (Pat. Revision, 254; Gen. St. p. 1237, § 117; *Id.* p. 2536, § 21; *Id.* p. 2591, § 340); NEW YORK (see section 71, note, *supra*). In *Fairbanks v. Sargent*, 39 Hun (N. Y.) 588, an individual coupon bond, under seal, payable to bearer, was held to be negotiable and not subject to defenses. But this was questioned in 104 N. Y. 108, by the court of appeals, which reversed the case on other points. NORTH CAROLINA (Code, § 41) makes such instruments subject to assignment and suit like inland bills of exchange, but this does not include a sealed note in which payee and amount are blank. *Borden v. Southerland*, 70 N. C. 528. And, unless a sealed note is indorsed before maturity, it is not negotiable, although payable to bearer and transferred without indorsement. *Spence v. Tapscott*, 93 N. C. 246; *Havens v. Potts*, 86 N. C. 31. PENNSYLVANIA (Act 1715, *Purd. Dig.* 224) makes specialties only assignable subject to equities. So, too, SOUTH CAROLINA (Code Civ. Proc. §§ 132, 133); TEXAS (Rev. Civ. St. arts. 266, 267); VIRGINIA (Code, § 2860); WEST VIRGINIA (Code, c. 99, § 14); and WISCONSIN (Sanb. & B. Ann. St. §§ 2605, 2606). In general, these statutes only apply to bonds or other contracts for the payment of money only. Such assignment may be by indorsement in ALABAMA (Code, § 1762; *Sayre v. Lucas*, 2 Stew. [Ala.] 259); CALIFORNIA (Civ. Code, § 1459); DELAWARE (Rev. Code, c. 63, § 8); GEORGIA (Code,

assignor or indorser is made liable without express stipulation to that effect.¹⁰⁴

What is a Seal—Scrolls—Stamps.

§ 72. What constitutes a seal has often been the subject of discussion. Sir Edward Cooke's definition, "*Sigillum est cera impressa, quia cera sine impressione non est sigillum*,"¹⁰⁵ can no longer be regarded as the rule upon this subject. In many of the United States a scroll is by statute made a sufficient seal.¹⁰⁶ In others an instrument is

§ 2776); IDAHO (Rev. St. § 3600); ILLINOIS (Hurd's Rev. St. c. 98, § 4); IOWA (Code, §§ 3043, 3044); KANSAS (Gen. St. c. 115, § 1); MISSISSIPPI (Ann. Code, § 3503); NEBRASKA (Comp. St. § 3380); OHIO (Rev. St. §§ 3171, 3172; *Avery v. Latimer*, 14 Ohio, 542); TENNESSEE (Ann. Code, § 3506). In WEST VIRGINIA, a sealed bill is a specialty, and not a note. *Laidley v. Bright*, 17 W. Va. 779.

¹⁰⁴ This is the case in DISTRICT OF COLUMBIA (Comp. St. c. 6, § 3), the assignor becoming liable as a surety; IDAHO (Rev. St. § 3601); ILLINOIS (Hurd's Rev. St. c. 98, §§ 3, 4); IOWA (Code, §§ 3044, 3048); MARYLAND (Pub. Gen. Laws, art. 8, § 9); MISSISSIPPI (Ann. Code, § 3503); MISSOURI (Rev. St. § 2391); NEBRASKA (Comp. St. § 3281); NEW HAMPSHIRE (Pub. St. c. 202, § 6); NEW JERSEY (Gen. St. p. 1237, § 117); VIRGINIA (Code, § 2861).

¹⁰⁵ 3 Co. Inst. 169.

¹⁰⁶ In CALIFORNIA, a "scroll of a pen or the writing of the word 'seal' against the signature of the maker" (Code Civ. Proc. § 1931); in CONNECTICUT, the word "seal" or the letters "[L. S.]" (Gen. St. Rev. 1875, p. 438, § 17); and a scroll is sufficient in ILLINOIS (Hurd's Ed., Rev. St. c. 29, § 1); MINNESOTA (Gen. St. § 4190, although not referred to in the instrument; *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650); MISSISSIPPI (Ann. Code, § 4081). "Whenever it is manifest that a scroll is intended to be used by way of seal, it must have that effect, whether it so appears from the body of the instrument or from the scroll itself." *Thacher, J., in Whittington v. Clarke*, 8 Smedes & M. 480; *McRaven v. McGuire*, 9 Smedes & M. 34. But such intention must be manifest, *Hudson v. Poindexter*, 42 Miss. 306. A scroll is a seal in NEW JERSEY (Patt. Revision, p. 254; Gen. St. p. 2336, § 1). So, in OREGON (1 Hill's Ann. Laws, § 752); TENNESSEE, by act of 1801 (*Scruggs v. Brackin*, 4 Yerg. 528); VIRGINIA (Code, § 5, subd. 12); WEST VIRGINIA (Code, c. 13, § 15); and WISCONSIN (Saub. & B. Ann. St. § 2215; *Williams v. Starr*, 5 Wis. 549); and MISSOURI (Rev. St. § 2388), if "expressed on the face thereof to be sealed," and scroll affixed "by way of seal"; and, in MICHIGAN, "any device affixed by way of a seal" since 1827 (*How. Ann. St. § 7510*). See, too, *Anderson v. Wilburn*, 8 Ark. 155, although the scroll

sealed if it is declared in its body to be so.¹⁰⁷ But the recital of an unsealed note in a mortgage under seal securing it does not make it a specialty.¹⁰⁸ In the absence of statute to that effect, a *scroll* is not a sufficient seal,¹⁰⁹ although referred to as a seal in the body of the

lacked the usual "L. S." *Hastings v. Vaughn*, 5 Cal. 315; *Commercial Bank of Manchester v. Ullman*, 10 Smedes & M. (Miss.) 411; *Underwood v. Dolins*, 47 Mo. 259; *Long v. Ramsay*, 1 Serg. & R. (Pa.) 72; *Meredith v. Hinsdale*, 2 Caines (N. Y.) 362, as to Pennsylvania law. In MINNESOTA, a scroll is a seal, although not referred to in the instrument. *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650. But see, contra, *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174.

¹⁰⁷ *Carter v. Penn*, 4 Ala. 140. And previous to the act of 1839 both seal (or scroll) and recognition of it in the instrument were required in ALABAMA. By that act, 1840, "all writings which import on their face to be under seal" are sealed instruments. So, in CONNECTICUT, as to writings executed "by any person or corporation not having an official or corporate seal, purporting and intending to be a specialty or under seal, and not otherwise sealed than by the addition of the word 'Seal' or the letters '[L. S.]'." Gen. St. Rev. 1875, p. 438, § 17. *Fish v. Brown*, 17 Conn. 340, referring to acts of 1824, 1836, and 1838, which had all been retrospective only. In GEORGIA the expression of intention to seal is sufficient by act of 1838. *Milledge v. Gardner*, 29 Ga. 700; but not the printed words, "Witness our hand and seal," *Brooks v. Kiser*, 69 Ga. 762; *Willhelms v. Partoine*, 72 Ga. 898; though "no instrument shall be considered as under seal unless so recited in the body of the instrument" (Code, § 3765), *Chambers v. Kingsberry*, 68 Ga. 828. "Signed and sealed, A. B. [L. S.]," is sufficient. *Humphries v. Nix*, 77 Ga. 98. And in MISSOURI such recital is necessary to the sufficiency of a scroll. Rev. St. § 2388. And in MISSISSIPPI the conclusion of a note with the words "Witness my hand and seal" is enough without a seal to make it a specialty, so far as the statute of limitations is concerned. *McCarley v. Board*, 58 Miss. 483.

¹⁰⁸ *Clarke v. Tiger*, 2 Starkie, 234; *Jackson v. Sackett*, 7 Wend. (N. Y.) 102.

¹⁰⁹ *Blackwell v. Hamilton*, 47 Ala. 470; *Clegg v. Lemessurier*, 15 Grat. (Va.) 108; *Andrews v. Herriot*, 4 Cow. (N. Y.) 508, overruling *Meredith v. Hinsdale*, 2 Caines (N. Y.) 362, on question of applicability of Pennsylvania law to New York action; *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227; *Coit v. Millikin*, 1 Denio (N. Y.) 376; *Douglas v. Oldham*, 6 N. H. 150; *Beardsley v. Knight*, 4 Vt. 479; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241. But see, contra, *Jones v. Logwood*, 1 Wash. (Va.) 42, where a scroll was held to be a sufficient seal independently of the act of 1788. See, however, for later Virginia cases on this subject, section 117, note infra. See, also, *Commonwealth v. Griffith*, 2 Pick. (Mass.) 18 note; *Bradford v. Randall*, 5 Pick. (Mass.) 497; *Tasker v. Bartlett*, 5 Cush. (Mass.) 364.

note or other instrument.¹¹⁰ Nor is a printed impression of a corporate seal sufficient.¹¹¹ But an impression stamped into the paper has been held to be a good corporate seal.¹¹² So, too, a paper stuck on with mucilage and stamped with a seal.¹¹³

¹¹⁰ *Irwin v. Brown*, 2 Cranch, C. C. 314, Fed. Cas. No. 7,080; especially where there is only a "flourish" opposite the name, of which it can be said by the court, "In judging by inspection I see nothing like a seal." *Tilghman, C. J.*, in *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502.

¹¹¹ *Bates v. Railroad*, 10 Allen (Mass.) 251; *Farmers' & Manufacturers' Bank v. Haight*, 3 Hill (N. Y.) 493. So, of a notary's seal. *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227. See, also, *Jackson v. Myers*, 43 Md. 452; *Muth v. Dolfield*, Id. 466. So, of the printed word and device after an individual signature, with no evidence in the instrument of an intention to make it sealed. *Buckingham v. Orr*, 6 Colo. 587. But a corporate seal printed on a bond, which recites that it is sealed, has been held to be a sufficient seal. *Royal Bank of Liverpool v. Grand J. R. & D. Co.*, 100 Mass. 444; *Woodman v. York & C. R. Co.*, 50 Me. 549. An impression upon the paper or other material on which the instrument is written is sufficient seal by statute in CALIFORNIA (Civ. Code, § 1628; Code Civ. Proc. § 1931). So, of a court seal in COLORADO (Code Civ. Proc. §§ 385, 408. So, of corporate and official seals in CONNECTICUT (Gen. St. Rev. 1875, p. 438, § 17). So, of public official, corporation, and court seals in IOWA (Code, § 48, subd. 14); and in MAINE (Rev. St. c. 1, § 6, subd. 15); and in MASSACHUSETTS, as also of corporate seals (Pub. St. c. 3, § 3, subsec. 19); and in MICHIGAN, of all seals; and in MINNESOTA, of public seals (St. § 255, subd. 13). In NEVADA a public seal may be affixed "by impressing it on the paper or on a substance attached to the paper, and capable of receiving the impression." Comp. Laws, § 965. In NEW HAMPSHIRE an impression on the paper is a good public seal. Pub. St. c. 2, § 1. In NEW YORK a court seal may be made by a stamp (3 Rev. St. [6th Ed.] p. 439, § 24). In OREGON a "stamp or impression made upon wax, wafer, paper, or any other like substance upon which a visible and permanent impression can be made," or "a wafer or wax attached to the instrument or a paper attached to it by an adhesive substance," is a sufficient seal. 1 Hill's Ann. Laws, § 752. And in VERMONT a public seal may be made by an impression on the paper. St. § 17. Where the statute provides only for public official or corporate seals, it may be inferred that private seals, being of less dignity, may be made in like manner.

¹¹² *Corrigan v. Falls Co.*, 5 N. J. Eq. 52; *Ross v. Bedell*, 5 Duer (N. Y.) 462;

¹¹³ *Gillespie v. Brooks*, 2 Redf. (Me.) 350; or a revenue stamp stuck on for a seal, *Van Bokkelen v. Taylor*, 62 N. Y. 108; but not a ribbon passed through slits in the paper, *Duncan v. Duncan*, 1 Watts (Pa.) 322. Anything attached for a seal is sufficient by statute in California (Code Civ. Proc. § 1931), as regards public seals.

Evidence—Presumptions.

§ 73. In the absence of statutory requirements to that effect, express recognition of the seal in the instrument, e. g. "witness my hand and seal," is not necessary.¹¹⁴ In states, however, where a scroll is sufficient seal, such recognition is *prima facie* evidence of the obligor's intention, and dispenses with other proof of an intention to seal,¹¹⁵ while the absence of all mention of it in the instrument leaves the fact of sealing to be proved.¹¹⁶ In Virginia, on the con-

Curtis v. Railroad Co., 15 N. Y. 9; *Connolly v. Goodwin*, 5 Cal. 220; *Allen v. Sullivan*, 32 N. H. 446; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381, *Foster, J.*, saying in this case: "Such an impression of a seal has never been held insufficient, and after our courts have allowed wafers instead of wax, and paper with gum or mucilage instead of wafers, there seems little reason why we should hesitate also to allow the sufficiency of a corporate seal on the paper itself." And it is said by *Grier, J.*, in *Pillow v. Roberts*, 13 How. 472: "It is the seal which authenticates, and not the substance on which it is impressed." See, too, *Sugd. Powers* (1st Am. Ed.) 236. But see, *contra*, *Mitchell v. Insurance Co.*, 45 Me. 105.

¹¹⁴ *Conine v. Railroad*, 3 Houst. (Del.) 288. But see *Moore v. Leseur*, 18 Ala. 606.

¹¹⁵ *Force v. Craig*, 7 N. J. Law, 272, *Ford, J.*, saying in this case: "The defendant demands evidence that the scroll was intended for a seal, but there needs no other proof than the instrument itself, saying, 'Witness my hand and seal.' In this state of things the court and jury are bound to treat it as a sealed bill." *Lindsay v. State*, 15 Ala. 43.

¹¹⁶ *Newbold v. Lamb*, 5 N. J. Law, 449; *Corlies v. Van Note*, 16 N. J. Law, 324. So, the presence of a corporate seal on a note, without recital, is no evidence of sealing. *Weeks v. Esler*, 143 N. Y. 374, 38 N. E. 377. But other cases find in such scroll seal, although not referred to in the body of the instrument, a presumption in favor of an intention to seal. *Parks v. Duke*, 2 McCord (S. C.) 380; *Peasley v. Boatwright*, 2 Leigh (Va.) 196; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *Giles v. Mauldin*, 7 Rich. Law (S. C.) 11. And in *Merritt v. Cornell*, 1 E. D. Smith (N. Y.) 335, affirmed in the court of appeals, *Ingraham, J.*, says of a scroll not mentioned in the instrument, "Proof of the handwriting, with the fact of the seal being affixed and the possession by the plaintiff, is presumptive evidence of signing, sealing, and delivery. * * * It is sufficient if the scroll be affixed at the time of delivery and execution, and that is presumed (in the absence of other proof) from the fact that the obligee is in possession of the instrument with the scroll attached."

trary, such proof cannot be made by parol.¹¹⁷ In the words of Hornblower, C. J., in *Corlies v. Van Note*:¹¹⁸ "If an instrument is shown to us with a *seal* in fact,—that is, with wafer or wax affixed to it,—the law pronounces it a *deed*, and that whether anything is said *in* the instrument about a seal or not. * * * When a writing with nothing but a blot or scroll or flourish after the name is shown in court, we are bound to consider and treat it as a simple contract only, unless it appears by the writing itself, or by the *testibus* clause, that the party making it intended to do so under his hand and seal." And in this case it was declared to be a question for the court, and not for the jury, to be determined *by inspection* whether an instrument be sealed or not.¹¹⁹ In other cases proof of the maker's signature has been held to raise a presumption in favor of the seal having been properly affixed.¹²⁰

But it may be shown in equity that a seal was omitted by mistake after the clause "witness my hand and seal,"¹²¹ or affixed by mistake,¹²² or that one seal was intended for the seal of both A. and B., who executed a paper which concluded "witness *our* hands and seals,"

¹¹⁷ *Clegg v. Lemessurier*, 15 Grat. (Va.) 108; *Cromwell v. Tate's Ex'r*, 7 Leigh (Va.) 301; *Anderson v. Bullock*, 4 Munf. (Va.) 442; *Baird v. Blagrove*, 1 Wash. (Va.) 170; *Austin's Adm'x v. Whitlock's Ex'rs*, 1 Munf. (Va.) 487; *Jenkins v. Hurt's Com'rs*, 2 Rand. (Va.) 446. In *Anthony v. Harrison*, 14 Hun (N. Y.) 201, Mr. Calvin Frost, the referee, says of the foregoing Virginia cases that they "are conceded to hold a doctrine not in harmony with the common law. * * * The weight of authority is largely against the Virginia cases." To like effect, see *Parks v. Duke*, 2 McCord (S. C.) 380; *Peasley v. Boatwright*, 2 Leigh (Va.) 196; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234. In *Peasley v. Boatwright*, *Anderson v. Bullock*, and *Austin v. Whitlock*, *supra*, there were scroll seals after the words "witness our hands."

¹¹⁸ 16 N. J. Law, 324.

¹¹⁹ So, too, *Moore v. Leseur*, 18 Ala. 606; *Van Bokkelen v. Taylor*, 62 N. Y. 108; *Duncan v. Duncan*, 1 Watts (Pa.) 322.

¹²⁰ *Merritt v. Cornell*, 1 E. D. Smith (N. Y.) 335; *Muckleroy v. Bethany*, 27 Tex. 551.

¹²¹ *McCown v. Sims*, 69 N. C. 159; *Conover v. Brown*, 49 N. J. Eq. 156, 23 Atl. 507. See, too, *McCarley v. Board of Sup'rs*, 58 Miss. 483, where such instrument was regarded as sealed.

¹²² *Lynam v. Califer*, 64 N. C. 572. So, it may be rejected as surplusage in a corporation note, under a resolution which did not authorize a seal. *Stevens v. Ball Club*, 142 Pa. St. 52, 21 Atl. 797.

and placed but one seal opposite both names;¹²³ or that a seal affixed to the obligee's name at the end of the condition of a bond was intended for the obligor's name placed by mistake at the beginning of the condition, and without seal.¹²⁴ If a note, joint in form, is sealed by one maker, and not by the other, it will be treated as the note of one, and the bond of the other,¹²⁵ and cannot be enforced against them in a joint action as their joint contract.¹²⁶

Corporation Seals—Coupon Bonds.

§ 74. It was once thought that a corporation seal was only equivalent to its signature, and, indeed, the only way by which it could execute a written instrument.¹²⁷ And therefore such seal was held not to make a specialty of the instrument, which remained a simple contract notwithstanding its execution under a corporate seal.¹²⁸ It is now, however, established that a corporation note or other contract can be executed without the corporate seal.¹²⁹ A corporation may use a common seal.¹³⁰

¹²³ *Stabler v. Cowman*, 7 Gill & J. 284; *Twitty v. Houser*, 7 S. C. 153; *Bowman v. Robb*, 6 Pa. St. 302. But a sealed note made in a firm name will not bind partners who do not sign. *Milwee v. Jay*, 47 S. C. 430, 25 S. E. 298.

¹²⁴ *Argenbright v. Campbell*, 3 Hen. & M. (Va.) 144, 198.

¹²⁵ *Biery v. Haines*, 5 Whart. (Pa.) 563; *Rankin v. Roler*, 8 Grat. (Va.) 63.

¹²⁶ *Biery v. Haines*, *supra*. But see, *contra*, *Rankin v. Roler*, *supra*.

¹²⁷ *Bytes, Bills*, 70; 2 *Daniel, Neg. Inst.* 496; 1 *Pars. Notes & B.* 163; *Story, Prom. Notes*, § 74; *Ang. & A. Corp.* § 219. Such seal is sometimes available to show the instrument to have been intended for an act of the corporation, and not of the individual officer signing it. *Dutton v. Marsh*, L. R. 6 Q. B. 361.

¹²⁸ "It would seem that the seal in such case is simply inoperative, not interfering with the negotiability of the instrument, if otherwise valid, and not converting into a deed a document purporting to be negotiable, but which the corporation had no power to make. The bill or note, if good at all, is good as a bill or note, and not as a money bond or as an acknowledgment under seal of indebtedness." *Green's Brice, Ultra Vires*, 162; *Aggs v. Nicholson*, 1 Hurl. & N. 165, 25 *Law J. Exch.* 348.

¹²⁹ *Bytes, Bills*, 71; 2 *Daniel, Neg. Inst.* 496; 1 *Pars. Notes & B.* 163; *Story, Prom. Notes*, § 74; *Danforth v. Turnpike Co.*, 12 *Johns. (N. Y.)* 227; *Union Bank v. Ridgely*, 1 *Har. & G. (Md.)* 413; *Many v. Iron Co.*, 9 *Paige (N. Y.)* 188; *Mechanics' Bank v. Bank*, 5 *Wheat.* 326; *Legrant v. Hampden*

¹³⁰ See note 130 on following page.

Independently of the statutes above referred to, bills and notes executed by corporations under their corporate seal have been held to be negotiable, and subject to all the rules of commercial paper.¹³¹

College, 5 Munf. (Va.) 324; *Hamilton v. Insurance Co.*, 5 Pa. St. 339; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; *Bank of Columbia v. Patterson*, 7 Cranch, 305; *Creswell v. Holden*, 3 MacArthur (D. C.) 579; *Commercial Bank v. Manufacturing Co.*, 1 B. Mon. (Ky.) 13. And this rule has been extended to municipal corporations. *Fourth School Dist. v. Wood*, 13 Mass. 199; 1 Dill. Mun. Corp. § 374. And a note to a corporation may be transferred by its agent by an assignment not under seal, *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84; or by indorsement not under seal by the cashier of a bank, *Fleckner v. Bank*, 8 Wheat. 338, 357. The English courts have held more strictly than those of the United States to the old rule requiring corporate contracts to be sealed. Ang. & A. Corp. § 236; *Slark v. Archway Co.*, 5 Taunt. 792; *Lamprell v. Guardians*, 3 Exch. 306; *Diggle v. Railway*, 5 Exch. 442; *Church v. Coke Co.*, 6 Adol. & E. 846; *Mayor of Ludlow v. Charlton*, 6 Mees. & W. 815; *East London Waterworks Co. v. Bailey*, 4 Bing. 283; *Arnold v. Mayor of Poole*, 4 Man. & G. 861; *Copper Miners' Co. v. Fox*, 16 Q. B. 229. But contracts of slight importance and constant recurrence are excepted from this rule, *East London Waterworks Co. v. Bailey*, supra; *Australian S. N. Co. v. Marzetti*, 11 Exch. 234; *Church v. Coke Co.*, 6 Adol. & E. 846; *London Gaslight & Coke Co. v. Nicholls*, 2 Car. & P. 365; *Beverley v. Coke Co.*, 6 Adol. & E. 829. A distinction has also been made in favor of executed contracts, as of themselves implying a consideration. *Mayor of Stafford v. Till*, 4 Bing. 75; *East London Waterworks Co. v. Bailey*, supra; *Beverley v. Coke Co.*, supra; *Dean of Rochester v. Pierce*, 1 Camp. 466; *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131; *Lowe v. Railway*, 18 Q. B. 633, this and most of the foregoing cases being actions for use and occupation. But the validity of this distinction is questioned in *Paine v. Strand Union*, 8 Q. B. 340; *Church v. Coke Co.*, supra.

¹³⁰ Thus, in *Mill Dam Foundery v. Hovey*, 21 Pick. (Mass.) 417, an ordinary wafer seal affixed to a corporation contract after the words "Witness our hands" was held a sufficient seal for the corporation. See, too, *Bank of Middlebury v. Railway*, 30 Vt. 159. And such seal may be proved by evidence of subsequent use. *Blood v. Water Co.*, 113 Cal. 221, 41 Pac. 1017, and 45 Pac. 252.

¹³¹ *Jackson v. Myers*, 43 Md. 452; *Muth v. Dolfield*, Id. 466; *Weeks v. Esler*, 143 N. Y. 374, 38 N. E. 377; *Central Nat. Bank v. Charlotte, C. & A. R. Co.*, 5 S. C. 156. In *Re Imperial Land Co.*, L. R. 11 Eq. 498, Sir R. Malins, V. C., said: "I agree with Mr. Chitty that a debenture merely means an instrument which shows that the party owes and is bound to pay. It is not less so because at the top it is called a debenture bond. * * * Every principle of public policy calls upon me to repudiate the notion that such documents are to be treated like bonds or choses in ac-

And it is now well established that corporation bonds under seal, if drawn in a negotiable form, are negotiable like bills and notes, and possess, in general, all the qualities of commercial paper.¹³²

tion in which the equities between the parties can be entered into," and quoted with approval the language of Lords Justices Wood and Selwyn in *Ex parte City Bank*, L. R. 3 Ch. 758. In this case (page 762) Sir W. P. Wood, L. J., says of a similar instrument: "It is under seal; but so, in the absence of special powers, must every instrument be which is executed by a corporation. If there had been in these articles any provision such as we often find providing for the issuing negotiable instruments not under seal, the argument from the use of a seal would have had much more weight."

¹³² This has been held of corporate bonds *generally*. *Colson v. Arnot*, 57 N. Y. 253 (1874); *Evertson v. Bank*, 66 N. Y. 14; *McClelland v. Railway Co.*, 110 N. Y. 469, 18 N. E. 237; *Chase Nat. Bank of New York v. Faurot*, 149 N. Y. 532, 44 N. E. 164, affirming 72 Hun, 373, 25 N. Y. Supp. 447; *American Nat. Bank v. American Wood-Paper Co. (R. I.)* 32 Atl. 305; *Carr v. Le Fevre*, 27 Pa. St. 413; *Hotchkiss v. Bank*, 21 Wall. 354; *Lehman v. Manufacturing Co.*, 64 Ala. 567. But not a corporate "debenture" in its terms conditional, *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374; nor a bond reissued by the guarantor after payment by him at maturity, *Gourdin v. Trenholm*, 25 S. C. 362. In *Carr v. Le Fevre*, 27 Pa. St. 418, *Lewis, C. J.*, said of such bonds payable to bearer: "Such bonds are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and, being expressly designed to be passed from hand to hand and by common usage actually so transferred, are capable of passing by delivery so as to enable the holder to maintain an action on them in his own name." So, too, *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 699. Also of *Railroad Bonds*: *Chapin v. Railroad*, 8 Gray (Mass.) 575; *White v. Railroad Co.*, 21 How. 575; *Junction Railroad Co. v. Cleneay*, 13 Ind. 161; *Moran v. Commissioners*, 2 Black, 722; *Brainerd v. Railroad*, 25 N. Y. 496, affirming 10 Bosw. (N. Y.) 332; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9; *Birdsall v. Russell*, 29 N. Y. 220; *Wickes v. Adirondack Co.*, 2 Hun (N. Y.) 112, 4 Thomp. & C. (N. Y.) 250; *Langston v. Railroad Co.*, 2 S. C. 248; *Murray v. Lardner*, 2 Wall. 110; *National Exch. Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375; *Grand Rapids & I. R. Co. v. Sanders*, 17 Hun (N. Y.) 552; *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539; *State v. Cobb*, 64 Ala. 127. The contrary was held in *Jackson v. Railroad Co.*, 48 Me. 147; but this case is not supported, *Evertson v. Bank*, 66 N. Y. 14. In *Moran v. Commissioners*, *supra*, they are called by *Wayne, J.*, "commercial securities." In *Junction Railroad Co. v. Cleneay*, *supra*, *Perkins, J.*, speaks of them as "not governed exactly by the law merchant," but "entitled to all the privileges of commercial paper." While in *White v. Railroad Co.*, *supra*, *Nelson, J.*, says of their negotiability that "the

usage and practice of the companies themselves, and of the capitalists and business men of the country dealing in them, as well as the repeated decision or recognition of the principle by courts and judges of the highest respectability, have settled the question." So of *Municipal Bonds*: 1 Dill. Mun. Corp. § 405; Craig v. City of Vicksburg, 31 Miss. 216; Bank of Rome v. Village of Rome, 19 N. Y. 20; Gelpeke v. City of Dubuque, 1 Wall. 175; Ottawa v. National Bank, 105 U. S. 342; New Providence Tp. v. Halsey, 117 U. S. 336, 6 Sup. Ct. 764; Ackley School Dist. v. Hall, 113 U. S. 135, 5 Sup. Ct. 371; City of Aurora v. West, 22 Ind. 88; Gould v. Town of Sterling, 23 N. Y. 464; Force v. City of Elizabeth, 28 N. J. Eq. 406; Durant v. Iowa Co., 1 Woolw. 69, Fed. Cas. No. 4,189; Thomson v. Lee Co., 3 Wall. 327; Arents v. Com., 18 Grat. (Va.) 750; Boyd v. Kennedy, 38 N. J. Law, 146; School Dist. No. 16 v. State Bank, 8 Neb. 168; Lindsley v. Dietendorf, 43 How. Prac. (N. Y.) 33; Marsh v. Little Valley, 1 Hun (N. Y.) 554; 4 Thomp. & C. (N. Y.) 116; Society for Savings v. City of New London, 29 Conn. 174; Town of Eagle v. Kohn, 84 Ill. 292; Weith v. City of Wilmington, 68 N. C. 24; Belo v. Commissioners, 76 N. C. 489; City of San Antonio v. Lane, 32 Tex. 405; Board v. Railway Co., 46 Tex. 316; Commissioners of Marion Co. v. Clark, 94 U. S. 278. Such bonds are declared to possess "all the qualities of commercial paper" by Swayne, J., in Gelpeke v. City of Dubuque, supra, and by Miller, J., in Durant v. Iowa Co., supra, and by Davis, J., in Thomson v. Lee, supra. The decision denying the negotiability of such bonds in Diamond v. Lawrence Co., 37 Pa. St. 353, cannot be regarded as authority, at least beyond the limits of the state of Pennsylvania. But see, Hopper v. Town of Covington, 8 Fed. 777, where the bonds were issued without authority. See, also, section 336 et seq., infra; Chase Nat. Bank v. Faurot (N. Y. App.) 44 N. E. 164, 35 Lawy. Rep. Ann. 605, note. So, of *Public Securities*: United States treasury notes, Vermilye v. Express Co., 21 Wall. 138; Dinsmore v. Duncan, 57 N. Y. 573; Seybel v. Bank, 54 N. Y. 288; Frazer v. D'Inwilliers, 2 Pa. St. 200; Ringling v. Kohn, 4 Mo. App. 59. State bonds, Delafield v. State of Illinois, 2 Hill (N. Y.) 177; Bond Debt Cases, 12 S. C. 200; or a bond of the king of Prussia payable "to every person who should for the time then being be the holder," Gorgier v. Mieville, 3 Barn. & C. 45. State improvement bonds, Finnegan v. Lee, 18 How. Prac. (N. Y.) 186. So, by custom of the European stock market, foreign government scrip for delivery of bonds to bearer on payment of last installment. Goodwin v. Robarts, 1 App. Cas. 476. So, by statute, in ALABAMA (Code, § 1761, amended by Laws 1888-89, p. 111), as to state, county, municipal, and corporate bonds, except as to presentment, protest, and notice. But an EAST INDIA bond, payable to A. B., "his executors and assigns," was held in England not negotiable in Glyn v. Baker, 13 East, 509. In the next year, however, an act was passed to make such bonds negotiable. 51 Geo. III. c. 64. This is also true of *detached coupons* which are not generally under seal, although the bond to which they belong may be. 1 Dill. Mun. Corp. § 405, note; Gelpeke v. City of Dubuque, 1 Wall. 175; Thomson v. Lee Co., 3 Wall. 327; Haven v. Depot

Co., 109 Mass. 88; *Burroughs v. Commissioners*, 65 N. C. 234; *Clark v. Iowa City*, 20 Wall. 583; *Evertson v. Bank*, 4 Hun (N. Y.) 692, 66 N. Y. 14; *Ketchum v. Duncan*, 96 U. S. 659; *Welsh v. Railroad Co.*, 25 Minn. 314; *National Exch. Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375. And also of coupons attached to a negotiable bond. *McCoy v. Washington Co.*, 3 Wall. Jr. 381, Fed. Cas. No. 8,731. Such coupons must, however, contain words of negotiability. *Jackson v. Railroad Co.*, 48 Me. 147; *Augusta Bank v. City of Augusta*, 49 Me. 507. A sealed bond with the payee's name in blank, although of negotiable form, is now held not to be negotiable in England. *Hibblewhite v. McMorine*, 6 Mees. & W. 200, overruling *Texira v. Evans*, 1 Anstr. 228. In the United States there is a diversity of opinion on this point. Such bonds have been held to be negotiable in *White v. Railroad Co.*, 21 How. 575; *Hubbard v. Railroad Co.*, 36 Barb. (N. Y.) 286; *Dutchess Co. Ins. v. Hachfield*, 1 Hun (N. Y.) 675, 4 Thomp. & C. (N. Y.) 158; *Boyd v. Kennedy*, 38 N. J. Law, 146; *Chapin v. Railroad Co.*, 8 Gray (Mass.) 575. For many other authorities both pro and contra, see Judge Stewart's note in *City of Elizabeth v. Force*, 29 N. J. Eq. 592; also, *Preston v. Hull*, 23 Grat. (Va.) 600, 12 Am. Law Reg. 699.

III. DATE.

- § 75. Date—When Necessary.
- 76. Blanks—Omission of Date.
- 77. Delivery Shown by Date—Parol Evidence.
- 78. Mistake in Date.
- 79. Antedating—Postdating.
- 80. Postdated Checks.
- 81. Local Date.
- 82. Date of Indorsement.
- 83. — Of Acceptance.
- 84. Alteration—Misdescription.
- 85. Limitation Affected by Date.

Date—When Necessary.

§ 75. It is usual to express in all commercial paper the time and place at which it is drawn and given. *Date*, in its full sense, comprehends both statement of time and place, although it is often used with reference to the former only. The date is commonly placed at the upper right-hand corner of the instrument, e. g. "New York, May 1, 1882." The position is immaterial, whether at top or bottom.¹³³ By the English common law no date whatever is essential.¹³⁴ It is, however, required by British statute in the case of promissory notes for more than 20s. and less than £5, payable to bearer on demand.¹³⁵ Formerly printed dates were prohibited in

¹³³ 1 Daniel, Neg. Inst. 92; 1 Pars. Notes & B. 388; Sheppard v. Graves, 14 How. 505.

¹³⁴ Byles, Bills, 79; Chit. Bills, 171; 1 Daniel, Neg. Inst. 92; 1 Edw. Bills & N. § 171; 1 Pars. Notes & B. 41; Story, Bills, § 37; Story, Prom. Notes, § 45; De la Courtier v. Bellamy, 2 Show. 422; Hague v. French, 3 Bos. & P. 173; Giles v. Bourne, 6 Maule & S. 73; Vandervere v. Ogburn, 2 N. J. Law, 67; Seldonridge v. Connable, 32 Ind. 375; Pierce v. Richardson, 37 N. H. 306; Dean v. De Lezardi, 24 Miss. 424; Whiting v. Daniel, 1 Hen. & M. (Va.) 391; Note Holders of Bank of Tennessee v. Funding Board, 16 Lea, 46; Stout v. Cloud, 5 Litt. (Ky.) 205. It is said, however, by Sutherland, J., that "we all know that it is necessary to its free and uninterrupted negotiability." Mitchell v. Culver, 7 Cow. (N. Y.) 336.

¹³⁵ 26 & 27 Vict. c. 105, requiring such notes to bear date at or before the time of issue. This law formerly embraced also negotiable bills and drafts, 17 Geo. III. c. 30, § 1. This act was repealed by 3 Geo. IV. c. 70, but was revived by 7 Geo. IV. c. 6, except as to checks on a banker. The exemption

England in the case of promissory notes payable to bearer on demand,¹³⁶ but this is now repealed.¹³⁷

No American statutes, it is believed, require notes, bills, or checks to bear a date.¹³⁸ It seems, however, hardly necessary to urge upon the careful draftsman a full and accurate expression both of the time and place of making. Such expression avoids all ambiguity in instruments made payable at a fixed time after date, as well as trouble likely to arise under stamp acts and statutes of limitation, and usury and questions as to a party's capacity to contract at that particular time. And the local date makes more easy the determination of what local law shall govern the contract. Indeed, Mr. Chitty suggests that, "to prevent intentional or accidental alteration, which may invalidate the instrument even in the hands of an innocent holder, it may be advisable to write the date at *full length* in words."¹³⁹ The question is also mooted by Mr. Justice Story whether a drawee may not refuse to pay an undated bill.¹⁴⁰ A date is now generally required by foreign statutes.¹⁴¹ But, although a date is

of checks from stamp duty by 55 Geo. III. c. 184, and 9 Geo. IV. c. 49, extended only to those specifying the place where they were issued and bearing date on or before the day on which they were issued. A false statement of the place avoided the instrument. *Waters v. Brogden*, 1 Younge & J. 457; *Field v. Woods*, 7 Adol. & E. 114; *Rex v. Pooley*, 3 Bos. & P. 311; *Bopart v. Hicks*, 3 Exch. 1. Under this rule, "Dorchester Old Bank, established in 1786," *printed* on a check, was held sufficient, *Stickland v. Mansfield*, 8 Q. B. 675; but not the heading, "Oxford, Worcester, &c., Railway," *Ward v. Railway Co.*, 2 De Gex, M. & G. 750.

¹³⁶ 55 Geo. III. c. 184, § 18.

¹³⁷ 23 & 24 Vict. c. 111, § 19.

¹³⁸ In CALIFORNIA "a negotiable instrument may be with or without a date." Civ. Code, § 3091. "Any date may be inserted by the maker * * * whether past, present or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date." Id. 8094. In DAKOTA the above-mentioned provisions of the California Code have been copied. Rev. Code, §§ 1825, 1828. So, by the Negotiable Instrument Law of 1897 (section 6), in CONNECTICUT, COLORADO, and FLORIDA, and (section 25) in NEW YORK.

¹³⁹ Chit. Bills (12th Am. Ed.) 171.

¹⁴⁰ Story, Bills, § 37.

¹⁴¹ The date, including both place and day, month and year of making, must be stated in bills of exchange, drafts, and promissory notes made payable to order in the ARGENTINE REPUBLIC (Code, art. 776), but the want of a date

required by the Code Napoleon, the want of it renders the instrument invalid *as* commercial paper,¹⁴² but does not avoid it.

Blanks—Omission of Date.

§ 76. A blank left intentionally or inadvertently by the maker for the date implies, like every other blank, an authority to the holder to fill it up,¹⁴³ even after the death of one member of a firm in whose

shall not affect the validity between immediate parties. AUSTRIA (Exch. Law, arts. 4, 96); BELGIUM (Code Nap.); BOLIVIA (Code Com. arts. 362, 463, 469); BRAZIL (Code Com. arts. 354, 427); CHILI (Code Com. arts. 633, 771); COLOMBIA (Code Com. arts. 384, 517); COSTA RICA (Code Com. arts. 373, 510); DENMARK (Act 1825, p. 74, § 7); ECUADOR (Code Com. arts. 426, 563); FRANCE (Code Com. § 188, altering in this respect the ordinance of 1673, art. 1, tit. 5, which did not so require); GERMANY (Exch. Law, arts. 4, 96); GREECE (Act 1835, establishing the Code Nap.); GUATEMALA (Ord. Bilbao, c. 13, § 2; *Id.* c. 14, § 4); HAYTI (Act 1826, adopting Code Nap.); HOLLAND (Code Com. arts. 100, 208, 210); HONDURAS (Ord. Bilbao, *supra*); HUNGARY (Exch. Law, c. 1, § 14); ITALY (Code Com. art. 196); MEXICO (Code Com. art. 223); NICARAGUA (Code Com. art. 241, as to bills, at least); PARAGUAY (Ord. Bilbao, *supra*); PERU (Law 1858, art. 381); PORTUGAL (Code Com. art. 426, as to notes only); RUSSIA (Law 1832, art. 541); SAN DOMINGO (Law 1844, adopting Code Nap.); SPAIN (Code Com. arts. 426, 563); SWEDEN and NORWAY (Law 1851, c. 1, § 1, as to bills only); SWITZERLAND (Oblig. R. 722); URUGUAY (Code Com. art. 789); VENEZUELA (Code Com. art. 1). See, as to Code Nap. Bedarride's *Droit Com.* vol. 1, p. 79, and, as to the earlier French law, Pothier, *Contrât de Change*, p. 26; Story, *Bills*, § 38. The German statute requiring expression of time and place of making is satisfied by a date giving any time and place, and does not require the true time or place to be given, but only *a* time and place. Thöl, *W. R.* 153, 154. Issuing a check without date, or with a false date, is punishable by fine of 6 per cent. of the face of the check in France. Law 1865, art. 6.

¹⁴² Bedarride, *Droit Com.* p. 79.

¹⁴³ 1 Daniel, *Neg. Inst.* 92; 1 Edw. *Bills & N.* §§ 88, 172; Story, *Prom. Notes*, § 11, note 1; 1 Pars. *Notes & B.* 115; *Michigan Bank v. Eldred*, 9 Wall. 544; *Page v. Morrell*, *42 N. Y. 117; *Id.*, 3 Abb. Dec. 433; *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 373; *Lennig v. Ralston*, 23 Pa. 137; *Shultz v. Payne*, 7 La. Ann. 222; *Witte v. Williams*, 8 S. C. 290; *Fullerton v. Sturges*, 4 Ohio St. 530. And see English bills of exchange act of 1882 (section 12). And this inference is clear where the bill is made payable a certain number of days "after date." *Shultz v. Payne*, *supra*. And the date may be added in filling up a blank indorsement.

name the note with blank date was given.¹⁴⁴ And it is said that this authority extends even to antedating a note, so far at least as to make it valid in the hands of a bona fide holder,¹⁴⁵ but not where the holder has notice of its being antedated.¹⁴⁶ It is to be observed, moreover, that, inasmuch as a note or bill is complete without any date, the absence of a date, even though a blank has been apparently left for it, is not conclusive, but only *prima facie*, evidence of authority to the holder to insert a date. Whether there be such authority is a question for the jury.¹⁴⁷

Delivery Shown by Date—Parol Evidence.

§ 77. Like other contracts, a note or bill takes effect only upon its delivery for that purpose.¹⁴⁸ The time of delivery is in all cases a

Maxwell v. Vansant, 46 Ill. 58. As to filling a blank date in a deed, see *Whiting v. Daniel*, 1 Hen. & M. 390, where the act was held to be an alteration, but immaterial.

¹⁴⁴ *Usher v. Dauncey*, 4 Camp. 97. But it has been held that a blank date cannot be filled after the death of the drawer. *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11.

¹⁴⁵ *Page v. Morrell*, 3 Abb. Dec. (N. Y.) 433, *42 N. Y. 117.

¹⁴⁶ 1 Pars. Notes & B. 115; *Emmons v. Meeker*, 55 Ind. 321; *Goodman v. Simonds*, 19 Mo. 106.

¹⁴⁷ 2 Pars. Notes & B. 552, 565; *Stout v. Cloud*, 5 Litt. (Ky.) 205; *Inglish v. Breneman*, 5 Ark. 382, 9 Ark. 122. The authority of this latter case was denied, however, in *Page v. Morrell*, *42 N. Y. 117.

¹⁴⁸ 1 Daniel, Neg. Inst. 74; 1 Pars. Notes & B. 49; Story, Prom. Notes, § 56, note 4; 1 Edw. Bills & N. § 171; *Cox v. Troy*, 5 Barn. & Ald. 474; *Abrey v. Crux*, L. R. 5 C. P. 42; *Ex parte Hayward*, 6 Ch. App. 546; *Marvin v. McCullum*, 20 Johns. (N. Y.) 288; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Chamberlain v. Hopps*, 8 Vt. 94; *Woodford v. Dorwin*, 3 Vt. 82; *Clough v. Davis*, 9 N. H. 500; *Flanagan v. Meyer*, 41 Ala. 132; *Hill v. Dunham*, 7 Gray (Mass.) 543; *Hilton v. Houghton*, 35 Me. 143; *Smith v. Foster*, 41 N. H. 215; *Pierce v. Richardson*, 37 N. H. 306; *Fritsch v. Heislen*, 40 Mo. 555; *King v. Fleming*, 72 Ill. 21. So, in the language of Kent, C. J.: "If they had been previously drawn, they had no force while in the possession and under the control of the maker. To all legal purposes, the notes are to be considered as made or drawn when they were delivered." *Lansing v. Gaine*, 2 Johns. (N. Y.) 303. It follows that a note dated before, and delivered after, a statute rendering it illegal, is controlled by the statute. *Bayley v. Taber*, 5 Mass. 286. Where the instrument is not dated, it may be shown by parol that it was to take effect on some other day than that of its delivery, if it contains no express

question of fact for the jury.¹⁴⁹ Date and delivery are often spoken of as one thing. For instance, a reference to date in an instrument having no expressed date, can only refer, in general, to the time of its delivery.¹⁵⁰ If the delivery is subsequent to its date, it goes into effect upon delivery.¹⁵¹ But its construction, at least in computing the time it shall run, is determined by the date expressed, and not by the time of delivery.¹⁵² Where, on the other hand, a note is made payable so many days from date, and no date is expressed, it falls due so many days from its delivery, and parol evidence is admissible to show when that was.¹⁵³ If the time of delivery cannot be ascertained, the time when its legal existence can first be proved will be taken to be the time of its date or delivery.¹⁵⁴

provision as to this point. *Davis v. Jones*, 17 C. B. 625. But, if a note payable six months after date is not delivered until end of the six months, it will be construed as it reads, and be, in effect, a demand note. *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197.

¹⁴⁹ *Hill v. Dunham*, 7 Gray (Mass.) 543.

¹⁵⁰ *Chit. Bills*, 171; *Byles, Bills*, 79; *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 Bost. & P. 173; *Giles v. Bourne*, 6 Maule & S. 73; *Armitt v. Breame*, 2 Ld. Raym. 1076, in construction of an award. So, in construction of a covenant, "when there is no date, or an impossible date, that word must mean delivery." *Bayley, J.*, in *Styles v. Wardle*, 4 Barn. & C. 908. See, too, *Seldonridge v. Connable*, 32 Ind. 375.

¹⁵¹ If a partnership note be delivered after the dissolution of the firm, although drawn and dated before, it cannot relate back, so as to bind a partner having no share in making or delivering it. *Woodford v. Dorwin*, 3 Vt. 82. The same principle applies where between date and delivery a statute is passed prohibiting such instrument. *Bayley v. Taber*, 5 Mass. 286.

¹⁵² 1 *Edw. Bills & N.* § 171; 1 *Pars. Notes & B.* 49; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Luce v. Shoff*, 70 Ind. 152. So, where a note was made payable six months after date, and postdated one year. *Bumpass v. Timms*, 3 Sneed (Tenn.) 459.

¹⁵³ *Richardson v. Ellett*, 10 Tex. 190. To the same effect as to parol evidence, see *Byles, Bills*, 123; *Story, Bills*, § 37; *Davis v. Jones*, 25 Law J. C. P. 91; *Id.*, 17 C. B. 625; *Giles v. Bourne*, 6 Maule & S. 73. In like manner the real date of an undated acceptance may be shown by parol. *Kenner v. Creditors*, 10 Mart. (La.) 17. But an indorser, whose indorsement bears no date, cannot set up that it was made on Sunday, and therefore not binding upon him, in defense to an action brought by a subsequent accommodation indorser without notice. *Greathead v. Walton*, 40 Conn. 226.

¹⁵⁴ 1 *Pars. Notes & B.* 387; *Story, Prom. Notes*, § 45. In *Mahier v. Le Blanc*, 12 La. Ann. 207, a draft, with a date, but by Louisiana law undated

Where there is a date expressed in the instrument, this is prima facie evidence of the time of its delivery.¹⁵⁵ But bank notes, which are frequently reissued, are an exception to this rule.¹⁵⁶ The court will take notice of the day of the week on which a given date falls.¹⁵⁷ The date of a note is also prima facie the date of an undated indorsement.¹⁵⁸ On the other hand, where an impossible date (e. g. Sep-

because not formally executed before a notary, but sous seing prive, was held insufficient to support a judgment rendered on it before the date of protest; that date being considered the first legal evidence of its existence.

¹⁵⁵ Byles, Bills, 79; Chit. Bills, 171; 1 Edw. Bills & N. § 174; 1 Pars. Notes & B. 41, 49; Benj. Chalm. Dig. Bills & N. 17; Roberts v. Bethell, 12 C. B. 778; Anderson v. Weston, 6 Bing. N. C. 296; Id., 8 Scott, 583; Taylor v. Kinloch, 1 Starkie, 175; Obbard v. Betham, 1 Moody & M. 486; Smith v. Batens, 1 Moody & R. 341; Cowing v. Altman, 71 N. Y. 435, reversing 5 Hun (N. Y.) 556; Sayre v. Wheeler, 31 Iowa, 112; Emery v. Vinall, 26 Me. 295; Knisely v. Sampson, 100 Ill. 574. But see Cowie v. Harris, 1 Moody & M. 141, and Rose v. Rowcroft, 4 Camp. 245, overruling this doctrine as to third persons, so far as commercial paper is concerned. And this presumption does not extend to the bill of a bankrupt, to prove the date of his debt, under the English bankruptcy act. Anderson v. Weston, supra. Between parties, however, this principle is so far true, that where a note bore date on Thursday, and there was evidence of its being signed on Sunday, but no evidence as to the time of its delivery, the presumption of validity arising out of its date sustained it as a valid instrument. Dohoney v. Dohoney, 7 Bush (Ky.) 217. As Sunday, by the statute of Massachusetts, extends only from midnight to sunset, a note dated on Sunday is not necessarily made within the hours of the legal Sunday; nor, it seems, is there a presumption to that effect. Hill v. Dunham, 7 Gray (Mass.) 543; Nason v. Dinsmore, 34 Me. 391. And see Ray v. Catlett, 12 B. Mon. (Ky.) 532, as to the particularity required in Kentucky in pleading that a note was executed and delivered on Sunday. As to presumption in favor of sustaining instrument where the very hour is important, see Knisely v. Sampson, supra.

¹⁵⁶ Wright v. Douglass, 3 Barb. (N. Y.) 554; Farmers' & Mechanics' Bank v. White, 2 Sneed (Tenn.) 482; Greer v. Perkins, 5 Humph. (Tenn.) 588; Long v. Bank, 81 N. C. 41. And it may be shown to have been issued later. Selfridge v. Bank, 8 Watts & S. (Pa.) 320.

¹⁵⁷ Chrisman v. Tuttle, 59 Ind. 155. So, as to the calendar in general, Reed v. Wilson, 41 N. J. Law, 29. But see Hill v. Dunham, 7 Gray (Mass.) 543, in which case it was left for the jury to determine whether a note was made before or after sunset, that being the end of the statutory Sunday.

¹⁵⁸ Burnham v. Webster, 19 Me. 232; Dodd v. Doty, 98 Ill. 393. If, however, the indorsement was actually made afterwards, this presumption will not make it relate back to the date of the note. Broun v. Hull, 33 Grat. (Va.)

tember 31st) is expressed, the last day of the month is assumed to be the date intended.¹⁵⁹ But, where a bill of exchange was dated on Sunday, it was held, in favor of an undated acceptance, that there was no presumption of the acceptance having been made on that day.¹⁶⁰ And the date is in no case conclusive upon the immediate parties, but delivery may be shown to have been made upon some other day.¹⁶¹ Where a firm note, dated before, was given after, dissolution of the partnership, that fact may be shown in defense by the outgoing partner.¹⁶²

Mistake in Date.

§ 78. It is also true that a mistake of date may be shown between immediate parties.¹⁶³ So, it may be shown that an instrument dated on Sunday was really delivered on another day, and therefore valid;¹⁶⁴ and in like manner that an instrument was really executed

23. In like manner the date of an indorsement of payment is prima facie evidence of the time of such payment. *Clapp v. Hale*, 112 Mass. 368; *Carter v. Carter*, 44 Mo. 195. But see, contra, *Shaffer v. Shaffer*, 41 Pa. St. 51. And in general the date of the note is prima facie evidence of the time of accrual of the debt. *Milliken v. Whitehouse*, 49 Me. 527.

¹⁵⁹ 1 Pars. Notes & B. 409, citing *Wagner v. Kenner*, 2 Rob. (La.) 120. But see *Styles v. Wardle*, 4 Barn. & C. 908.

¹⁶⁰ *Begbie v. Levi*, 1 Crompt. & J. 180.

¹⁶¹ 1 Pars. Notes & B. 41; 2 Pars. Notes & B. 514; *Cowing v. Altman*, 71 N. Y. 435, reversing 5 Hun (N. Y.) 556; *Breck v. Cole*, 4 Sandf. (N. Y.) 80; *Aldridge v. Bank*, 17 Ala. 45; *Drake v. Rogers*, 32 Me. 524; *Dean v. De Lezardi*, 24 Miss. 424; *Paige v. Carter*, 64 Cal. 489, 2 Pac. 260.

¹⁶² *Woodford v. Dorwin*, 3 Vt. 82.

¹⁶³ *Buck v. Steffey*, 65 Ind. 58; *McSparran v. Neeley*, 91 Pa. St. 17; *Germania Bank of City of New York v. Distler*, 4 Hun (N. Y.) 633; *Drake v. Rogers*, 32 Me. 524; *Biggs v. Piper*, 86 Tenn. 589, 8 S. W. 851. Although such correction will alter the time for maturity of the note. *Drake v. Rogers*, supra. So, a mistaken date may be corrected, in aid of a subsequent bona fide holder. *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197.

¹⁶⁴ *Clough v. Davis*, 9 N. H. 500; *Lovejoy v. Whipple*, 18 Vt. 379; *Goss v. Whitney*, 24 Vt. 187; *Aldridge v. Bank*, 17 Ala. 45; *Drake v. Rogers*, 32 Me. 524; *Marshall v. Russell*, 44 N. H. 509; *Stacy v. Kemp*, 97 Mass. 166; *Hilton v. Houghton*, 35 Me. 143; *King v. Fleming*, 72 Ill. 21; *Smith v. Bean*, 15 N. H. 577. And in like manner it may be shown that a note executed on Sunday was not delivered until Wednesday. *Fritsch v. Heislen*, 40 Mo. 455; *King v. Fleming*, supra. And, where the presumption of an indorsement on

on Sunday and illegal, although dated on Monday.¹⁶⁵ An erroneous date may be corrected by a memorandum on the back or margin of the instrument, e. g. a memorandum showing that the year 1855 was intended instead of 1854.¹⁶⁶

But parol evidence is not admissible to prove a mistake in date in a suit brought by an innocent purchaser and to his disadvantage.¹⁶⁷ Thus, a note dated on Monday is good in the hands of a bona fide holder, although really executed and delivered on Sunday, and the illegal delivery cannot be proved against such holder.¹⁶⁸ It may, however, be shown, even against such holder, that the note was antedated, where this was done for the purpose of fraudulently evading a statute prohibiting such a note.¹⁶⁹ Parol evidence is also admissible to correct a misdescription of date, e. g. where a mortgage se-

Sunday arose from a delivery on that day of a note dated on Monday, the indorsement may be proved to have been made on another day, in order to follow out the Arkansas rule of favorable construction of assignments. *Trieber v. Bank*, 31 Ark. 128. "All blank assignments shall be taken to have been made on such day as shall be of most advantage to the defendant." *Gantt's Dig. Ark.* § 570.

¹⁶⁵ *Bank of Cumberland v. Mayberry*, 48 Me. 198; *Allen v. Deming*, 14 N. H. 133.

¹⁶⁶ *Byles*, Bills, 101; *Fitch v. Jones*, 5 El. & Bl. 238; *Fanshawe v. Peet*, 2 Hurl. & N. 1. See, too, *Brutt v. Picard*, *Ryan & M.* 37; *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501.

¹⁶⁷ 1 *Daniel*, Neg. Inst. 93; 1 *Pars. Notes & B.* 388; *Huston v. Young*, 33 Me. 85; the maker of a note dated in 1847, and payable in two years from date, not being permitted to prove, at suit of a bona fide holder, that the note was actually made in 1848, and therefore not yet due. Nor can the maker of a note dated at Boston show, against a bona fide holder for value, that it was really made in New York, and therefore void for usury. *Towne v. Rice*, 122 Mass. 67.

¹⁶⁸ *Clinton Nat. Bank v. Graves*, 48 Iowa, 228; *Cranston v. Goss*, 107 Mass. 439; *Greathead v. Walton*, 40 Conn. 226; *Bank of Cumberland v. Mayberry*, 48 Me. 198; *State Capitol Bank v. Thompson*, 42 N. H. 369; *Knox v. Clifford*, 38 Wis. 651; *Vinton v. Peck*, 14 Mich. 287; *Ball v. Powers*, 62 Ga. 757. And, a fortiori, where it was dated and delivered on Monday, and only signed on Sunday. *King v. Fleming*, 72 Ill. 21. But, to entitle the holder to recovery in such case, the burden of proof of good faith lies on him. *Allen v. Deming*, 14 N. H. 133.

¹⁶⁹ *Bayley v. Taber*, 5 Mass. 286.

curing a note described it as dated March 15th, and it was drawn March 15th, but actually dated and delivered March 24th.¹⁷⁰

Antedating—Postdating.

§ 79. In general, a bill or note may be antedated or postdated at the pleasure of the drawer or maker.¹⁷¹ But it is not within the authority of a partner to give a postdated firm check.¹⁷² And by English statute unstamped bank bills or notes cannot be postdated under a penalty of £100.¹⁷³ And all negotiable bills, notes, and drafts under £5 must, in Great Britain, be dated before or on the day of making, under a penalty of £20.¹⁷⁴ In general, an antedated note is sufficiently proved by proof of its execution without proof of the date of execution, although it be shown to have been antedated.¹⁷⁵ Antedating or postdating an instrument, however, for a fraudulent purpose, renders it invalid; e. g. dating a bill forward to evade the stamp duties,¹⁷⁶ or antedating it to evade a prohibitory

¹⁷⁰ Dean v. De Lezardi, 24 Miss. 424.

¹⁷¹ Byles, Bills, 79; Benj. Chalm. Dig. 16; 1 Daniel, Neg. Inst. 93; 1 Edw. Bills & N. § 173; 1 Pars. Notes & B. 41; Story, Prom. Notes, § 48; Pasmore v. North, 13 East, 517; Usher v. Dauncey, 4 Camp. 97; Barker v. Sterne, 9 Exch. 684, antedate; Gatty v. Fry, 2 Exch. Div. 265, postdated check; Forster v. Mackreth, L. R. 2 Exch. 163; Emanuel v. Robarts, 9 Best & S. 121; Bull v. O'Sullivan, L. R. 6 Q. B. 209; Dean v. De Lezardi, 24 Miss. 424; Aldridge v. Bank, 17 Ala. 45; Bayley v. Taber, 5 Mass. 286; Drake v. Rogers, 32 Me. 524; Brewster v. McCardell, 8 Wend. (N. Y.) 478; Richter v. Selin, 8 Serg. & R. 425; Gray v. Wood, 2 Har. & J. (Md.) 328; Luce v. Shoff, 70 Ind. 152; Union Bethel African Methodist Episcopal Church v. Civil Sheriff, 33 La. Ann. 1461. This is true of checks, also. Frazier v. Bookbinding Co., 24 Hun (N. Y.) 281; Gatty v. Fry, 2 Exch. Div. 265. See, too, English Bills of Exchange Act, § 13.

¹⁷² Forster v. Mackreth, L. R. 2 Exch. 163.

¹⁷³ 9 Geo. IV. c. 23, § 12; Byles, Bills, 80.

¹⁷⁴ Byles, Bills, 80; 17 Geo. III. c. 30, revived by 7 Geo. IV. c. 6; repealed as to checks by 17 & 18 Vict. c. 83, § 9; temporarily repealed by 26 & 27 Vict. c. 105, 32 & 33 Vict. c. 85, 34 & 35 Vict. c. 95, and 38 & 39 Vict. c. 72.

¹⁷⁵ Gray v. Wood, *supra*.

¹⁷⁶ Byles, Bills, 80; 1 Daniel, Neg. Inst. 94. As to stamp act, Field v. Woods, 6 Dowl. 23; s. c. 7 Adol. & E. 114; Serle v. Norton, 9 Mees. & W. 309. But where a deed was executed on Sunday, and antedated as of Saturday, although void on this account it was held capable of ratification, and validated thereby. Love v. Wells, 25 Ind. 503.

law,¹⁷⁷ or a statute against usury.¹⁷⁸ But the mere fact that the instrument is postdated throws no suspicion upon the good faith of a purchaser.¹⁷⁹ Nor does it subject a bill to such a defense as want of consideration, where that would not be otherwise admissible.¹⁸⁰ And if a bill or note be postdated, and one of the parties to it die before the day of its date arrives, it will still be valid in the hands of a bona fide holder for value.¹⁸¹

Postdated Checks.

§ 80. A check should be, and commonly is, made payable forthwith. If it is payable at a future day, it is, properly speaking, a bill of exchange, and not a check;¹⁸² unless this is rather apparent than real, as in the case of a check drawn after business hours on Saturday, and dated on Saturday, but made payable on Monday.¹⁸³ In like manner, a postdated check is, to all intents and purposes, a bill of exchange,¹⁸⁴ and should be stamped as such in England. The English stamp act formerly prescribed penalties for postdating checks payable *to bearer* on demand.¹⁸⁵ Under this act such postdated checks were, until 1870, void in the hands of original parties and subsequent

¹⁷⁷ Bayley v. Taber, 5 Mass. 286.

¹⁷⁸ Williams' Ex'rs v. Williams, 15 N. J. Law, 255. But where a note was given for a loan made in Georgia, to a citizen of that state, at a rate of interest lawful there, and the note was signed by one of the parties in North Carolina, where such rate was usurious, dating it as if made in Georgia was held to be no evasion of the North Carolina usury law. Davis v. Coleman, 29 N. C. 424.

¹⁷⁹ Brewster v. McCardell, 8 Wend. (N. Y.) 478.

¹⁸⁰ Walker v. Geisse, 4 Whart. (Pa.) 252.

¹⁸¹ Chit. Bills, 172; 1 Pars. Notes & B. 42; Pasmore v. North, 13 East, 517.

¹⁸² Morrison v. Bailey, 5 Ohio St. 13; Bowen v. Newell, 8 N. Y. 190, reversing 5 Sandf. (N. Y.) 326. And see s. c. 2 Duer (N. Y.) 584; Id. 13 N. Y. 291; Minturn v. Fisher, 4 Cal. 35. But see, contra, Brown v. Lusk, 4 Yerg. (Tenn.) 210. It may bear date after the day of the drawer's death. Whitehouse v. Whitehouse, 90 Me. 468, 38 Atl. 374.

¹⁸³ Andrew v. Blachly, 11 Ohio St. 89.

¹⁸⁴ Allen v. Keesee, 1 East, 435; Bradley v. Delaplaine, 5 Har. (Del.) 305.

¹⁸⁵ By the stamp act of 55 Geo. III. c. 184, § 13 (now repealed), checks payable to bearer on demand were made subject to a penalty, if post dated, to be enforced against the drawer, and against any one knowingly taking or paying the same. These penalties were continued in force by 16 & 17 Vict. c. 59, § 2, but are now repealed by 33 & 34 Vict. c. 99.

holders with notice,¹⁸⁶ and were not even admissible in such case as evidence of money paid,¹⁸⁷ but were valid in the hands of a bona fide holder without notice.¹⁸⁸ But now, since 1870, such check, if stamped, is admissible in evidence, even where the holder has notice of its being postdated.¹⁸⁹ And the act of 55 Geo. III. c. 184, never affected postdated checks which were payable *to order*.¹⁹⁰ A postdated check being to all intents and purposes a bill of exchange, as we have seen, is payable only when the future day of its date arrives, and is then payable on demand.¹⁹¹ And it is not by the law merchant entitled to grace.¹⁹²

Local Date.

§ 81. It is usual to express the place as well as the time of making in the date of all commercial paper, and, as we have seen, this is required by many foreign statutes. It was also formerly required by the English statutes of 55 Geo. III. c. 184, and 9 Geo. IV. c. 49, so far as regarded the exemption of checks from stamp duty. At common law this was not necessary,¹⁹³ nor is it made so by statute in the United States. Where such place is expressed, it is *prima facie* the place of residence of the maker or drawer.¹⁹⁴ A note without other place of payment named is not thereby made payable at the place

¹⁸⁶ *Dunsford v. Curlewis*, 1 Fost. & F. 702; *Serle v. Norton*, 9 Mees & W. 309; *Austin v. Bunyard*, 6 Best & S. 687; *Whitwell v. Bennett*, 3 Bos. & P. 559.

¹⁸⁷ *Serle v. Norton*, 9 Mees. & W. 309.

¹⁸⁸ *Austin v. Bunyard*, 6 Best & S. 687.

¹⁸⁹ *Gatty v. Fry*, 2 Exch. Div. 265; 33 & 34 Vict. c. 97, § 17.

¹⁹⁰ *Emanuel v. Robarts*, 9 Best & S. 121; *Whistler v. Forster*, 14 C. B. (N. S.) 248; *Bull v. O'Sullivan*, L. R. 6 Q. B. 209 (1871).

¹⁹¹ *Hill v. Gaw*, 4 Pa. St. 493; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 305, affirmed 13 Wend. (N. Y.) 133; *Salter v. Burt*, 20 Wend. (N. Y.) 205; *Gough v. Staats*, 13 Wend. (N. Y.) 549; *Taylor v. Sip*, 30 N. J. Law, 289.

¹⁹² 2 Pars. Notes & B. 68.

¹⁹³ 1 Edw. Bills & N. § 171; Story, Prom. Notes, § 49.

¹⁹⁴ *Duncan v. McCullough*, 4 Serg. & R. (Pa.) 480; *Sasscer v. Whitely*, 10 Md. 98; *Branch Bank of State of Alabama at Decatur v. Peirce*, 3 Ala. 321; *Robinson v. Hamilton*, 4 Stew. & P. (Ala.) 91; *Chapman v. Lipscombe*, 1 Johns. (N. Y.) 294; *Taylor v. Snyder*, 3 Denio (N. Y.) 145; *Britton v. Niccolls*, 11 Fed. 191. See, too, *Hyatt v. James*, 2 Bush (Ky.) 463; *Sprague v. Tyson*, 44 Ala. 338. So far, at least, as to lead one to suppose that the maker "might be found there." *Pierce v. Whitney*, 22 Me. 113. But this has been denied in

named in the date.¹⁹⁵ But, in the absence of other proof of residence, it may be used as evidence of the place where the note is payable, and demand should be made there.¹⁹⁶ To send notice of dishonor there, however, for the maker or drawer, is a want of due diligence, if he resides elsewhere,¹⁹⁷ and his actual residence can be ascertained by reasonable diligence.¹⁹⁸

The law of the place where the contract is made, in general, governs its construction and determines its legality. This is true, not only where no place of date is expressed,¹⁹⁹ but also where there is an expressed date which differs from the place of delivery, in which case the place of delivery governs.²⁰⁰ The place named in the date is

Pennsylvania, and such place held to indicate the place of drawing the instrument, and nothing more. *Lightner v. Will*, 2 Watts & S. (Pa.) 140.

¹⁹⁵ *Anderson v. Drake*, 14 Johns. (N. Y.) 114; *Bank of America v. Woodworth*, 18 Johns. (N. Y.) 322; *Galpin v. Hard*, 3 McCord (S. C.) 394; *Burrows v. Hannegan*, 1 McLean, 309, Fed. Cas. No. 2,205; *Taylor v. Snyder*, 3 Denio (N. Y.) 145; *Pierce v. Whitney*, 29 Me. 188. But see, contra, *Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314. Although, if dated in one place, parol evidence may show another place of payment to have been intended. *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285.

¹⁹⁶ 1 Pars. Notes & B. 442, 458; *Moodie v. Morrall*, 1 Mill. Const. (S. C.) 367. But see *Oxnard v. Varnum*, 111 Pa. St. 193, 2 Atl. 224.

¹⁹⁷ 1 Pars. Notes & B. 453, 458; 1 Edw. Bills & N. § 175; *Fisher v. Evans*, 5 Bin. (Pa.) 541; *Burrows v. Hannegan*, 1 McLean, 309, Fed. Cas. No. 2,205. But see, contra, *Hepburn v. Toledano*, 5 Mart. (La.) 316. See, also, *Mann v. Moors*, Ryan & M. 249. And such notice is sufficient if he have a house there, although he may have another house elsewhere in the country. *Stewart v. Eden*, 2 Caines (N. Y.) 121. So, if he is thought to reside elsewhere, but his residence cannot be ascertained after due diligence. *Chapman v. Lipscombe*, 1 Johns. (N. Y.) 294. But if dated in New York, and maker known to have removed to another place known to the holder, demand in New York is insufficient. *Anderson v. Drake*, 14 Johns. (N. Y.) 114.

¹⁹⁸ *Foard v. Johnson*, 2 Ala. 565; *Hill v. Varrell*, 3 Me. 233; *Mason v. Pritchard*, 9 Heisk. (Tenn.) 793; *Nailor v. Bowie*, 3 Md. 251; *Sprague v. Tyson*, 44 Ala. 338.

¹⁹⁹ *Evans v. Anderson*, 78 Ill. 558; *Hyde v. Goodnow*, 3 N. Y. 266.

²⁰⁰ *Hart v. Wills*, 52 Iowa, 56, 2 N. W. 619; *Second Nat. Bank of Leavenworth v. Smoot*, 2 MacArthur (S. C.) 371; *Overton v. Bolton*, 9 Heisk. (Tenn.) 762. And in *Lennig v. Ralston*, 23 Pa. St. 137, a bill of exchange, drawn and dated at Philadelphia with the intention of making it a Pennsylvania contract, was held to be governed by the laws of Pennsylvania, although sent to London with the day and year of date left blank, and filled there. But, as we

prima facie evidence of the place where the note was made and of the place where it was indorsed.²⁰¹ And a note dated in one place, and negotiable there, cannot, as against a bona fide holder, be shown to have been made in a place where it would be nonnegotiable.²⁰² In the absence of place of date and of other evidence of place of delivery, the maker's residence is prima facie the place of delivery.²⁰³ So, too, the indorser's residence is presumed to be the place of an undated indorsement.²⁰⁴ And, in the absence of other evidence, the place where the action was brought was held to be prima facie the place of delivery.²⁰⁵ Such presumption, however, is not made when its result would be to make the contract illegal and void by statute.²⁰⁶

Date of Indorsement.

§ 82. What has been said of the date of bills, notes, and checks applies in general also to the contracts of indorsement and acceptance. The expression of a date is not necessary at common law to an indorsement.²⁰⁷ And it is not usual to express such date either in England or in the United States. It is, however, usual in most foreign countries, and in many is required by statute.²⁰⁸ In the have seen, a note dated at Boston cannot be shown by parol evidence against a bona fide holder for value to have been delivered in New York, where it would be void for usury. *Towne v. Rice*, 122 Mass. 67.

²⁰¹ See *Hall v. Harris*, 16 Ind. 180, and *Dundee Mortgage & Trust Inv. Co. v. Nixon*, 95 Ala. 318, 10 South. 311, as to making; *Patterson v. Carrell*, 60 Ind. 128, as to making and indorsement. But it will not be presumed from the words, "Berne, June 18th, 1856," at the end of a note, that it was executed in a foreign country. *Farhni v. Ramsee*, 19 Ind. 400.

²⁰² *Quaker City Nat. Bank v. Showacre*, 26 W. Va. 48.

²⁰³ *Harmon v. Wilson*, 1 Duv. (Ky.) 322.

²⁰⁴ *Simpson v. White*, 40 N. H. 540.

²⁰⁵ *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258. And this presumption was strengthened in the case of an indorser by the addition to his signature of the words, "La Porte, Ind." *Rose v. Bank*, 15 Ind. 292.

²⁰⁶ *American Ins. Co. v. Woodruff*, 34 Mich. 6; *American Ins. Co. v. Cutler*, 36 Mich. 261. But dating a note in Georgia is no evasion of the usury law of North Carolina, where it was signed by one of the parties, if the note was given for a loan made in Georgia to a citizen of that state, and lawful there. *Davis v. Coleman*, 29 N. C. 424.

²⁰⁷ *Sanger v. Sumner*, 13 Ark. 280.

²⁰⁸ It is required by statute that all indorsements should be dated, in BELGIUM (see Code Nap.); BRAZIL (Code Com. art. 361); CHILI (Code Com.

United States the date of an indorsement has even been held so immaterial a part that its alteration does not affect the rights of the indorsee.²⁰⁹ The date of an indorsement, like that of a note, is *prima facie* evidence of the time of making it, but circumstances may throw the burden of proof on the holder.²¹⁰ If the indorsement is not dated, the date of the note is *prima facie* that of the indorsement also.²¹¹ Other cases limit this presumption so as to imply only that the indorsement was made before maturity.²¹²

art. 658, although a blank indorsement without date implies a consideration, and is sufficient to effect a transfer,—article 661); COLOMBIA (Code Com. art. 424); COSTA RICA (Code Com. art. 414); FRANCE (Code Com. § 137); GREECE (see Code Nap.); HAYTI (Law of 1826 taken from Code Nap.); HUNGARY (Exch. Law 1860, c. 1, § 30); SAN DOMINGO (Code Nap., since 1844); ECUADOR (Spanish Code, since 1829); MEXICO (Code Com. art. 360); NICARAGUA (Code Com. art. 261); PORTUGAL (Code Com. art. 355); RUSSIA (Exch. Law 1832, art. 559); SALVADOR (Code Com. art. 421); SPAIN (Code Com. 1829, art. 467); TURKEY (Code Com. art. 94); URUGUAY (Code Com. art. 822); VENEZUELA (Code Com. art. 34). The French ordinance of 1673 also required an indorsement to be dated (1 Bedarride, p. 452); and without date it amounted only to a power to collect, and not a transfer (Id.; Pothier, Contr. de Change, 40). In HOLLAND an indorsement cannot be antedated. Com. Code. art. 128. In ITALY a date does not vitiate the indorsement. Code Com. art. 223. In ZURICH the omission of a date is at the indorser's risk. Law 1805, § 23. In GERMANY and AUSTRIA a date is unnecessary (Thöl, W. R. 436).

Where an indorsement is antedated, the indorser is liable for damages, and further, in case of fraud, to punishment as for forgery, in SPAIN (Code Com. art. 470); COLOMBIA (Code Com. art. 427); COSTA RICA (Code Com. art. 417); HOLLAND (Exch. Law 1838, art. 138); ECUADOR (Law of 1829, same as Spain); PERU (Code Com. art. 428); SALVADOR (Code Com. art. 424). So, as to all false dating of an indorsement, in MEXICO. Code Com. art. 363. Antedating of indorsements is also forbidden, under penalty of forgery, by Code Nap. § 139, which is applicable to FRANCE, BELGIUM, GREECE, HAYTI, SAN DOMINGO, and TURKEY. Code Com. art. 96. It is also forbidden, and, if done with fraudulent purpose, renders the indorser liable to a penalty and for damages, in PORTUGAL (Code Com. art. 359) and RUSSIA (Exch. Law 1832, art. 563).

²⁰⁹ Griffith v. Cox, 1 Overt. (Tenn.) 210.

²¹⁰ 1 Greenl. Ev. § 560; Smith v. Ferry, 69 Mo. 142; Baker v. Arnold, 3 Caines (N. Y.) 279.

²¹¹ Smith v. Nevlin, 89 Ill. 193; New Orleans Canal & Banking Co. v. Templeton, 20 La. Ann. 141; Collins v. Gilbert, 94 U. S. 753; Gray v. Brown, 49

²¹² See note 212 on following page.

In all such cases of an undated indorsement evidence is admissible to prove the real date.²¹³ And the presumption of indorsement before maturity is not rebutted by evidence merely of the payee's declarations to the contrary.²¹⁴ But where one holds without any indorsement, and was not known as the holder until after the maturity of the paper, and when the paper at its maturity was in other hands, the presumption is that the transfer was made after maturity.²¹⁵ An indorsement by a third person other than the payee has the same presumption in its favor,²¹⁶ which in like manner is liable to be rebutted by other evidence.²¹⁷

Me. 544; *Meadows v. Cozart*, 76 N. C. 450; *Noxon v. De Wolf*, 10 Gray (Mass.) 343; *Benthall v. Judkins*, 13 Metc. (Mass.) 265; *National Pemberton Bank v. Lougee*, 108 Mass. 373; *Patterson v. Carrell*, 60 Ind. 128; *White v. Weaver*, 41 Ill. 409; *Stewart v. Smith*, 28 Ill. 397. And this is true of an undated indorsement by one who is not an apparent party to the note. *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461. And conclusively as in favor of a bona fide holder. And in Arkansas an assignee under a blank assignment can assume the date most advantageous to himself. *Weaver v. Caldwell*, 9 Ark. 344.

²¹² 1 Pars. Notes & B. 380; *Balch v. Onion*, 4 Cush. (Mass.) 559; *Ranger v. Cary*, 1 Metc. (Mass.) 369; *Sullivan v. Violett*, 6 Gill (Md.) 181; *Rahm v. Bridge Manufactory*, 16 Kan. 530; *Rea v. Owens*, 37 Iowa, 262; *Mobley v. Ryan*, 14 Ill. 51; *Rhode v. Alley*, 27 Tex. 443; *Smith v. Turney*, 32 Tex. 143; *Challis v. Woodburn*, 2 Kan. App. 652, 43 Pac. 792.

²¹³ *Anderson v. Weston*, 6 Bing. N. C. 296; *Gray v. Brown*, 49 Me. 544; *Clendenin v. Southerland*, 31 Ark. 20; *Trieber v. Bank*, Id. 128; *Hutchinson v. Moody*, 18 Me. 393; *Baker v. Arnold*, 3 Caines (N. Y.) 279; *Mobley v. Ryan*, 14 Ill. 51. But it has been held in Massachusetts that this presumption is not overcome by proof that the note was delivered to the indorsee before, and indorsed after, its dishonor. *Ranger v. Cary*, 1 Metc. (Mass.) 369.

²¹⁴ *Hearson v. Graudine*, 87 Ill. 115.

²¹⁵ *Allison v. Hubbell*, 17 Ind. 559. So, where there was a blank indorsement, but payee was shown to be in possession of the note at its maturity. *Hutchinson v. Moody*, *supra*.

²¹⁶ *Good v. Martin*, 95 U. S. 90; *Gilpin v. Marley*, 4 Houst. (Del.) 284; *Sullivan v. Violett*, 6 Gill (Md.) 181; *Colburn v. Averill*, 30 Me. 310; *Lowell v. Gage*, 38 Me. 35.

²¹⁷ *Freeman v. Ellison*, 37 Mich. 459.

Date of Acceptance.

§ 83. The acceptance is more usually dated, and should always be so. But this is immaterial, except where the bill is made payable a given time after sight or after acceptance.²¹⁸ In such case the running of the time of payment is reckoned from the date of the acceptance, and not from the time of presentment.²¹⁹ The date of an acceptance is presumptively the time when it was made.²²⁰ If there be no express date, the bill must be presumed to have been accepted on its date,²²¹ or, at least, before its maturity.²²² And evidence is, of course, admissible, either in support or rebuttal of the presumption, to show the actual time of acceptance.²²³

Alteration—Misdescription.

§ 84. An alteration of the date, as of any other material part of the instrument, avoids it.²²⁴ This is true, although such alteration may have no effect in changing the time of maturity.²²⁵ More espe-

²¹⁸ 1 Pars. Notes & B. 282. And if a written date appear, though in a different handwriting, it is presumptively the acceptor's act. *Glossop v. Jacob*, 4 Camp. 227.

²¹⁹ 1 Pars. Notes & B. 291; *Mitchell v. Degrand*, 1 Mason, 176, Fed. Cas. No. 9,661.

²²⁰ 2 Pars. Notes & B. 488; *Glossop v. Jacob*, *supra*.

²²¹ 2 Pars. Notes & B. 488, note.

²²² 1 Pars. Notes & B. 289; *Roberts v. Bethell*, 12 C. B. 778.

²²³ 2 Pars. Notes & B. 489.

²²⁴ 1 Edw. Bills & N. § 172; 2 Pars. Notes & B. 550; *Bathe v. Taylor*, 15 East, 412; *Heffner v. Wenrich*, 32 Pa. St. 423; *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505; *Hamilton v. Wood*, 70 Ind. 306; *Lemay v. Williams*, 32 Ark. 166; *Mitchell v. Ringgold*, 3 Har. & J. (Md.) 159; *Lewis v. Kramer*, 3 Md. 265; *Owings v. Arnot*, 33 Mo. 406; *Newman v. King*, 54 Ohio St. 273, 43 N. E. 683. And this is true even in the case of a bona fide holder, and, if made after indorsement, it will discharge the indorser. *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528. But an alteration by maker's agent, under a mistaken view of his authority, before delivery to a holder for value, will not avoid the note. *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501. In England the alteration of the date of an acceptance should be pleaded specially, unless it be such an alteration as would render a new stamp necessary. *Parry v. Nicholson*, 13 Mees. & W. 778.

²²⁵ *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505.

cially, where the time of maturity is thereby altered, an acceptor will be discharged by such alteration.²²⁶ Such alteration also amounts to a discharge of the surety upon such paper.²²⁷ And even the correction of a mistake in the day and year of date will discharge the surety.²²⁸ But an alteration of such mistake before delivery by the agent of both drawer and acceptor will not avail either of them as ground of discharge.²²⁹

In general, the date of a bill, note, or check need not be averred in the pleading. It is sufficient to aver that A. B. made his certain note on, etc.²³⁰ And the same is true as to the date of an indorsement.²³¹ And proof of a note of different date from that averred in the pleadings is not a variance.²³² When, however, the note is misdescribed as to date in the pleadings, this should be explained.²³³ And it seems that misdescription of date in an affidavit to hold to bail is material;²³⁴ but not in an agreement or mortgage referring to the instrument, if its identity is not thereby left in doubt;²³⁵ nor even

²²⁶ *Hirschman v. Budd*, L. R. 8 Exch. 171; *Master v. Miller*, 4 Term R. 320.

²²⁷ *Wood v. Steele*, 6 Wall. 80; *Britton v. Dierker*, 46 Mo. 591. Not so, however, an alteration made before delivery and authorized by the surety. *Prather v. Zulauf*, 38 Ind. 155.

²²⁸ *Miller v. Gilleland*, 19 Pa. St. 119.

²²⁹ *Brutt v. Picard*, Ryan & M. 37. So, too, where the alteration was supposed by the agent to be within his authority, but was not a mere correction of mistake. *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501.

²³⁰ *Robinson v. Grandy*, 50 Vt. 122. But where the averment was that a note which had no date, and was payable "nine months after date," was made at a time less than nine months before commencement of suit, it was fatal. *Seldonridge v. Connable*, 32 Ind. 375.

²³¹ *Caldwell v. Lawrence*, 84 Ill. 161.

²³² *Byles*, Bills, 80; 1 *Daniel*, Neg. Inst. 94; 2 *Pars. Notes & B.* 474; *Coxon v. Lyon*, 2 Camp. 307, note; *Smith v. Lord*, 2 Dowl. & L. 759. But it is said by Mr. Byles, *supra*, that this "would be otherwise if the declaration went on to describe the instrument as bearing date on a particular day."

²³³ 1 *Daniel*, Neg. Inst. 94; 2 *Pars. Notes & B.* 474. And in *Tobler v. Stubblefield*, 32 Tex. 188, such misdescription of date was held to be sufficient ground for setting aside a judgment by default.

²³⁴ *Chit. Bills*, 615; *Jadis v. Williams*, 4 Law J. 136.

²³⁵ *Byles*, Bills, 80; *Way v. Hearne*, 32 Law J. C. P. 34; *Dean v. De Lezardi*, 24 Miss. 424. So, even a mistake of the time of maturity in an acceptance; the bill being dated September 8, 1856, and payable four months after date, but accepted "due December 11th, 1856," instead of January, 1857. *Fanshawe v. Peet*, 2 Hurl. & N. 1.

in a notice of dishonor, if such misdescription causes no uncertainty.²³⁶

Limitation Affected by Date.

§ 85. Where a bill or note is payable on demand, the statute of limitations runs from the date of the instrument, and not from demand of payment.²³⁷ When, however, the instrument is antedated, it takes effect, as we have seen, from its delivery only, and the statute of limitations runs from that time, and not from its date.²³⁸ But where a note is made payable six months after date, and postdated in 1841, although actually made and delivered in 1840, the time of maturity, as we have already seen, is reckoned by relation to the date expressed (1841), and the statute of limitations begins to run from such maturity.²³⁹

²³⁶ 1 Pars. Notes & B. 476; *Mills v. Bank*, 11 Wheat. 431; *Ross v. Bank*, 5 Humph. (Tenn.) 335; *Saltmarsh v. Tuthill*, 13 Ala. 390. So, a notice of protest, dated by mistake on a day later, but actually served on the day of the note's maturity, cannot mislead, and, although it amounts to a misdescription of the note, is immaterial. *Tobey v. Lennig*, 14 Pa. St. 483.

²³⁷ 1 Pars. Notes & B. 38, 375; 2 Pars. Notes & B. 643; *Newman v. Kettelle*, 13 Pick. (Mass.) 418; *Collins v. Driscoll*, 69 Cal. 550; *Caldwell v. Rodman*, 50 N. C. 139; *Kingsbury v. Butler*, 4 Vt. 458; *Larason v. Lambert*, 12 N. J. Law, 247; *Ruff v. Bull*, 7 Har. & J. (Md.) 14; *Easton v. McAllister*, 1 Mo. 662; *Wilks v. Robinson*, 3 Rich. (S. C.) 182; *Woodward v. Drennan*, 3 Brev. (S. C.) 189. But bank notes are an exception to this rule. *Greer v. Perkins*, 5 Humph. (Tenn.) 588; *Farmers' & Mechanics' Bank of Memphis v. White*, 2 Sneed (Tenn.) 482; *Wright v. Douglass*, 3 Barb. (N. Y.) 554.

²³⁸ *Raeffe v. Moore*, 58 Ga. 94. In this case the note was made payable one day after date, and dated July 1st, but actually made and delivered in August.

²³⁹ *Bumpass v. Timms*, 3 Sneed (Tenn.) 459.

CHAPTER IV.

FORM—THE CONTRACT FOR PAYMENT.

- I. ITS POSITIVE CHARACTER.
- II. ITS UNCONDITIONAL CHARACTER.
- III. ITS LIMITED CHARACTER.
- IV. ITS CERTAINTY.

- A. Certainty as to Amount.*
- B. Certainty as to Time of Payment.*
- C. Certainty as to Place of Payment.*

I. ITS POSITIVE CHARACTER.

- § 86. Language of Contract.
- 87. Necessary Promise or Order.
- 88. Acknowledgments—Duebills.
- 89. Certificates of Deposit of Receipt.
- 90. What Words Imply a Promise.
- 91. Municipal Warrants—Coupons.

Language of Contract.

§ 86. No forms of contract are better known, nor in general simpler or briefer, than the ordinary form of promissory note, bill of exchange or draft, and check. No particular form of words is necessary to constitute such instrument.¹ Thus, a note may be in the form commonly used for a bond,² or, under some circumstances, for a bill of exchange.³ So, an order for payment indorsed on a bond or

¹ Byles, Bills, 78; Chit. Bills, 148; 1 Daniel, Neg. Inst. 82; 1 Edw. Bills & N. § 134; 1 Pars. Notes & B. 23; Story, Bills, § 33; Story, Prom. Notes, § 12; Morris v. Lea, 2 Ld. Raym. 1396, 1 Strange. 629; Brooks v. Elkins, 2 Mees. & W. 74; Peto v. Reynolds, 9 Exch. 410, 11 Exch. 418; Hitchcock v. Cloutier, 7 Vt. 22; Partridge v. Davis, 20 Vt. 499; Smith v. Bridges, 1 Ill. 18. And this is expressly provided in the Civil Code of Lower Canada (§ 2344).

² Woodward v. Genet, 2 Hilt. (N. Y.) 526; Bank of Louisiana v. Williams, 21 La. Ann. 121; Hitchcock v. Cloutier, 7 Vt. 22.

³ Byles, Bills, 93; Chit. Bills, 151; Edis v. Bury, 6 Barn. & C. 433, 9 Dowl.

note or on a statement of account has been held to be equivalent to a bill of exchange.⁴

Irrespective, however, of words relating to the consideration, place of payment, and transferability (to be considered elsewhere), certain phrases have been at times required by statute to make a note negotiable in the fullest commercial sense. Such a requirement is that which limited negotiability to notes containing the words "without defalcation or discount."⁵ So, the statute requiring notes given for a patent to express that fact on their face by the words "given for a patent right."⁶ And in some foreign states bills of exchange must

& R. 492; *Edwards v. Dick*, 4 Barn. & Ald. 212; *Lloyd v. Oliver*, 18 Q. B. 471; *Allen v. Mawson*, 4 Camp. 115.

⁴ 1 Daniel, Neg. Inst. 82; *Leonard v. Mason*, 1 Wend. (N. Y.) 522. But not a negotiable bill. *Hoyt v. Lynch*, 2 Sandf. (N. Y.) 328. But in *Platzer v. Norris*, 38 Tex. 1, such instrument was held not to be a bill of exchange, for want of the name of a payee. An order of this sort is not the less a bill of exchange because referring to, instead of indorsed on, a note: e. g. an order to pay C. or bearer \$400, "and take up A.'s note for that amount." *Cook v. Satterlee*, 6 Cow. (N. Y.) 108. But an order for payment of demurrage, indorsed on a bill of lading, will not render it negotiable. *Falkenburg v. Clark*, 11 R. I. 278.

⁵ In MISSOURI the words, "negotiable and payable without defalcation or discount," were formerly necessary to a negotiable note. R. C. 298, § 7. But they are no longer required. Rev. St. § 733. See, as to former requirement, *Macy v. Kendall*, 33 Mo. 164.

So, in NEW JERSEY the words "without defalcation or discount" were formerly necessary to make a promissory note negotiable, independent of equities. Pat. Rev. p. 342, § 4. This was repealed in 1871 (P. L. p. 13).

In ARKANSAS like force was given to the words "without defalcation" until Gould's Dig. c. 15, § 3. See, too, *Woodruff v. Webb*, 32 Ark. 612.

In PENNSYLVANIA promissory notes "bearing date in the city and county of Philadelphia," and containing the words "without defalcation," or "without set-off," may be "held by the indorsees discharged from any claim of defalcation or set-off." Purd. Dig. p. 1731, § 1.

⁶ In NEW YORK (Neg. Inst. Law, § 330) the words "given for a patent right" must be added on the face of notes given in purchase of patent rights, and such addition subjects the note to defenses as though in the hands of the original payee. So in OHIO. Ann. St. § 3178. This act has been held not to apply to a nonnegotiable note, *State v. Brower*, 30 Ohio St. 101; or to a note given for a patented machine, *State v. Peck*, 25 Ohio St. 26. So in PENNSYLVANIA. Purd. Dig. p. 1731, § 3. INDIANA, TENNESSEE, NEBRASKA, and VERMONT have similar acts. The INDIANA statute has

be designated as such in plain words;⁷ while in Germany the word "Wechsel" (exchange) or its equivalent in a foreign language is indispensable to both bill and notes.⁸ In Hungary, moreover, there is a curious provision as to form, which makes everything "in Hebrew letters" invalid in such instruments.⁹

Necessary Promise or Order.

§ 87. Whatever may be the language or form of words used, commercial paper must be a contract for the payment of money. In a note this contract takes the form of a promise to pay. In a bill or draft it takes the form of a request or order to pay.¹⁰ But the

been held unconstitutional. *Helm v. Bank*, 43 Ind. 167. But see, *contra*, *Brechbill v. Randall*, 102 Ind. 528, 1 N. E. 362; *New v. Walker*, 108 Ind. 365, 9 N. E. 386. And the contrary has been held in PENNSYLVANIA, *Haskell v. Jones*, 86 Pa. St. 173; and in OHIO, *Tod v. Wick*, 36 Ohio St. 370. So, under the U. S. constitution, *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198. The omission of these words will not, however, affect the validity of the note in the hands of a bona fide holder. *Hunter v. Henninger*, 93 Pa. St. 373; *Haskell v. Jones*, 86 Pa. St. 173; *Hereth v. Meyer*, 33 Ind. 511; *Herdie v. Roessler*, *supra*; *Harmon v. Hagerty*, 88 Tenn. 705, 13 S. W. 690; *Moses v. Comstock*, 4 Neb. 516; *Pendar v. Kelley*, 48 Vt. 27; *Streit v. Waugh*, Id. 298. And the words "given for a patent right" do not destroy the presumption of good faith in the purchaser. *Goddard v. Lyman*, 14 Pick. (Mass.) 268; *Hereth v. Bank*, 34 Ind. 380.

⁷ This is the case as to drafts in BOLIVIA (Com. Code, art. 463); SPAIN (Com. Code, art. 563); PERU (Cod. Com. art. 522); COLOMBIA (Com. Code, art. 517); COSTA RICA (Com. Code, art. 510); and ECUADOR (same as Spain); as to bills and notes, in RUSSIA (Exch. Law, art. 541); and SALVADOR (Com. Code, art. 510); as to bills of exchange only in SWEDEN and NORWAY (Exch. Law, c. 1, § 1), and SWITZERLAND (Oblig. R. 722).

⁸ Thöl, W. R. 146; German Exch. Law, arts. 4, 96. This requirement was adopted also in AUSTRIA (Exch. Law, arts. 4, 96), and in HUNGARY (Exch. Law, c. 1, § 14).

⁹ Hungarian Exch. Law, c. 1, § 14; Law 1844, § 2.

¹⁰ Byles, Bills, 82; 1 Daniel, Neg. Inst. 40; 1 Pars. Notes & B. 42; Story, Prom. Notes, § 19, note 3. On the other hand, "I direct my executors to pay." is a note. *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487. "The acknowledgment of the indebtedness, and that it is due, implies a promise to pay on demand." *Peckham, J.*, 131 N. Y. 467, 30 N. E. 488, affirming 60 Hun, 412, 15 N. Y. Supp. 596. So, *Hatch v. Gillette*, 8 App. Div. 605, 40 N. Y. Supp. 1017. But where, by mistake or fraud, the instrument read, "Borrowed of

word "pay" is not indispensable. Thus, a promise "to pay or cause to be paid" has been held to be a sufficient promissory note;¹¹ so, "to account," "to be accountable for";¹² so, without further words of promise, "good to A. B. or order for \$30";¹³ or, "good to bearer," written under an account in which the amount was stated;¹⁴ so, "I guaranty to pay."¹⁵ And even the words, "I have borrowed," have been held to imply a promise of payment,¹⁶ or the indorsement "holden."¹⁷ In like manner, an order to "let the bearer

I. S. £50, which I promise *never* to pay," recovery was had as on a proper promise. *Anon.*, 2 Atk. 32; Chit. Bills, 151.

¹¹ *Lovell v. Hill*, 6 Car. & P. 238; or simply an acknowledgment of debt "to be paid." *Casborne v. Dutton*, Selw. N. P. 381. So, too, without any word of promise, the following instrument has been held to be a promissory note: "For value received of A. B. or order, \$30 *on demand*, and interest annually." *Cummings v. Gassett*, 19 Vt. 308. But a letter promising to accept an order is not a note. *Allen v. Leavens*, 26 Or. 164, 37 Pac. 488.

¹² *Morris v. Lee*, 2 Ld. Raym. 1396, 1 Strange, 629. See, too, *Furber v. Caverly*, 42 N. H. 74, where an indorsement of "A. B. accountable" was held to be a sufficient contract of guaranty. So, *Bagley v. Buzzell*, 19 Me. 88. But, contra, under stamp act, a mere receipt for £20, "which I borrowed of you, and I have to be accountable for the said sum." *Horne v. Redfearn*, 4 Bing. N. C. 433.

¹³ *Franklin v. March*, 6 N. H. 364. And see *Weston v. Myers*, 33 Ill. 424, where no payee was named, but the holder was allowed to add his own name as payee. But the contrary was held, for want of a payee, in *Brown v. Gilman*, 13 Mass. 158.

¹⁴ *Hussey v. Winslow*, 59 Me. 170.

¹⁵ *Ketchell v. Burns*, 24 Wend. (N. Y.) 456; *Luqueer v. Prosser*, 1 Hill (N. Y.) 256; *Bruce v. Westcott*, 3 Barb. (N. Y.) 374; *Partridge v. Davis*, 20 Vt. 499. Not so, however, a guaranty of another note written on a separate paper. *Weed v. Clark*, 4 Sandf. (N. Y.) 31.

¹⁶ *Harrow v. Dugan*, 6 Dana (Ky.) 341; *Woodfolk v. Leslie*, 2 Nott. & McC. (S. C.) 585. So, too, the following has been held to be a good note: "A. B. borrowed of C. D. £14 as per loan, in promise of payment of which I am truly thankful for, and shall never be forgotten by me. J. M., your affectionate brother, £14." *Ellis v. Mason*, 1 Jur. 380, cited in *Bank of Orleans v. Merrill*, 2 Hill (N. Y.) 295, note. But see *Horne v. Redfearn*, 4 Bing. N. C. 433. And in *Hyne v. Dewdney*, 21 Law J. Q. B. 278, Lord Campbell, C. J., said of a paper in these words, "Borrowed of A. B. £100 for one or two months," that there was "no binding contract,— * * * nothing more than a simple acknowledgment of the money having been paid."

¹⁷ *Bean v. Arnold*, 16 Me. 251.

have \$50" constitutes a valid bill of exchange.¹⁸ So, too, an order to "credit A. in cash."¹⁹ And all mistakes of expression are immaterial, which merely substitute a past for a present tense, e. g. "I promise";²⁰ or use the pronoun "I" for several joint makers;²¹ or the pronoun "we" for a sole maker.²² So, too, "we *or* either of us promise" has been held to constitute a good joint and several note.²³

The expressions "please," "and oblige," etc., do not detract from the commercial character of an instrument. Thus, Lord Kenyon held an instrument to be a bill of exchange, which read: "Mr. N. will much oblige Mr. W. by paying," etc.²⁴ But a mere request to do a

¹⁸ Biesenthall v. Williams, 1 Duv. (Ky.) 329. But see, contra, Little v. Slackford, 1 Moody & M. 171.

¹⁹ Ellison v. Collingridge, 9 C. B. 570; Allen v. Assurance Co., Id. 574. But an order to "credit A. or bearer \$30, and I will pay you," is not a sufficient bill of exchange. Woolley v. Sergeant, 8 N. J. Law, 262.

²⁰ Bland v. People, 4 Ill. 364. And "I promised," etc., has been held to be a sufficient negotiable note to support an indictment for the forgery of a note. Perkins' Case, 7 Grat. (Va.) 651.

²¹ Luqueer v. Prosser, 1 Hill (N. Y.) 256; Hemmenway v. Stone, 7 Mass. 58; Wallace v. Jewell, 21 Ohio St. 163; Ely v. Clute, 19 Hun (N. Y.) 35; Holman v. Gilliam, 6 Rand. (Va.) 39; Maiden v. Webster, 30 Ind. 317; Harrow v. Dugan, 6 Dana (Ky.) 341; Ladd v. Baker, 26 N. H. 76; Humphreys v. Gillow, 13 N. H. 387; Eddy v. Bond, 19 Me. 461; Barnet v. Skinner, 2 Bailey (S. C.) 88; Hopkins v. Lane, 4 Thomp. & C. (N. Y.) 311; Lane v. Salter, 4 Rob. (N. Y.) 239; Higerty v. Higerty, 1 Phila. (Pa.) 232; Kinsely v. Shenberger, 7 Watts (Pa.) 193; Kreck v. Avinger, 3 Hill (S. C.) 215; Monget v. Penny, 7 La. Ann. 134; Groves v. Stephenson, 5 Blackf. (Ind.) 584; Monson v. Drakeley, 40 Conn. 552; Dederick v. Barber, 44 Mich. 19, 5 N. W. 1064; Dill v. White, 52 Wis. 456, 9 N. W. 404. It has, nowever, been held not to be prima facie a joint note, where one signed at the right hand with a seal, and the other to the left, with the word "Witness" printed above his name. Steininger v. Hoch, 39 Pa. St. 263; Hopkins v. Lane, 4 Thomp. & C. (N. Y.) 311. But, see, contra, Keller's Adm'r v. McHuffman, 15 W. Va. 64, which only differed from Steininger v. Hoch, supra, in using the word "security" instead of "witness."

²² Whitmore v. Nickerson, 125 Mass. 496; Rice v. Gove, 22 Pick. (Mass.) 158; Holmes v. Siuelair, 19 Ill. 71; Dickerson v. Burke, 25 Ga. 225.

²³ Pogue v. Clark, 25 Ill. 333.

²⁴ Ruff v. Webb, 1 Esp. 129. See, too, Russell v. Powell, 14 Mees. & W. 418. And see Biesenthall v. Williams, 1 Duv. (Ky.) 329. But "We authorize you to pay to A. B. or order" is not sufficient to make a bill of exchange. Hamilton v. Spottiswoode, 4 Exch. 200.

favor to the drawer is not a bill of exchange, e. g. "Please let the bearer have £7 and place it to my account, and you will much oblige your humble servant;"²⁵ or, "Please take up my note payable to S. for \$200, and it will be all right, as we talked;"²⁶ or, "Please pay my wages as fast as they become due to the amount of \$150."²⁷ So, "I allow to give" has been held to express a mere intention, and no sufficient promise.²⁸ And a promise with testamentary intent is not sufficient.²⁹

Acknowledgments—Duebills.

§ 88. A mere *acknowledgment* of indebtedness is not, in general, sufficient to constitute either a bill or note;³⁰ although such acknowledgment has been held a sufficient promise to take a case out of the statute of limitations in Georgia.³¹ And in Alabama an acknowledgment of a sum due, setting out the consideration for which it was given, has been held to be a promissory note.³² And some of the United States have by statute extended the character and law of promissory notes to all instruments in writing "whereby any person acknowledges any sum of money to be due to any other person."³³

²⁵ Little v. Slackford, 1 Moody & M. 171.

²⁶ Gillilan v. Myers, 31 Ill. 525.

²⁷ Knowlton v. Cooley, 102 Mass. 233.

²⁸ Harmon v. James, 7 Ind. 263.

²⁹ E. g. "It is my will to her," following a formal promise to pay at his death. Caviness v. Rushton, 101 Ind. 500.

³⁰ Byles, Bills, 28; Chit. Bills, 150; 1 Daniel, Neg. Inst. 42; 1 Pars. Notes & B. 25; Story, Prom. Notes, § 14; Sears v. Trustees, 28 Ill. 183; City of New Orleans v. Strauss, 25 La. Ann. 50; Carson v. Lucas, 13 B. Mon. 213. And this is clearly the case where a memorandum ("I owe the estate of A. B. \$150") was given merely as a statement, without intention of making a note of it. Bowles v. Lambert, 54 Ill. 237.

³¹ Brewer v. Brewer, 6 Ga. 588.

³² Fleming v. Burge, 6 Ala. 373. See, too, Blood v. Northup, 1 Kan. 28; Finney v. Shirley, 7 Mo. 42. So, an indorsement on an account, acknowledging it to be due. Cowan v. Hallack, 9 Colo. 572, 13 Pac. 700.

³³ This statute appears to have originated in ILLINOIS. Hurd's Rev. St. c. 98, §§ 3-7. It was held to include a duebill. Lee v. Balcom, 9 Colo. 216, 11 Pac. 74; Schmitz v. Mining Co., 8 S. D. 544, 67 N. W. 618. It has been

But, in the absence of special statutes and of words indicating a promise of payment, a mere *duebill* or I. O. U. is not regarded as a promissory note in England.³⁴ And this is also the rule in some of the United States at least.³⁵ In other states a duebill, acknowledging a sum of money to be due A. B. "or bearer" has been held to be a sufficient promissory note,³⁶ especially where the sum due is referred to as "borrowed," "amount of bill rendered," etc.³⁷

Certificates of Deposit or Receipt.

§ 89. In like manner a banker's *certificate of deposit*, although not expressly providing for payment on return of the certificate, has been held to imply such promise, and to be equivalent, therefore, to a

enacted also in INDIANA (Horner's Rev. St. 1897, § 5501), e. g. a certificate of indebtedness "to A. or order, payable on," etc. (Johnson School Tp. v. Citizens' Bank, 81 Ind. 515), and IOWA (Code, § 3045), if negotiable words used, and MISSISSIPPI (Ann. Code, § 3502). But in ILLINOIS the following is not a negotiable note: "Cartage Ticket, 50 cents. Hubbard, Spencer & Co." Hibbard v. Holloway, 13 Ill. App. 101.

³⁴ Byles, Bills, 29; Chit. Bills, 150; Fesenmayer v. Adcock, 16 Mees. & W. 449; Melanotte v. Teasdale, 13 Mees. & W. 216; Smith v. Smith, 1 Fost. & F. 539; Gould v. Coombs, 1 C. B. 543; Fisher v. Leslie, 1 Esp. 426; Israel v. Israel, 1 Camp. 499; Childers v. Boulnois, Dowl. & R. N. P. 8; Beeching v. Westbrook, 8 Mees. & W. 412.

³⁵ Carson v. Lucas, 13 B. Mon. (Ky.) 213; Garland v. Scott, 15 La. Ann. 143; Gay v. Rooke, 151 Mass. 115, 23 N. E. 835; Almy v. Winslow, 126 Mass. 342; Currier v. Lockwood, 40 Conn. 349; Read v. Wheeler, 2 Yerg. (Tenn.) 50. This decision, made in 1821, was overruled in 1840 in Cummings v. Freeman, 2 Humph. (Tenn.) 143. So as to maturity of a duebill "returnable on demand." Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186. See, too, Brenzer v. Wightman, 7 Watts & S. (Pa.) 264. Especially if the duebill does not name a payee, or time of payment. Biskup v. Oberle, 6 Mo. App. 583.

³⁶ Sackett v. Spencer, 29 Barb. (N. Y.) 180; Russell v. Whipple, 2 Cow. (N. Y.) 536; Huyck v. Meador, 24 Ark. 191; Wardwell v. Sterne, 22 La. Ann. 28. Where, however, a duebill was made due to "bearer," but addressed to A. B., it was held to be a question for the jury to determine whether it was intended for a note, or a mere memorandum. Hopson v. Brunwankel, 24 Tex. 607.

³⁷ Cummings v. Freeman, 2 Humph. (Tenn.) 143; Finney v. Shirley, 7 Mo. 42; McGowen v. West, Id. 569; Brady v. Chandler, 31 Mo. 28; Bacon v. Bicknell, 17 Wis. 523; Jacquin v. Warren, 40 Ill. 459; Spearing v. Zacharie, 26 La. Ann. 496; McDonald v. Yeager, 42 Ind. 388.

promissory note,³⁸ even within the meaning of the banking act.³⁹ A mere bank *deposit book*, however, is not negotiable,⁴⁰ nor a *stock certificate*.⁴¹ On the other hand, a certificate of purchase of certain property for \$400, "which amount I hereby acknowledge to be unpaid

³⁸ 1 Edw. Bills & N. § 486; 1 Pars. Notes & B. 26; *Richer v. Voyer*, L. R. 5 P. C. 461; *Miller v. Austen*, 13 How. 218, affirming *Austen v. Miller*, 5 McLean, 153, Fed. Cas. No. 661; *Bank of Orleans v. Merrill*, 2 Hill (N. Y.) 295; *Leavitt v. Palmer*, 3 N. Y. 35; *Pardee v. Fish*, 60 N. Y. 265; *Hart v. Association*, 54 Ala. 495; *Hunt v. Divine*, 37 Ill. 137; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; *Cate v. Patterson*, 25 Mich. 191; *Brummagin v. Tallant*, 29 Cal. 503; *Tripp v. Curtenius*, 36 Mich. 494; *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Hazelton v. Bank*, 32 Wis. 51; *Laughlin v. Marshall*, 19 Ill. 390; *Gregg v. Bank*, 87 Ind. 238; *Howe v. Hartness*, 11 Ohio St. 449; *Johnson v. Barney*, 1 Iowa, 531; *Bean v. Briggs*, Id. 488; *Fultz v. Walters*, 2 Mont. 165; *Kilgore v. Bulkley*, 14 Conn. 362; *Poorman v. Mills*, 35 Cal. 118; *Mills v. Barney*, 22 Cal. 240; *Welton v. Adams*, 4 Cal. 37; *McMillan v. Richards*, 9 Cal. 418. So, "received of A. B. on deposit" is a negotiable note to bearer. *Maxwell v. Agnew*, 21 Fla. 154. In CALIFORNIA (Civ. Code, § 8095), WYOMING (Laws 1888, c. 70, art. 1, § 10), and NORTH DAKOTA (Rev. Codes, § 4861), certificates of deposit are classified by statute as negotiable instruments; and so in WISCONSIN (Rev. St. §§ 1675, 1676) certificates of deposit, "whereby any one shall promise to pay," etc. But a different rule has been adopted in PENNSYLVANIA. *London Savings Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 408; *Patterson v. Poindexter*, 6 Watts & S. (Pa.) 227; *Charnley v. Dulles*, 8 Watts & S. (Pa.) 361. So, *Lebanon Bank v. Mangan*, 28 Pa. St. 452, following *Patterson v. Poindexter*, above cited, and holding the adverse decision of *Miller v. Austen*, 13 How. 218, only authoritative in Pennsylvania as an expression of the law of Ohio.

³⁹ *Leavitt v. Palmer*, 3 N. Y. 35; *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Hazelton v. Bank*, 32 Wis. 51. But it is not such a note as must by statute of New York be signed by both president and cashier of the bank making it. *Leavitt v. Palmer*, 3 N. Y. 35; *Barnes v. Bank*, 19 N. Y. 159. See, too, *Carey v. McDougald*, 7 Ga. 85 (Ga. Code 1837, Hotchk. St. Law, p. 358).

⁴⁰ *Witte v. Vincenot*, 43 Cal. 325; *Howard v. Bank*, 40 Vt. 597.

⁴¹ *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, although it will pass by delivery under a blank indorsement. *Graves v. Mining Co.*, 81 Cal. 327, 22 Pac. 665. But a scrip certificate for the delivery of shares of stock to bearer has been held in England to be negotiable by the usage of bankers, and therefore to be valid in the hands of an innocent purchaser, although negotiated by a broker in fraud of his principal, the rightful owner. *Rumball v. Bank*, L. R. 2 Q. B. Div. 194.

and yet due," has been held in Georgia to be a good promissory note.⁴² So, too, a warehouseman's receipt is negotiable.⁴³

What Words Imply a Promise.

§ 90. In general any expression of a promise to pay will make a promissory note of what would otherwise be in form merely an acknowledgment of debt. Thus, an acknowledgment of debt "payable" to A. B. is a note.⁴⁴ So, an acknowledgment of debt to A. B., "to be paid on demand,"⁴⁵ or of a balance due which "I am still indebted and do promise to pay."⁴⁶ In like manner a duebill "payable" or "to be paid" on demand or in any other specified manner is, to all intents and purposes, a promissory note;⁴⁷ or "to be paid when called for";⁴⁸ or even payable to another person than the one to whom the money is said to be due, in which case it has been held to be a good note to such other person.⁴⁹ And even in England an "I. O. U., £20, to be paid on," etc., has been held to be a sufficient promissory note.⁵⁰ And in the United States a certificate of deposit, "pay-

⁴² *Lowe v. Murphy*, 9 Ga. 338.

⁴³ In Minnesota without indorsement. *State v. Loomis*, 27 Minn. 521, 8 N. W. 758. St. § 7649. In Missouri, however, only by indorsement. *Erie & Pacific Dispatch v. St. Louis Cotton Co.*, 6 Mo. App. 172. The Missouri statute (Wag. St. 220, §§ 6, 7) formerly made such receipts "negotiable by written indorsement and delivery in the same manner as bills of exchange and promissory notes." And, if not transferred by indorsement, they are not negotiable. *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333. But they are not covered by the statute relating to negotiable instruments in Illinois. *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281.

⁴⁴ 1 Pars. Notes & B. 25. So, "will be due, without grace," on, etc. *Central Trust Co. v. New York Equipment Co.*, 74 Hun, 405, 26 N. Y. Supp. 850.

⁴⁵ *Casborne v. Dutton*, Selw. N. P. 401; or "paid when kald for." *Kraft v. Thomas*, 123 Ind. 513, 24 N. E. 346.

⁴⁶ *Chadwick v. Allen*, 2 Strange, 706.

⁴⁷ *Smith v. Allen*, 5 Day (Conn.) 337; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675; *Mitchell v. Railroad Co.*, 17 Ga. 574; *Marrigan v. Page*, 4 Humph. (Tenn.) 246; *Pepoon v. Stagg*, 1 Nott & McC. (S. C.) 102; *Carver v. Hayes*, 47 Me. 257; *Potts v. Coal Co.*, 6 Phila. (Pa.) 249; *Richmond, F. & P. R. R. v. Snead*, 19 Grat. (Va.) 354. See, too, *Ubsdell v. Cunningham*, 22 Mo. 124; *Corbett v. Georgia*, 24 Ga. 287.

⁴⁸ *Bilderback v. Burlingame*, 27 Ill. 338, under the Illinois statute.

⁴⁹ *Bowie v. Foster*, Minor (Ala.) 264.

⁵⁰ *Brooks v. Elkins*, 2 Mees. & W. 74.

able on return of this certificate," is equivalent to a note;⁵¹ or, with the words added, "which sum the bank will pay to him or his order";⁵² or, "payable in current bank bills";⁵³ or even, in some states, "payable in currency," currency being in such cases held equivalent to money;⁵⁴ but not a certificate of deposit "payable in current funds";⁵⁵ nor, in England, a certificate of deposit "to be returned on demand," but intended merely for purposes of stock speculation.⁵⁶

The same reasoning is applicable to *receipts* for money containing a promise of repayment. Thus, "Received of A. B. £100, which I promise to pay on demand," has been held to be a good note.⁵⁷ So, a receipt for money "to be returned when called for."⁵⁸ But a certificate in these words, "The bearer leaves \$100 in my hands, which sum I hold subject to his order," is not a negotiable instrument;⁵⁹ much less a mere statement of receipt intended for evidence of moneys to be accounted for.⁶⁰ Neither is a receiver's certificate of in-

⁵¹ *Miller v. Austen*, 13 How. 218, affirming *Austen v. Miller*, 5 McLean. 153, Fed. Cas. No. 661; *Bean v. Briggs*, 1 Iowa, 488; *Johnson v. Barney*, Id. 531; *Laughlin v. Marshall*, 19 Ill. 390; *Poorman v. Mills*, 35 Cal. 118; *Tripp v. Curtenius*, 36 Mich. 494; *Drake v. Markle*, 21 Ind. 433; *Carey v. McDougald*, 7 Ga. 85.

⁵² *Carey v. McDougald*, *supra*.

⁵³ *Pardee v. Fish*, 60 N. Y. 265.

⁵⁴ *Klauber v. Biggerstaff*, 47 Wis. 551; *Hart v. Association*, 54 Ala. 495; *Drake v. Markle*, 21 Ind. 434; *Howe v. Hartness*, 11 Ohio St. 449. But see, *contra*, *Huse v. Hamblin*, 29 Iowa, 501; *Ford v. Mitchell*, 15 Wis. 334.

⁵⁵ *Lindsey v. McClelland*, 18 Wis. 505; *Johnson v. Henderson*, 76 N. C. 227. But see *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40, 19 S. W. 334, "in checks."

⁵⁶ *Sibree v. Tripp*, 15 Mees. & W. 23, Pollock, C. B., saying in this case, "It seems to me that a promissory note, whether referred to in the statute of Anne or in the text-books, means something which the parties *intend* to be a promissory note." It was therefore held not to require stamping as a promissory note.

⁵⁷ *Ashby v. Ashby*, 3 Moore & P. 186; *Green v. Davies*, 4 Barn. & C. 235.

⁵⁸ *Woodfolk v. Leslie*, 2 Nott & McC. (S. C.) 585.

⁵⁹ *Roman v. Serna*, 40 Tex. 306, holding such an instrument to be a nonnegotiable letter of credit. But an indorsement of a note, "A. B., holder," is a sufficient "assumption of liability" to hold the indorser without a demand. *Bean v. Arnold*, 16 Me. 251.

⁶⁰ *Tomkins v. Ashby*, 6 Barn. & C. 541. And such instrument need not be stamped as a note. So, a company voucher, which is "to become a draft" on approval, is not negotiable clear of defense. *Sioux Nat. Bank v. Cudahy*

debtedness, made by order of court to A. B. or bearer, and payable out of a particular fund, a negotiable instrument;⁶¹ nor, in general, a receipt for personal property (wool), although "payable in six months."⁶² But in some of the United States promises to pay personal property and acknowledgments of such property being due to another are made negotiable notes by statute.⁶³

Municipal Warrants—Coupons.

§ 91. Lastly, ordinary warrants, orders, and certificates of indebtedness drawn by one county, township, or city officer on another in favor of creditors of the municipality, although they may be so far negotiable as to pass by indorsement or delivery, and be sued by the holder in his own name, "yet," in the language of Mr. Justice Dillon, "they are not commercial or negotiable paper in the hands of holders so as to exclude inquiry into the legality of their issue or preclude defenses thereto."⁶⁴ This class of instruments in-

Packing Co., 63 Fed. 805; Cudahy Packing Co. v. Sioux Nat. Bank, 21 C. C. A. 428, 75 Fed. 473.

⁶¹ Turner v. Railroad Co., 95 Ill. 134; Union Trust Co. v. Chicago & Lake Huron R. Co., 7 Fed. 513; McCurdy v. Bowes, 88 Ind. 583; Central Nat. Bank of Boston v. Hazard, 30 Fed. 484; Stanton v. Railroad Co., 31 Fed. 585.

⁶² Martin v. Butler, Wright (Ohio) 553.

⁶³ This is the case in IDAHO (Rev. St. § 3600), subject to equities; ILLINOIS (Rev. St. [Hurd's Ed.] c. 98, §§ 3-7); INDIANA (Horner's Rev. St. § 5501); IOWA (Code, § 3045), "whenever it is manifest from their terms that such was the intention of their maker, but the use of the technical words 'order' or 'bearer' alone will not manifest such intention." So, in WISCONSIN, warehouseman's receipts are made negotiable by statute. Rev. St. § 1675.

⁶⁴ 1 Dill. Mun. Corp. § 406; 1 Pars. Notes & B. 26; 1 Daniel, Neg. Inst. 393; Knapp v. Mayor of Hoboken, 39 N. J. Law, 394; Wall v. County of Monroe, 103 U. S. 74; County of Ouachita v. Wolcott, Id. 559; Shirk v. Pulaski Co., 14 Dill. 209, Fed. Cas. No. 12,794; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Miner v. Vedder, 66 Mich. 101, 33 N. W. 47; Sonnenthiel v. Skinner, 67 Tex. 453, 3 S. W. 686; Mayor v. Ray, 19 Wall. 468; Read v. City of Buffalo, 67 Barb. (N. Y.) 526; Fairchild v. Railroad Co., 15 N. Y. 338; Bull v. Sims, 23 N. Y. 570; Oatman v. Taylor, 29 N. Y. 657; Kelley v. City of Brooklyn, 4 Hill (N. Y.) 263; Smith v. Inhabitants of Cheshire, 13 Gray (Mass.) 318; Matthis v. Town of Cameron, 62 Mo. 504; Burlington & M. R. Co. v. Clay Co., 13 Neb. 367, 13 N. W. 628; People v. Johnson, 100 Ill. 537; Ohio v. Treasurer of Liberty Tp., 22 Ohio St. 144; Allison v. Juniata Co., 50 Pa. St. 351; Emery

cludes also school-district warrants,⁶⁵ and has been extended even to a municipal promissory note given for a loan not authorized by statute.⁶⁶ On the other hand, interest coupons payable to bearer are negotiable, although detached from the bond to which they belong.⁶⁷

v. Inhabitants of Mariaville, 56 Me. 315; East Union Tp. v. Ryan, 86 Pa. St. 459; Camp v. Knox Co., 3 Lea (Tenn.) 199; Hyde v. Franklin Co., 27 Vt. 185; Taft v. Pittsford, 28 Vt. 286; Talty v. Trust Co., 1 MacArthur (D. C.) 522; Sturtevant v. Inhabitants of Liberty, 46 Me. 459; State v. Dubuclet, 23 La. Ann. 267; Second Nat. Bank of Lansing v. City of Lansing, 1 Mich. N. P. 181; Eaton v. Berlin, 49 N. H. 219; Clark v. Polk Co., 19 Iowa, 248; People v. Board of Sup'rs of El Dorado Co., 11 Cal. 170; Dana v. City and County of San Francisco, 19 Cal. 486; Dyer v. Covington Tp., 19 Pa. St. 200; O'Donnell v. City of Philadelphia, 2 Brewst. (Pa.) 481; Aylesworth v. Gratiot Co., 43 Fed. 351; State v. Cook, 43 Neb. 318, 61 N. W. 693. But see, contra, Dalrymple v. Whittingham, 26 Vt. 345, where a warrant on the town treasurer was held to be negotiable. A United States militia voucher is not negotiable. Creighton v. Black, 2 Mont. 354; Rev. St. U. S. § 3477. But parish warrants have been held to be negotiable in LOUISIANA, Gullfont v. Parish of Ascension, 28 La. Ann. 413. And county warrants in ILLINOIS, Garvin v. Wiswell, 83 Ill. 215. And in PENNSYLVANIA until 1849, Craig v. Richmond Dist., 1 Phila. (Pa.) 33. So, in INDIANA, a county order for refunding taxes "due and payable June 30th," Brownlee v. Board of Com'rs of Madison Co., 81 Ind. 186.

⁶⁵ Fox v. Shipman, 19 Mich. 218; School Dist. No. 2 of Dixon Co. v. Stough, 4 Neb. 357; State v. Huff, 63 Mo. 288.

⁶⁶ Town of Hackettstown v. Swackhamer, 37 N. J. Law, 198.

⁶⁷ Clark v. Iowa City, 20 Wall. 583; Walnut v. Wade, 103 U. S. 683; Thomson v. Lee County, 3 Wall. 327; First Nat. Bank of North Bennington v. Town of Mt. Tabor, 52 Vt. 93; Thompson v. Perrine, 106 U. S. 589; Haven v. Railroad Co., 109 Mass. 88; Beaver Co. v. Armstrong, 44 Pa. St. 63; Burroughs v. Commissioners of Richmond Co., 65 N. C. 234; Gelpeke v. City of Dubuque, 1 Wall. 175; Evertson v. Bank, 66 N. Y. 14.

II. ITS UNCONDITIONAL CHARACTER.

- § 92. What is a Conditional Promise.
- 93. What are not Conditions.
- 94. The Condition must be Expressed.
- 95. Effect of Subsequent Performance.

What is a Conditional Promise.

§ 92. It is a rule, governing all forms of commercial paper alike, that the instrument must be payable unconditionally, or, as it is often expressed, "at all events." Otherwise, although it remain valid as a conditional contract, it must lose its force as a negotiable instrument.⁶⁸

⁶⁸ Byles, Bills, 95; Chit. Bills, 155; 1 Daniel, Neg. Inst. 45; 1 Edw. Bills & N. § 155; 1 Pars. Notes & B. 42; Story, Bills, § 46; Story, Prom. Notes, § 21; Cook v. Satterlee, 6 Cow. (N. Y.) 108; Carlos v. Fancourt, 5 Term R. 482; Worley v. Harrison. 3 Adol. & E. 669; Conover v. Stillwell, 34 N. J. Law, 54; Third Nat. Bank of Syracuse v. Armstrong, 25 Minn. 531; Carnahan v. Pell, 4 Colo. 190; Dilley v. Van Wie, 6 Wis. 209; Blaikie v. Griswold, 10 Wis. 293; Van Steenwyck v. Sackett, 17 Wis. 645; Kingsbury v. Wall, 68 Ill. 311; Smalley v. Edey, 15 Ill. 324; Overton v. Tyler, 3 Pa. St. 346; Mast v. Matthews, 30 Minn. 441, 16 N. W. 155; Edwards v. Ramsey, 30 Minn. 91, 14 N. W. 272; Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Tradesmen's Nat. Bank of Philadelphia v. Green, 57 Md. 602; Hosstatter v. Wilson, 36 Barb. (N. Y.) 307.

In CALIFORNIA negotiable instruments must be "without any condition not certain of fulfillment." Civ. Code, § 8088. But an option to pay, or perform some other act, in itself nonnegotiable, does not destroy the negotiability of the instrument. *Id.* § 8090.

In DAKOTA the above-mentioned provisions of the California Code have been copied. Rev. Code, §§ 1822, 1824.

In TENNESSEE bonds with collateral conditions, and bills or notes for specific articles, or for the performance of any duty, are made assignable, but not negotiable. Code, § 3516. So, the English bills of exchange act (45 & 46 Vict. c. 61, § 3) requires negotiable bills to be unconditional. By recent statute of INDIANA (Horner's Rev. St. § 5518), "any and all agreements to pay attorney fees, depending upon any condition therein set forth and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void." This statute applies, however, only to such agreements on a condition expressed in the instrument. *Churchman v. Martin*, 54 Ind. 380; *Brown v. Barber*, 59 Ind. 533; *Smock v. Ripley*, 62 Ind. 81; *Garver v. Pontious*, 66 Ind. 191.

The following instruments have been held to be *conditional*, and therefore not commercially negotiable: "If I am then living";⁶⁹ "provided the terms mentioned in my letter are complied with";⁷⁰ subject to a contract or policy of insurance;⁷¹ "if not revoked, and [the payee] continue in my employ";⁷² "provided he proceeds to sea";⁷³ "if he do his duty as an able seaman";⁷⁴ "provided the ship M. arrives * * * free from capture and condemnation by the British";⁷⁵ "provided A. B. shall not return to England or his death be duly certified before" the time of payment;⁷⁶ "provided A. B. shall not be surrendered to prison" within a certain limited time;⁷⁷ "providing that a certain mortgage be paid and canceled";⁷⁸ on condition of the delivery of a certain deed;⁷⁹ provided A. B. shall

So, by the Negotiable Instrument Law, it "must contain an unconditional promise" in COLORADO, CONNECTICUT, VIRGINIA, FLORIDA (§ 1), MARYLAND and NEW YORK (§ 20). And where its nonnegotiability ousts the jurisdiction of the federal courts, it cannot be waived by the parties. *Raisin Fertilizer Co. v. Snell*, 21 Fed. 353.

⁶⁹ *Chit. Bills*, 157; *Braham v. Bubbs*, 1826 Trin. Term, Middlesex; *Abbott, C. J.*, distinguishing this case from that of a note payable at the maker's death.

⁷⁰ *Kingston v. Long*, 4 Doug. 9; *Bayley, Bills & N.* (6th Ed.) 16. And see *Greele v. Parker*, 5 Wend. (N. Y.) 414, where it was held that an acceptance "on the terms proposed" threw no burden on the holder of proving what the terms were; following *Read v. Wilkinson*, 2 Wash. C. C. 514, Fed. Cas. No. 11,611.

⁷¹ *Cushing v. Field*, 70 Me. 50; *American Exch. Bank v. Blanchard*, 7 Allen (Mass.) 333. See also, *Taylor v. Curry*, 109 Mass. 36, where the added words, "on policy No. 33." were held not affect the negotiability of the note. But a marginal memorandum, "Given as collateral security with agreement," is part of a note, and renders it conditional, and therefore nonnegotiable, *Costelo v. Crowell*, 127 Mass. 293.

⁷² *Shaver v. Telegraph Co.*, 57 N. Y. 459.

⁷³ *Loftus v. Clark*, 1 Hilt. (N. Y.) 310; *James v. Hagar*, 1 Daly (N. Y.) 517.

⁷⁴ *Chit. Bills*, 156; *Alves v. Hodgson*, 7 Term R. 242.

⁷⁵ *Coolidge v. Ruggles*, 15 Mass. 387. So, if made payable simply on the arrival of a certain ship, *Palmer v. Pratt*, 9 Moore, 358, 2 Bing. 185; or after its arrival and discharge of coal, *Grant v. Wood*, 12 Gray (Mass.) 220.

⁷⁶ *Chit. Bills*, 156; *Morgan v. Jones*, 1 Crompt. & J. 162.

⁷⁷ *Chit. Bills*, 156; *Smith v. Boheme*, Gilb. Cas. 93; *Barnesly v. Baldwyn*, Mod. 418, 2 Strange, 1151.

⁷⁸ *Hays v. Gwin*, 19 Ind. 19.

⁷⁹ *Kingsbury v. Wall*, 68 Ill. 311.

not pay by a certain day;⁸⁰ on the death of A. B., "provided he leaves us sufficient to pay that sum, or if we otherwise shall be able to pay it";⁸¹ not to ask or expect payment "until [maker's] old mill is sold at a fair price."⁸² So, by contemporaneous indorsement, "no demand to be made as long as the interest is paid";⁸³ or "not to be paid unless I have the use" of certain leased premises;⁸⁴ or a note for payment of interest only, unless the principal should be necessary for the support of the payee;⁸⁵ or "after my advances are paid";⁸⁶ or if a receipt be returned;⁸⁷ or "on return of this certificate and my guaranty of another note";⁸⁸ or on condition that the payee deliver a certain deed on delivery of the goods, for which the order, otherwise negotiable, was given.⁸⁹ So, a note for a reap-

⁸⁰ Chit. Bills, 156; *Appleby v. Biddolph*, cited 8 Mod. 363; 4 Vin. Abr. 240, pl. 16; *Smalley v. Edey*, 15 Ill. 324; *Baird v. Underwood*, 74 Ill. 176. Or providing for the surrender of the note, if the maker pays the payee's fines. *Chapman v. Wight*, 79 Me. 595, 12 Atl. 546. So, a recital that the note is given as collateral security for another debt. *American Nat. Bank v. Sprague*, 14 R. I. 410.

⁸¹ *Roberts v. Peake*, 1 Burrows, 323.

⁸² *Blake v. Coleman*, 22 Wis. 415. Or until the maker is released from liability as surety in other matter. *Moore v. Edwards*, 167 Mass. 74, 44 N. E. 1070. Or payable "when the amount shall have been realized from sales. * * * otherwise to be void." *Martin v. Shumatte*, 62 Tex. 188. See, too, § 112, *infra*. And, where a note was conditioned that a certain "farm sold by the sheriff should not be redeemed by that time," it was held unnecessary to aver any consideration, in declaring upon it. *Nichols v. Woodruff*, 8 Blackf. 493.

⁸³ Chit. Bills, 162; *Seacord v. Burling*, 5 Denio (N. Y.) 444. But not an indorsement stating that a note was given upon the condition mentioned in an agreement compromising a suit, where the indorsement was only made for the purpose of identification. *Brill v. Crick*, 1 Mees. & W. 232.

⁸⁴ *Jennings v. Bank*, 13 Colo. 417, 22 Pac. 777.

⁸⁵ *Light v. Scott*, 88 Ill. 239. And such condition can be set up against a holder with notice. *Shufeldt v. Gillilan*, 124 Ill. 460, 16 N. E. 879. So, a note payable in four years, with interest, "not to paid annually" unless the promisor "can make it convenient," is a conditional note, and not negotiable. *Humphrey v. Beckwith*, 48 Mich. 151, 12 N. W. 28. For other conditions modifying time of payment, see § 109 et seq., *infra*.

⁸⁶ *Shackelford v. Hooker*, 54 Miss. 716.

⁸⁷ *Mason v. Metcalf*, 4 Baxt. (Tenn.) 440.

⁸⁸ *Smilie v. Stevens*, 39 Vt. 315.

⁸⁹ *Kingsbury v. Wall*, 68 Ill. 311. Or on the surrender of a certificate of

ing machine, otherwise negotiable, but conditioning the title to the machine on the payment of the note;⁹⁰ or an otherwise negotiable receipt for wheat to be held "unless taken by law from me";⁹¹ or "less \$55 in the event that T. fails to deliver" certain goods;⁹² or to pay "if the same be due him from me on his and my settlement out of the last payment on houses which I am now building";⁹³ or "on account of my share of rent which will be due June 1st";⁹⁴ or "out of the fifth payment, when it should be due and allowed."⁹⁵ So, a promise to pay £13, "and all fines according to the rule";⁹⁶ or \$100, "and take up their note to A. B. for that amount";⁹⁷ or on condition of the payee paying another note of the same maker.⁹⁸ So, a receipt for certain drafts payable to the maker of the receipt, "which we promise to pay to A. B."⁹⁹ So, an order for the payment of a nonnegotiable conditional note;¹⁰⁰ or an order for payment "according to a donation made to the parish, the same to be in accordance with a resolution of the police jury";¹⁰¹ or to pay

stock. *Van Zandt v. Hopkins*, 151 Ill. 248, 37 N. E. 845. Or requiring the bank books to accompany the draft. *White v. Cushing*, 88 Me. 339, 34 Atl. 164.

⁹⁰ *Third Nat. Bank of Syracuse v. Armstrong*, 25 Minn. 531; *Wright v. Traver*, 73 Mich. 493, 41 N. W. 517. Or reserving option to return the machine in lieu of payment. *First Nat. Bank of Webster v. Alton*, 60 Conn. 402, 22 Atl. 1010. And see sections 93, 203, *infra*.

⁹¹ *Carnahan v. Pell*, 4 Colo. 190.

⁹² *Faull v. Tinsman*, 36 Pa. St. 108. So, a note for \$60. with the provision that, "if \$50 be paid January 1st, it shall cancel this note." *Fralick v. Norton*, 2 Mich. 130.

⁹³ *Jackman v. Bowker*, 4 Metc. (Mass.) 235. So, a note for rent due "under contract of lease and conditional sale." *Post v. Railway Co.*, 171 Pa. St. 615, 33 Atl. 362.

⁹⁴ *Rice v. Porter's Adm'r*, 16 N. J. Law, 440. So, an order to pay, "if in funds," is not a bill of exchange. *Kemble v. Lull*, 3 McLean, 272, Fed. Cas. No. 7,683.

⁹⁵ *Haydock v. Lynch*, 2 Ld. Raym. 1563.

⁹⁶ *Ayrey v. Fearnside*, 4 Mees. & W. 168. And see § 206, *infra*.

⁹⁷ *Cook v. Satterlee*, 6 Cow. (N. Y.) 108.

⁹⁸ *Henry v. Colman*, 5 Vt. 402. So, if a certain other note is not paid. *Grimison v. Russell*, 14 Neb. 521, 16 N. W. 819.

⁹⁹ *Williamson v. Bennett*, 2 Camp. 417.

¹⁰⁰ *Noyes v. Gilman*, 65 Me. 589.

¹⁰¹ *Jenkins v. Caddo*, 7 La. Ann. 559.

in installments as a certain building should be finished;¹⁰² or on condition that a certain railroad be built to G. by February, 1871;¹⁰³ or payable six months "after ratification of peace between the United States and the Confederate States";¹⁰⁴ or containing an option to pay or render A. B. to prison;¹⁰⁵ or an election to pay a certain judgment or lose amount of money already paid;¹⁰⁶ or a promise to pay "as a set-off for the sum left me in my father's will";¹⁰⁷ or to go as a set-off for a certain order and the remainder of a debt.¹⁰⁸

But an agreement to pay £50 "for a cart for the use of A. B., to be paid without fail in three weeks," has been held to be rather an agreement than a note;¹⁰⁹ as, also, a note indorsed, "This note is taken for security of balances not extending further than within-named sum, and is not to be in force for six months."¹¹⁰

What are not Conditions.

§ 93. On the other hand the following provisions in an instrument have been held to leave it still *unconditional* and negotiable,

¹⁰² *Miller v. Stone Co.*, 1 Bradw. (Ill.) 273. So, too, though the contingency afterwards happen. *White v. Smith*, 77 Ill. 351.

¹⁰³ *Eldred v. Malloy*, 2 Colo. 320; *Blackman v. Lehman*, 63 Ala. 547. And see *Freeman v. Matlock*, 67 Ind. 99. But a note payable in four years, taking up a note which was made payable when a certain railroad should be completed, is independent of any such condition. *Four-Mile Val R. Co. v. Bailey*, 18 Ohio St. 208. So, a note payable on the completion of a railroad is not conditioned on its having certain privileges enumerated by way of description in the note. *Johnson v. Railroad Co.*, 81 Ga. 725, 8 S. E. 531. Nor will such condition in a subscription for stock be imported into a note given in payment. *Slipher v. Earhart*, 83 Ind. 173.

¹⁰⁴ *McNinch v. Ramsay*, 66 N. C. 229.

¹⁰⁵ *Smith v. Boheme*, Gilb. Cas. 93. In CALIFORNIA (Civ. Code, § 8090) and in DAKOTA (Rev. Code, § 1824), however, an option to pay or perform some other act, in itself nonnegotiable, does not destroy the negotiability of the instrument. And see *Dinsmore v. Duncan*, 57 N. Y. 573.

¹⁰⁶ *Draper v. Fletcher*, 26 Mich. 154.

¹⁰⁷ *Clarke v. Percival*, 2 Barn. & Adol. 660.

¹⁰⁸ *Chit. Bills*, 157; *Davies v. Wilkinson*, 2 Perry & D. 256.

¹⁰⁹ *Chit. Bills*, 157; *Ellis v. Ellis*, Gow. 216.

¹¹⁰ *Leeds v. Lancashire*, 2 Camp. 205. See, too, *Robins v. May*, 11 Adol. & E. 214.

e. g. "as per memorandum of agreement";¹¹¹ "on return of this certificate";¹¹² on receiving wages from a public ship and prize money;¹¹³ "provided the money is not collected in the meantime from A.";¹¹⁴ "with ten per cent. interest if not paid when due";¹¹⁵ provided the payee deliver the crop of tobacco raised by him, then he to have one-fourth of the above in hand, and in addition \$3 per hundredweight for the part yet undelivered.¹¹⁶ So, in a note for insurance premium, the provision that, "if not paid at maturity, the whole amount of premium on said policy shall be considered as earned and the policy be null and void so long as this remains unpaid."¹¹⁷ So, "this note to be valid as part pay for a piano bought of me at retail price."¹¹⁸ So, an agreement to "pay A.'s draft, \$2,300, for stock," is an unconditional acceptance.¹¹⁹ And an agreement, recited as consideration in the note, to show property of A., from which the maker of the note can make another debt due him, is an independent agreement, and does not render the note conditional.¹²⁰ Likewise, a recital that on payment of the note the payee

¹¹¹ *Jury v. Barker*, El., Bl. & El. 459. And see note to this case, 96 E. C. L. 459; *Littlefield v. Hodge*, 6 Mich. 326.

¹¹² *Fells Point Sav. Inst. of Baltimore v. Weedon*, 18 Md. 320; *Frank v. Wessels*, 64 N. Y. 155; *Church, C. J.*, saying, in this case, of *Patterson v. Poindexter*, 6 Watts & S. (Pa.) 227, "The intimation as to the effect of the clause requiring a return is not authoritative and has not been followed in this state or elsewhere." So, too, *Bean v. Briggs*, 1 Iowa, 488; *Drake v. Markle*, 21 Ind. 433; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119; *Kirkwood v. Bank*, 40 Neb. 484, 58 N. W. 1016; *Id.*, 40 Neb. 497, 58 N. W. 1135. But see, contra, *White v. Cushing*, 88 Me. 339, 34 Atl. 164.

¹¹³ *Evans v. Underwood*, 1 Wils. 262.

¹¹⁴ *Pemberton v. Hoosier*, 1 Kan. 108.

¹¹⁵ *Houghton v. Francis*, 29 Ill. 244. But see *Third Nat. Bank of Syracuse v. Armstrong*, 25 Minn. 530. And a provision for adding collection fees "in case of nonpayment at maturity" is a condition. *Sweeney v. Thickstun*, 77 Pa. St. 131. So, an agreement in a two-year note, that, if paid in one year, there should be no interest, is a condition which destroys its negotiability. *Lamb v. Story*, 45 Mich. 488.

¹¹⁶ *Ring v. Foster*, 6 Ohio, 279.

¹¹⁷ *Kirk v. Insurance Co.*, 39 Wis. 138.

¹¹⁸ And such note can be enforced if the payee refuses to take the piano. *Preston v. Whitney*, 23 Mich. 260.

¹¹⁹ *Coffman v. Campbell*, 87 Ill. 98.

¹²⁰ *Plumb v. Niles*, 34 Vt. 330.

shall sell a certain machine to the maker of the note.¹²¹ It has also been held that an option in a promissory note, reserving the right to pay it in United States bonds, is not a condition, and does not impair the negotiability of the note.¹²² Nor is the negotiability of a railroad company's bond affected by a provision that it may be registered, and so made transferable only on the company's books.¹²³

The Condition must be Expressed.

§ 94. All conditions, to affect the negotiability of commercial paper, must appear on its face.¹²⁴ And the mere words, "this note is given on condition," with nothing further to show what the condition is, are wholly immaterial, and may be erased without material alteration of the paper.¹²⁵ Moreover, the unconditional renewal of a note is free from any condition expressed in the original note.¹²⁶ And a note is not rendered conditional by a condition not expressed in it, but expressed in the mortgage given to secure it.¹²⁷ Where a

¹²¹ *Hawley v. Bingham*, 6 Or. 76. Or providing that the title to it shall not pass until the note is paid. *Barnley v. Tufts*, 66 Miss. 48, 5 South. 627; *Howard v. Simpkins*, 70 Ga. 322. But such a condition must be expressed in the note in Maine, and, as against third parties, must be recorded. *Holt v. Knowlton*, 86 Me. 456, 29 Atl. 1113; *Cunningham v. Trevitt*, 82 Me. 145, 19 Atl. 110; *Hill v. Nutter*, 82 Me. 199, 19 Atl. 170; *Monaghan v. Longfellow*, 82 Me. 419, 19 Atl. 857.

¹²² *Dinsmore v. Duncan*, 57 N. Y. 573.

¹²³ *Savannah & M. R. Co. v. Landaster*, 62 Ala. 555. And if registered, payable "to the registered holder thereof." *Strauss v. Telegraph Co.*, 164 Mass. 130, 41 N. E. 57.

¹²⁴ *Byles, Bills*, 96; *Richards v. Richards*, 2 Barn. & Adol. 447. And a note given for payment of a stock subscription, and absolute in its terms, amounts to a waiver of the condition as to location and building of the railroad contained in the subscription. *Evansville, I. & C. Straight-Line R. Co. v. Dunn*, 17 Ind. 603. From the rule requiring all conditions to appear in the instrument, it follows that a verbal condition subsequent, providing for the return or cancellation of a former note, cannot affect a bona fide holder for value. *Goddard v. Cutts*, 11 Me. 410.

¹²⁵ *Palmer v. Largent*, 5 Neb. 223.

¹²⁶ *Rogers v. Broadnax*, 27 Tex. 238.

¹²⁷ *Albright v. Russell*, 5 Neb. 207. But the rule is different if the note is expressly made subject to the condition contained in the mortgage. *Goodenow v. Curtis*, 33 Mich. 505. See, too, *Titlow v. Hubbard*, 63 Ind. 6. On the other hand, an indorsement on a mortgage, "on same condition as per

condition does not appear on the face of the instrument, it is not competent to prove it by parol.¹²⁸

Effect of Subsequent Performance.

§ 95. Where the negotiability of an instrument is vitiated by a contingency expressed in it, this defect is not cured by the subsequent happening of the contingent event.¹²⁹ But a different rule seems to have been followed in Maine, where a note, payable "if there is anything over" in a certain settlement to be made, was held to be absolute after a settlement made showing a balance.¹³⁰

An action will in all cases lie upon a contingent note on proof of the happening of the contingency; even, it seems, on a note partaking somewhat of the character of a wager, and made payable "when W. H. H. shall be elected president of the United States."¹³¹ And, after the contingency has happened, it may be declared on as a note.¹³² And it seems that it may be declared on as a note not-

note of this date," was held sufficient to give the mortgage force as a duplicate of the note. *Grinnell v. Baxter*, 17 Pick. (Mass.) 386. So a collateral agreement for the discontinuance of a suit is not a condition precedent to payment of the note. *Bruce v. Carter*, 72 N. Y. 616.

¹²⁸ *Cunningham v. Wardwell*, 12 Me. 466, where the maker offered to show that the note was payable only on condition of the safe arrival of a certain cargo; or only out of dividends to be received, *McDowell v. Steel Works*, 124 Ill. 491, 16 N. E. 854. See, too, *Brown v. Wiley*, 20 How. 442; *McSherry v. Brooks*, 46 Md. 103; *Gliddens v. Harrison*, 59 Ala. 481; *Jones v. Shaw*, 67 Mo. 667; *Henshaw v. Dutton*, 59 Mo. 139; *Calhoun v. Davis*, 2 Ind. 532; *Sears v. Wright*, 24 Me. 278; *Miller v. White*, 7 Blackf. (Ind.) 491; *Dale v. Pope*, 4 Litt. (Ky.) 166; *Beard v. White*, 1 Ala. 436; *McCoy v. Moss*, 5 Port. (Ala.) 88; *Rice v. Ragland*, 10 Humph. (Tenn.) 545; *Campbell v. Upshaw*, 7 Humph. (Tenn.) 185; *Gazoway v. Moore*, Harp. (S. C.) 401; *McClanaghan v. Hines*, 2 Strob. (S. C.) 122; *Rodgers v. Rosser*, 57 Ga. 319; *Scaife v. Beall*, 43 Ga. 333; *Rockmore v. Davenport*, 14 Tex. 602; *McGrath v. Barnes*, 13 S. C. 328. For conditions annexed to the delivery of a bill or note, see § 227, *infra*.

¹²⁹ *Bytes, Bills*, 97; *Hill v. Halford*, 2 Bos. & P. 413; *White v. Smith*, 77 Ill. 351; *Miller v. Stone Co.*, 1 Bradw. (Ill.) 273.

¹³⁰ *Stevens v. Power Co.*, 62 Me. 498.

¹³¹ *Williams v. Smith*, 4 Ill. 524; *Gordon v. Casey*, 23 Ill. 70. So, where a note is made payable at a certain time "on condition that the banks of Tennessee have resumed payment at that time. * * * and, if not, as soon as they do resume." *Walters v. McBee*, 1 Lea (Tenn.) 364.

¹³² *McGehee v. Childress*, 2 Stew. (Ala.) 506. So, where it is to be can-

withstanding the contingency in New Hampshire.¹³³ The performance of the condition must, however, be shown before a recovery can be had on the instrument.¹³⁴ What constitutes performance of the condition is a question of fact for the jury.¹³⁵ A condition may be rejected, however, as repugnant and void. A proviso in a bill of exchange limiting the liability of the drawer is a condition of this character.¹³⁶

ceeded if a house is built before Jan. 1, it becomes absolute after that date. *Stout v. Watson*, 45 Minn. 454, 48 N. W. 195.

¹³³ *Odiorne v. Odiorne*, 5 N. H. 315; *Congregational Soc. v. Goddard*, 7 N. H. 480. But see *Drown v. Smith*, 3 N. H. 300.

¹³⁴ *Shackelford v. Hooker*, 54 Miss. 716; *Nagle v. Homer*, 8 Cal. 353. And where, for instance, a note for \$75 contains a condition that, "if paid by April 1st, \$50 shall discharge it," a payment of that amount on the 9th of April, although before maturity of the note, is no performance of the condition. *Holland v. Vanard*, 3 G. Greene (Iowa) 230. But it seems that, if the performance has been prevented by the maker's own action, he cannot avail himself of the failure. *King v. King*, 69 Ind. 467.

¹³⁵ *Jackson v. Stockbridge*, 29 Tex. 394. The following cases may be consulted as to performance of particular conditions: *Location of railroad*: *Dayenport & St. P. R. Co. v. Rogers*, 39 Iowa, 298. *Building of railroad*: *Thompson v. Oliver*, 18 Iowa, 417. *Assent of heirs to payment in C. S. A. notes*: *Martin v. Singleton*, 23 La. Ann. 551. *Rendering prisoner on capias*: *Daggett v. Gage*, 41 Ill. 465. *Paying another note since barred by the statute of limitations*: *Jordan v. Fountain*, 51 Ga. 332. *C. S. A. conscription*: *Lively v. Robbins*, 39 Ala. 461.

¹³⁶ *In re State Fire Ins. Co.*, 32 Law J. Ch. 300. So, an agreement that a note should not be considered such. *San José Sav. Bank v. Stone*, 59 Cal. 183.

III. ITS LIMITED CHARACTER.

- § 96. Payable in Money Only—American Statutes.
- 97. — “In Specie”—“Gold.”
- 98. Legal Tender Act and Decisions.
- 99. Payable in “Current Funds”—“Currency.”
- 100. — In Bank Notes.
- 101. — In Merchandise or Work.
- 102. “Sterling”—“Dollars.”
- 103. Parol Evidence.

Payable in Money Only—American Statutes.

§ 96. No rule of commercial paper is better established than that which requires it to be for the payment of money, and money only.¹³⁷ In some of the states this rule has been changed by statute.¹³⁸ Un-

¹³⁷ Byles, Bills, 94; Chit. Bills, 153; 1 Daniel, Neg. Inst. 60; 1 Edw. Bills & N. § 147; 1 Pars. Bills & N. 45; Story, Bills, § 43; Story, Prom. Notes, § 17; Hosstatter v. Wilson, 36 Barb. (N. Y.) 307.

¹³⁸ In ALABAMA only bills of exchange and promissory notes payable in money at a bank or private banking house, or other place of payment expressed, are made negotiable, and governed by the law merchant; other contracts in writing being assignable subject to defense. Code, §§ 1756, 1757. See, too, Oates v. Bank, 100 U. S. 239. In ARKANSAS bills, notes, and other contracts “for the payment of money or property or both” are assignable (Dig. § 489); subject, however, to equities (section 491), except “bills of exchange or negotiable notes transferred in good faith and for value before maturity, but such instruments shall be governed in all respects by the rules of the law merchant concerning commercial and negotiable paper” (Id. § 492). Bills of exchange include drafts or orders drawn by one person on another “for the payment of a certain sum of money therein specified.” Id. § 487. In CALIFORNIA “a negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer.” Civ. Code, § 3087. It must be “payable in money only” (Id. § 3088), although it may also “give to the payee an option between the payment of the sum specified therein, and the performance of another act,” but as to the latter provision it is not negotiable (Id. § 3090). Other nonnegotiable contracts for the payment of money or personal property are assignable, subject to defense. Id. § 1459; Code Civ. Proc. § 368. In DAKOTA the same provisions have been enacted as in CALIFORNIA. Rev. Code, §§ 1821, 1822, 1824. In GEORGIA a promissory note may be for the payment of “money or other articles of value.” Code, § 3677; Daniel v. Andrews, Dud. 157. In IDAHO

der the common law, the following bills and notes have been held to be payable in money, and negotiable, viz.: "In current money";¹³⁰ "in

only notes for the payment of "a sum of money" are made negotiable. Rev. St. §§ 3575, 3600. In ILLINOIS a note may be payable in money or in property, the assignor being liable in the latter case only on due diligence by the holder in prosecuting the maker. Hurd's Rev. St. c. 98, §§ 3-7. In INDIANA, promises "to pay money * * * and for the delivery of a specific article or to convey property or to perform any stipulation therein mentioned shall be negotiable" (Horner's St. § 5501), subject, however, to defense except in case of inland and foreign bills and notes payable to order or bearer in an Indiana bank. In IOWA, instruments for the payment of a sum of money in property or labor, or to deliver property or labor, or acknowledging property or labor to be due, "are negotiable with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker, but the use of the technical words 'order' or 'bearer' alone will not manifest such intention." Code, § 3045. In KENTUCKY all bonds, bills, and notes for money or property are assignable subject to defense. Bills, drafts, or checks payable in bank notes or currency or other funds are negotiable as if for money, except that only the value of the currency mentioned can be recovered. St. § 4745. In MARYLAND, the British statute, 3 & 4 Anne, c. 9, is still in force. Bill of Rights, art. 5; Alexander's Brit. St. p. 649. In MISSISSIPPI, only notes for the payment of a sum of money are properly negotiable, notes payable in "any other thing" being merely assignable subject to equities. Ann. Code, §§ 3502, 3503. In MISSOURI, only notes "for the payment of money" are clothed by statute with the negotiable character of inland bills of exchange. Rev. St. § 733. In NEBRASKA, all negotiable instruments must be "for any sum or sums of money certain." Comp. St. § 3360. In NEVADA, negotiable notes must be for the payment of a "sum of money therein mentioned." 1 Comp. Laws 1873, c. 5, § 9; P. L. 1861, p. 4. So, in NEW JERSEY. Gen. St. 2604. In NORTH CAROLINA, negotiable instruments must be for money. Code, § 41. So, in OHIO. Rev. St. § 3171. So, in OREGON. Hill's Ann. Laws, § 3188. In PENNSYLVANIA, bills of exchange, drafts, notes, checks, etc., drawn or indorsed in that state "payable in any other state, territory, country or place," may be payable "in current funds" or in money with rate of exchange or like qualification superadded. Purd. Dig. p. 1732, § 2; P. L. 1849, p. 427, § 11. In RHODE ISLAND, negotiable notes must be for the payment of money only. Gen. Laws, c. 166, § 7. So, in SOUTH CAROLINA. Rev. St. § 1393. So, in TEN-

¹³⁰ Bainbridge v. Owen, 2 J. J. Marsh (Ky.) 463. So, a bill payable in "current funds" has been held to be payable in current money, and negotiable. Laird v. State, 61 Md. 309. If payable in "current money," the amount of recovery will be the specie value of such currency as it would be most for the promisor's interest to have paid. Miller v. McKinney, 5 Lea (Tenn.) 93.

current money of Kentucky";¹⁴⁰ "in lawful current money of Pennsylvania";¹⁴¹ "in good current money of this state";¹⁴² in "lawful money";¹⁴³ "in York state bills or specie";¹⁴⁴ "in exchange";¹⁴⁵ "in good solvent cash notes";¹⁴⁶ but not a receipt for an amount "in checks," payable generally.¹⁴⁷

On the other hand, the following bills and notes have been held not payable in money and not negotiable, viz.: "In New York funds";¹⁴⁸ "in Tennessee money";¹⁴⁹ "in current Mississippi bank

NESSEE. Ann. Code, § 3505. And the same is true of every negotiable sealed bill, bond, or note. Id. § 3506. But bills or notes for specific articles are only assignable. Id. In VERMONT, negotiable bills and notes must be for the payment of money. St. § 2306. So, in WEST VIRGINIA, negotiable notes and checks. Code, c. 99, § 7. So, in WISCONSIN, all negotiable notes. Ann. St. § 1675. By the negotiable instruments law of 1897, such instruments must be drawn "to pay a sum certain in money" in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 1), NEW YORK and MARYLAND (§ 20); and WASHINGTON (Codes & St. § 3650).

¹⁴⁰ *McChord v. Ford*, 3 T. B. Mon. 166, there being no current money in Kentucky at that time except specie.

¹⁴¹ Meaning congressional legal tender, *Wharton v. Morris*, 1 Dall. 125.

¹⁴² *Graham v. Adams*, 5 Ark. 261.

¹⁴³ *Dorrance v. Stewart*, 1 Yeates (Pa.) 349, the note being made in Connecticut, and intended to mean lawful money of Connecticut.

¹⁴⁴ *Keith v. Jones*, 9 Johns. (N. Y.) 120. See New York Statutes; 1 Rev. St. 768.

¹⁴⁵ *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783, overruling *Lowe v. Bliss*, 24 Ill. 168. But a note "payable by New York or Chicago exchange" is payable in bills, and has been held not to be negotiable. *First Nat. Bank v. Slette*, 67 Minn. 425, 69 N. W. 1148.

¹⁴⁶ *Baker v. Todd*, 6 Tex. 273; *Smith v. Falwell*, 21 Tex. 466, distinguishing such notes from a promise to pay in cash notes. But in *Lawrence v. Dougherty*, 5 Yerg. (Tenn.) 435, a note for \$500 "which may be discharged in merchantable cotton" was held to be the same thing as a note payable in cotton, and therefore not negotiable. Notes payable "in good solvent cash notes" are said to constitute a "money demand" on failure to deliver the notes. *Grant v. Burleson*, 38 Tex. 214. But see, contra, *Ward v. Lattimer*, 2 Tex. 245. *Williams v. Sims*, 22 Ala. 512; *Hopkins v. Seymour*, 10 Tex. 202.

¹⁴⁷ *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40, 19 S. W. 334.

¹⁴⁸ *Hasbrook v. Palmer*, 2 McLean, 10, Fed. Cas. No. 6,188.

¹⁴⁹ Meaning Tennessee bank notes, *Taylor v. Neblett*, 4 Heisk. (Tenn.) 491. But see *Searcy v. Vance*, Mart. & Y. (Tenn.) 225, to the effect that such expression is equivalent to money, and makes a negotiable note. So, as to "Arkansas money." *Wilburn v. Greer*, 6 Ark. 255.

money";¹⁵⁰ "in Tennessee or Alabama money or its equivalent";¹⁵¹ "in Arkansas money of the Fayetteville Branch";¹⁵² "in Canada money," the note being made in the United States;¹⁵³ in Brandon money";¹⁵⁴ in "foreign bills";¹⁵⁵ in "paper medium";¹⁵⁶ "in East India bonds";¹⁵⁷ in United States bonds;¹⁵⁸ in Confederate bonds (illegal and void).¹⁵⁹ It is said, however, that a purchase-money note for land, payable "in Mississippi certificates of indebtedness," is so far a note for money as to be secured by a vendor's lien.¹⁶⁰

A note payable in money will not lose its negotiability by reason of an option contained in it for payment in United States bonds.¹⁶¹ But a note payable "in bank stock or lawful money of the United States" is not a negotiable note for the payment of money.¹⁶² Where the means of payment provided for are not money, it follows that the damages recoverable are not the amount named, but the value of the medium named in money.¹⁶³

¹⁵⁰ That is, Mississippi bank notes. *Hopson v. Fountain*, 5 Humph. (Tenn.) 140.

¹⁵¹ *Chevallier v. Buford*, 1 Tex. 503.

¹⁵² *Hawkins v. Watkins*, 5 Ark. 481.

¹⁵³ *Thompson v. Sloan*, 23 Wend. (N. Y.) 71. This is the case also of a note made in Canada, and payable "in Canada bills," although provincial notes were authorized and made a legal tender by statute of 29 & 30 Vict. c. 10. *Gray v. Worden*, 29 U. C. Q. B. 535.

¹⁵⁴ *Gordon v. Parker*, 2 Smedes & M. (Miss.) 495.

¹⁵⁵ Meaning bills of country banks. *Jones v. Fales*, 4 Mass. 245.

¹⁵⁶ *Lange v. Kohne*, 1 McCord (S. C.) 115.

¹⁵⁷ *Byles, Bills*, 94; *Bull*, N. P. 272.

¹⁵⁸ *Easton v. Hyde*, 13 Minn. 90 (Gil. S3); *Blouin v. Liquidators of Hart*, 30 La. Ann. 714.

¹⁵⁹ *Prigeon v. Smith*, 31 Tex. 171.

¹⁶⁰ *Deason v. Taylor*, 53 Miss. 697. On the other hand, a promise in writing to pay "county scrip" has been held to be an agreement, and not a note. *Jones v. State*, 40 Ark. 344.

¹⁶¹ *Dinsmore v. Duncan*, 57 N. Y. 573. But such quality is lost by the holder's indorsing his option to take bonds in payment. *Id.*

¹⁶² *Alexander v. Oaks*, 19 N. C. 513. See 1 Rev. St. N. C. c. 13, § 3. So, a note containing an option to pay in money or property is not negotiable. *Taylor v. Tompkins*, 1 White & W. Civ. Cas. Ct. App. § 1050. In such notes the election belongs to the debtor, and the creditor can only demand money on the debtor's failure to exercise his option. *Nipp v. Diskey*, 81 Ind. 214.

¹⁶³ *Hopson v. Fountain*, 5 Humph. (Tenn.) 140; *Chevallier v. Buford*, 1 Tex. 503; *Gordon v. Parker*, 2 Smedes & M. (Miss.) 495.

It is believed that the rule requiring commercial paper to be payable in money only, except so far as it has been changed by a few statutes in the United States, is a universal one. It is implied in the definitions and other provisions of nearly every foreign commercial code, and assumed without discussion by French and German writers on commercial law.¹⁶⁴

Payable "in Specie"—"Gold."

§ 97. A bill of exchange or promissory note payable "in gold" or "in specie" is for the payment of money, and not for bullion or merchandise.¹⁶⁵ And therefore, as such, its negotiability has passed unquestioned. In like manner a note payable "in specie or its equivalent" is a note for money, on which an action of debt, not covenant, will lie.¹⁶⁶ This view is, however, opposed to that of an earlier case in Texas, where a note payable "in lawful funds of the United States, or its equivalent," was held to be a contract for coin, nonnegotiable, and only assignable in equity.¹⁶⁷

¹⁶⁴ In ITALY, notes may be made to order for payment in produce, subject to the same regulations as notes payable in money. Code Com. arts. 275, 276. But such notes or bills must be payable at a time fixed. Article 278. In MEXICO (Code Com. art. 223) bills of exchange must be for the payment of an amount particularly specified "in actual and current money."

¹⁶⁵ *Chrysler v. Renois*, 43 N. Y. 209, "in gold dollars"; *Wood v. Bullens*, 6 Allen (Mass.) 516; *Strickland v. Holbrooke*, 75 Cal. 268, 17 Pac. 204, "in United States gold coin." So, too, a promise to pay "one thousand Mexican silver dollars." *Hogue v. Williamson*, 85 Tex. 553, 22 S. W. 580.

¹⁶⁶ *Rhyne v. Wacaser*, 63 N. C. 36. And it has been held that a note payable "in gold or its equivalent in notes" may be satisfied by payment of the sum named in United States legal tender notes. *Killough v. Alford*, 32 Tex. 457, and that in such case judgment should be rendered for gold or its equivalent in United States legal tender notes, and that a judgment for the amount in gold is erroneous. *Wells, Fargo & Co. v. Van Sickle*, 6 Nev. 45. But see *Holt v. Given*, 43 Ala. 612, where it was held that payment of such note could only be made in legal tender notes of equivalent value.

¹⁶⁷ *Ogden v. Slade*, 1 Tex. 13, *Lipscomb, J.*, saying: "By 'equivalent' the parties must have meant such paper currency as passed at par with gold. This alternative of an equivalent would perhaps restrain the negotiability and destroy the mercantile character of the paper, so that it would not pass by delivery, and the holder might not maintain a suit in his own name on it at common law."

Legal Tender Act and Decisions.

§ 98. The United States legal tender act of 1862 provides that the United States notes issued under that act "shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt."¹⁶⁸ This act led to many conflicting decisions, the principal of which are noted in the following sections. In 1865 it was held to be unconstitutional by the court of errors of the state of Kentucky, so far as it affected contracts made prior to the passage of the act.¹⁶⁹ This decision was affirmed by the supreme court of the United States, in December, 1869, and judgment to that effect announced by the court in the following February.¹⁷⁰ Fifteen months later it was expressly overruled by the same court, and the legal tender act has since that time been generally held by the courts to be applicable to contracts made before its passage.¹⁷¹

¹⁶⁸ Rev. St. U. S. § 3588. This was afterwards extended to the greenback issues of 1863, 1864, and 1872, the latter, however, not extending to the redemption of bank notes "calculated and intended to circulate as money." *Id.* § 3590.

¹⁶⁹ *Griswold v. Hepburn*, 2 Duv. (Ky.) 20. This case was upon a promissory note for "eleven thousand dollars" made in 1860, and falling due February 20, 1862, five days before the passage of the Legal Tender Act. The judgment was for recovery in gold or its equivalent value.

¹⁷⁰ *Hepburn v. Griswold*, 8 Wall. 603. As to the argument urging the necessity of the Legal Tender Act as incident to the power to make war, Chief Justice Chase says (page 625): "We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in congress, that such an act is inconsistent with the spirit of the constitution, and that it is prohibited by the constitution." Mr. Justice Miller, dissenting from this, says (page 639): "If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the legislature, and not for the court, to determine." The judgment was rendered by a vote of five judges for affirmance (Chase, C. J., Nelson, Clifford, Grier, and Field, JJ.), three judges dissenting (Miller, Swayne, and Davis, JJ.).

¹⁷¹ *Legal Tender Cases*, 12 Wall. 457. This case overruled *Hepburn v. Griswold*, by a similar vote of five judges (Miller, Swayne, Davis, Strong, and Bradley, JJ.), four judges dissenting (Chase, C. J., and Nelson, Clifford, and Field, JJ.). The personnel of the court had been changed in the mean-

And it has been held that a note payable "in gold" may be satisfied under the legal tender act by payment in legal tender notes.¹⁷²

time by the resignation of Mr. Justice Grier and the appointment of Messrs. Justices Strong and Bradley. For a protest against this extraordinary action of the court and an account of the circumstances by which it was brought about, the reader is referred to the dissenting opinions of Chief Justice Chase (page 572) and Mr. Justice Clifford (page 604). Mr. Justice Bradley, in his opinion (page 567), says: "I do not say that it is a war power, or that it is only to be called into exercise in time of war." And Mr. Justice Strong says of the obligation of the contract (page 548): "It was not a duty to pay gold or silver or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other, constitutes its obligation. * * * The obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made." In the *Hepburn Case* that would have been coin. This principle has since been extended by the United States supreme court, in *Juilliard v. Greenman*, 110 U. S. 449, 4 Sup. Ct. 122, to greenbacks reissued under the act of 1878 (Field, J., dissenting). The opinion of the court, read by Mr. Justice Gray, puts the act upon a peace footing, as follows: "Congress, as a legislature of a sovereign nation, being expressly empowered by the constitution 'to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin'; and being clearly authorized and as incidental to the exercise of those great powers to emit bills of credit, to charter national banks, and to provide a national currency for the whole people in the form of coin, treasury notes and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from congress by the constitution,—we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of congress, consistent with the letter and spirit of the constitution, and therefore, within the meaning of that instrument, necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States."

¹⁷² *Buchegger v. Shultz*, 13 Mich. 420; *Jump v. Peltier*, 18 La. Ann. 193; *Riley v. Sharp*, 1 Bush (Ky.) 348; *Gist v. Alexander*, 15 Rich. Law (S. C.) 50. See, too, *Shollenberger v. Brinton*, 52 Pa. St. 9, virtually overruled in

And, where made in 1858 "to be paid in gold or silver," judgment for the amount in "dollars" was held to be correct.¹⁷³ Indeed, the addition of the words "in gold" was held to be an immaterial alteration in 1860, when there was no other means of payment.¹⁷⁴ So, too, United States legal tenders have been held sufficient payment of a note "payable in specie."¹⁷⁵ But in a later case in Vermont it was held that the holder was entitled to an amount of currency equivalent in value to the amount in specie at the time of rendering judgment.¹⁷⁶ And in the United States supreme court it was held, at the same term at which the legal tender cases were decided, that a note "payable in specie" could only be satisfied by payment in coined dollars.¹⁷⁷ And this may now be regarded as the rule regarding bills, notes, and other contracts payable either "in gold" or "in specie."¹⁷⁸

The rule is still clearer that judgment must be for coin on all notes and bills payable "in coin";¹⁷⁹ or "in gold and silver coin";¹⁸⁰

McCalla v. Ely, 64 Pa. St. 254. But it was held in *Glass v. Pullen*, 6 Bush (Ky.) 346, that a judgment on such note should be for gold or its equivalent in legal tender notes, and that such a note given for a loan of equal amount in legal tender notes was a usurious contract; and in *Hittson v. Davenport*, 4 Colo. 169, that a payment in currency on such note should only be credited to the amount of its value in gold, the note being for so many "dollars gold * * * in gold." A municipal bond reciting an indebtedness "in gold coin," "which sum they bind themselves to pay," is a promise to pay money or legal tender. *Woodruff v. State of Mississippi*, 162 U. S. 291, 16 Sup. Ct. 820.

¹⁷³ *Johnson's Adm'r v. Vickers*, 1 Duv. (Ky.) 266.

¹⁷⁴ *Bridges v. Winters*, 42 Miss. 135.

¹⁷⁵ *Wood v. Bullens*, 6 Allen (Mass.) 516. So, *Flournoy v. Healy*, 31 Tex. 590, where the note was for a specified sum "in specie" or a larger sum "in United States currency," and the judgment was rendered for the smaller sum.

¹⁷⁶ *Townsend v. Jennison*, 44 Vt. 315. But see *Flournoy v. Healy*, 31 Tex. 590.

¹⁷⁷ *Trebilcock v. Wilson*, 12 Wall. 687, Miller and Bradley, JJ., dissenting.

¹⁷⁸ And, where a note is payable "in gold or its equivalent in currency," the recovery will be an amount in currency equal in value to the amount named in gold. *Dunn v. Barnes*, 73 N. C. 273. And, as to the enforcement of such contracts, see *Burnett v. Stearns*, 33 Cal. 468; *Bridges v. Reynolds*, 40 Tex. 204.

¹⁷⁹ *Poett v. Stearns*, 31 Cal. 78; *Phillips v. Dugan*, 21 Ohio St. 466; *Smith v. Wood*, 37 Tex. 616; *Bowen v. Darby*, 14 Fla. 202; *Churchman v. Martin*,

¹⁸⁰ See note 180 on following page.

or in "gold dollars";¹⁸¹ or "lawful silver money";¹⁸² or in "English golden guineas and other gold and silver at the present established weight and rate";¹⁸³ or "in gold coin of the United States of the present standard of weight and fineness, notwithstanding any law which now may or hereafter shall make anything else a tender in payment of debts."¹⁸⁴

Payable in "Current Funds"—"Currency."

§ 99. It appears to be established in some states that a bill or note payable in "current funds" is payable in money, and therefore negotiable.¹⁸⁵ So, too, a note payable "in current funds of the state of Ohio";¹⁸⁶ or "in funds current in the city of New York";¹⁸⁷ or a certificate of deposit for \$100 "in funds * * * to be paid in like funds."¹⁸⁸ In other states the contrary has been held as to

54 Ind. 380. Although it was held that judgment on such a note should be for "dollars," not for coin, in *Preston v. Breedlove*, 36 Tex. 96. So, on a note payable "in gold or its equivalent," the premium on gold existing at the maturity of the note, and not at the time of judgment, will not be taken into account. *Atkinson v. Lanier*, 69 Ga. 460.

¹⁸⁰ *Bronson v. Rodes*, 7 Wall. 229, approved in *Trebilcock v. Wilson*, 12 Wall. 687, Miller, J., dissenting in both cases. So, too, if payable "in gold or silver coin." *Smith v. McKinney*, 22 Ohio St. 200. But see, contra, *Hastings v. Johnson*, 2 Nev. 190; *Glover v. Robbins*, 49 Ala. 220.

¹⁸¹ *Lafitte v. Rivera*, 23 La. Ann. 32. This decision relied on the authority of *Hepburn v. Griswold*, 8 Wall. 603, since overruled in the *Legal Tender Cases*, 12 Wall. 457.

¹⁸² *McCalla v. Ely*, 64 Pa. St. 254, overruling *Shollenberger v. Brinton*, 52 Pa. St. 9.

¹⁸³ *Butler v. Horwitz*, 7 Wall. 258.

¹⁸⁴ *Dutton v. Pailaret*, 52 Pa. St. 109.

¹⁸⁵ *Bull v. Bank*, 123 U. S. 105, 8 Sup. Ct. 62; *American Emigrant Co. v. Clark*, 47 Iowa, 671. To the same effect, see *Wood v. Price*, 46 Ill. 435; *Galena Ins. Co. v. Kupfer*, 28 Ill. 332; *Kupfer v. Marc*, Id. 388, affirmed as *Marc v. Kupfer*, 34 Ill. 286; *Williams v. Arnis*, 30 Tex. 37. See, too, *Blood v. Northup*, 1 Kan. 28.

¹⁸⁶ *White v. Richmond*, 16 Ohio, 5.

¹⁸⁷ *Lacy v. Holbrook*, 4 Ala. 88.

¹⁸⁸ *Swift v. Whitney*, 20 Ill. 144.

instruments payable "in current funds";¹⁸⁹ "in current funds at Pittsburgh";¹⁹⁰ "in New York funds or their equivalent."¹⁹¹

The same difference prevails in the decisions as to bills and notes payable "in currency." Such instruments are held to be negotiable in many states.¹⁹² So, too, a note payable in "greenback currency";¹⁹³ or in "paper currency" (meaning legal tender notes);¹⁹⁴ or "in currency at its specie value";¹⁹⁵ or "in the common currency of the country,—that which will pay taxes";¹⁹⁶ or "in currency at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due," such note being payable in United States currency, although of improved value.¹⁹⁷ In North Carolina, however, "undepreciated currency" was held not to mean coin, but "ordinary commercial and business currency."¹⁹⁸

The following expressions also have been held to mean cash or money, the instrument payable in such manner being negotiable,

¹⁸⁹ *Platt v. Bank*, 17 Wis. 222; *Lindsey v. McClelland*, 18 Wis. 481; *Johnson v. Henderson*, 76 N. C. 227; *Haddock v. Woods*, 46 Iowa, 433; *National State Bank of Lafayette v. Ringel*, 51 Ind. 393; *Conwell v. Pumphrey*, 9 Ind. 135; *Texas Land & Cattle Co. v. Carroll*, 63 Tex. 52.

¹⁹⁰ *Wright v. Hart*, 44 Pa. St. 454.

¹⁹¹ *Hasbrook v. Palmer*, 2 McLean, 10, Fed. Cas. No. 6,188.

¹⁹² *Howe v. Hartness*, 11 Ohio St. 449; *Fry v. Dudley*, 20 La. Ann. 368; *Butler v. Paine*, 8 Minn. 324 (Gil. 284); *Klauber v. Biggerstaff*, 47 Wis. 551, 3 N. W. 357; *Id.*, 9 Cent. Law J. 488 (collecting and reviewing a great number of American cases); *Phelps v. Town*, 14 Mich. 374, *Christiancy, J.*, defining currency to be "money current by law or paper equivalent in value circulating in the community at par." In *Swift v. Whitney*, 20 Ill. 144, *Walker, J.*, says: "By the term 'currency' is understood bank bills or other paper money issued by authority, which pass as and for coin. * * * It would seem that current bills or currency are of the value of cash, and exclude the idea of depreciated paper money." See, too, the remarks of *Field, J.*, in *Trebilcock v. Wilson*, 12 Wall. 695; also, *Paup v. Drew*, 10 How. 218.

¹⁹³ *Burton v. Brooks*, 25 Ark. 215, national bank notes not being included in such designation.

¹⁹⁴ *Frank v. Wessels*, 64 N. Y. 155.

¹⁹⁵ *Caldwell v. Craig*, 22 Grat. (Va.) 340, such note being held to be payable in specie.

¹⁹⁶ *Johnson v. Miller*, 76 N. C. 439, United States legal tender notes being meant, at least prima facie.

¹⁹⁷ *Echols v. Grattan*, 42 Ga. 547.

¹⁹⁸ *Blackburn v. Brooks*, 65 N. C. 413.

viz.: "New York state currency";¹⁹⁹ "currency of the state of Mississippi";²⁰⁰ "Kentucky currency";²⁰¹ "currency of Missouri";²⁰² "currency of Zanesville";²⁰³ "Canada currency";²⁰⁴ "current money of the state of Alabama."²⁰⁵

On the other hand, the following have been held not to be negotiable, viz.: "In currency";²⁰⁶ "common currency of Arkansas" (or Alabama);²⁰⁷ "in the currency of Kentucky";²⁰⁸ "in Pennsylvania or New York paper currency to be current in the state of Pennsylvania or the state of New York";²⁰⁹ "current notes of the state of North Carolina";²¹⁰ "in currency of the country, but not in Confederate notes."²¹¹

¹⁹⁹ Ehle v. Bank, 24 N. Y. 548.

²⁰⁰ Mitchell v. Hewitt, 5 Smedes & M. (Miss.) 361; i. e. not bank notes, but specie.

²⁰¹ Lampton v. Haggard, 3 T. B. Mon. (Ky.) 149. See, too, as to the meaning of "Illinois currency," Marine Bank v. Birney, 28 Ill. 90; Marine Bank of Chicago v. Rushmore, Id. 463; Chicago Fire & Marine Ins. Co. v. Keiron, 27 Ill. 501, approving the definition of "currency" in Wharton's Law Lex. 236, as "bank notes or other paper money issued by authority, and which are continually passing as and for coin." And in Springfield Marine & Fire Ins. Co. v. Tincher, 30 Ill. 399, it was held that a certificate of deposit for "currency" since depreciated must be paid in bills passing as coin.

²⁰² Cockrill v. Kirkpatrick, 9 Mo. 697. And it was held in this case that parol evidence was inadmissible to show that depreciated notes were intended.

²⁰³ Dugan v. Campbell, 1 Ohio, 115.

²⁰⁴ Black v. Ward, 27 Mich. 191.

²⁰⁵ Carter v. Penn, 4 Ala. 140, meaning coin, not bank notes.

²⁰⁶ Bank of Mobile v. Brown, 42 Ala. 108; Huse v. Hamblin, 29 Iowa, 501; Rindskoff Bros. & Co. v. Barrett, 11 Iowa, 172; Ford v. Mitchell, 15 Wis. 334; Farwell v. Kennett, 7 Mo. 595.

²⁰⁷ Bank notes being intended, Dillard v. Evans, 4 Ark. 175; Carlisle v. Davis, 7 Ala. 42.

²⁰⁸ Chambers v. George, 5 Litt. (Ky.) 335, bank notes being the currency intended.

²⁰⁹ Leiber v. Goodrich, 5 Cow. (N. Y.) 136.

²¹⁰ Warren v. Brown, 64 N. C. 381.

²¹¹ Coffin v. Hill, 1 Heisk. (Tenn.) 385. This was held to be payable in current bank notes current at its maturity, although depreciated, and a verdict was had for "dollars."

Payable in Bank Notes.

§ 100. It is generally agreed that paper payable in bank notes or bills loses its negotiable character. This is so, if it is payable "in bank notes";²¹² or "in current bank notes";²¹³ or "in current bills";²¹⁴ or "in cash or Bank of England notes";²¹⁵ or "in office notes of the bank" (payee);²¹⁶ or "in current bank notes receivable at the counter of said bank";²¹⁷ or "in notes of the United States Bank or either of the Virginia banks";²¹⁸ or in "North Carolina bank notes";²¹⁹ or "in good North Carolina bank bills";²²⁰ or in "bank notes of the chartered banks of Pennsylvania";²²¹ or in "cur-

²¹² *State v. Corpening*, 10 Ired. (N. C.) 58; *Jones v. Fales*, 4 Mass. 245; *Childress v. Stuart*, Peck (Tenn.) 276. So, in *Gray v. Donahoe*, 4 Watts (Pa.) 400, Sergeant, J., saying: "No principle is better established nor more necessary to be maintained than that bank notes are not 'money,' in the legal sense of the word. * * * Bank notes are merely promissory notes for the payment of money."

²¹³ *Gamble v. Hatton*, Peck (Tenn.) 130; *Kirkpatrick v. McCullough*, 3 Humph. (Tenn.) 171; *Simpson v. Moulden*, 3 Cold. (Tenn.) 429; *McDowell v. Keller*, 4 Cold. (Tenn.) 258; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425, affirmed 7 Hill (N. Y.) 359; *Pardee v. Fish*, 60 N. Y. 265; *Gray v. Donahoe*, 4 Watts (Pa.) 400; *Jackson v. Waddill*, 1 Stew. (Ala.) 579; *Young v. Scott*, 5 Ala. 475. Damages in such case being the value of the bank notes at the maturity of the bill, *Moore v. Gooch*, 6 Heisk. (Tenn.) 104; *McDowell v. Keller*, 4 Cold. (Tenn.) 258; *Hopson v. Fountain*, 5 Humph. (Tenn.) 140. But, contra, *Fleming v. Nall*, 1 Tex. 246.

²¹⁴ *Collins v. Lincoln*, 11 Vt. 268.

²¹⁵ *Byles*, Bills, 94; *Ex parte Imeson*, 2 Rose, 225. But see 3 & 4 Wm. IV. c. 98, § 6.

²¹⁶ *Irvine v. Lowry*, 14 Pet. 293.

²¹⁷ *Fry v. Rousseau*, 3 McLean, 106, Fed. Cas. No. 5,141.

²¹⁸ *Beirne v. Dunlap*, 8 Leigh (Va.) 514 (disapproving *Crawford v. Daigh*, 2 Va. Cas. 521; *Campbell v. Weister*, 1 Litt. [Ky.] 30; *January v. Henry*, 3 T. B. Mon. [Ky.] 8; *Noe v. Preston*, 5 J. J. Marsh. [Ky.] 57). And it has been held that proof of a note "to be paid in notes on the Bank of Kentucky or the Branch Bank at L." will not sustain a declaration on a note payable in money. *Osborne v. Fulton*, 1 Blackf. (Ind.) 234.

²¹⁹ *Kirkpatrick v. McCullough*, 3 Humph. (Tenn.) 171, overruling *Deberry v. Darnell*, 5 Yerg. (Tenn.) 451.

²²⁰ *Patton v. Hunt*, 64 N. C. 163.

²²¹ *McCormick v. Trotter*, 10 Serg. & R. 94.

rent bank notes of Tennessee";²²² or "in Tennessee money," meaning Tennessee bank notes;²²³ or in "current Mississippi bank money," meaning Mississippi bank notes;²²⁴ or "in current notes of either of the banks of N.";²²⁵ or in "Shamokin bank notes."²²⁶ But in early cases in Ohio the contrary was held as to bills payable "in current Ohio bank notes";²²⁷ or "in current bank notes of Cincinnati."²²⁸ So, too, in an early case in New York of a note payable "in bank notes current in the city of New York";²²⁹ and in Mississippi of a note payable "in notes of the banks of the state of Mississippi payable and negotiable in any bank in the state of Mississippi."²³⁰

Payable in Merchandise or Work.

§ 101. Except where it is otherwise provided by statute, as already noted, instruments for payment in goods are not bills of exchange or promissory notes, although in form negotiable in all other respects.²³¹ In like manner, an order for the delivery of cer-

²²² *Whiteman v. Childress*, 6 Humph. (Tenn.) 303.

²²³ *Taylor v. Neblett*, 4 Heisk. (Tenn.) 491.

²²⁴ *Hopson v. Fountain*, 5 Humph. (Tenn.) 140.

²²⁵ *Bonnell v. Covington*, 7 How. (Miss.) 322.

²²⁶ *Shamokin Bank v. Street*, 16 Ohio St. 1.

²²⁷ *Swetland v. Creigh*, 15 Ohio, 118.

²²⁸ *Morris v. Edwards*, 1 Ohio, 205.

²²⁹ *Judah v. Harris*, 19 Johns. (N. Y.) 144, the court taking notice that such notes are of cash value throughout the state.

²³⁰ *Besancon v. Shirley*, 9 Smedes & M. 457, under the statute, Howard & H. St. p. 373, § 12.

²³¹ *Matthews v. Houghton*, 11 Me. 377; *Carleton v. Brooks*, 14 N. H. 149; *Jerome v. Whitney*, 7 Johns. (N. Y.) 321; *Thomas v. Rosa*, Id. 461; *Gushee v. Eddy*, 11 Gray (Mass.) 502; *Sears v. Lawrence*, 15 Gray (Mass.) 267; *Farnum v. Virgin*, 52 Me. 576; *Tibbets v. Gerrish*, 25 N. H. 41; *Perry v. Smith*, 22 Vt. 361; *Peay v. Pickett*, 1 Nott & McC. (S. C.) 254; *Griffeth v. Hanks*, 46 Tex. 217; *Bailey v. Simonds*, 6 N. H. 159; *Clark v. King*, 2 Mass. 524; *Wingo v. McDowell*, 8 Rich. Law (S. C.) 446; *Lawrence v. Dougherty*, 5 Yerg. (Tenn.) 435; *Looney v. Pinckston*, 1 Overt. (Tenn.) 384; *Gwinn v. Roberts*, 3 Ark. 72; *Coyle's Ex'x v. Satterthwaite's Adm'r*, 4 T. B. Mon. (Ky.) 124; *May v. Lansdown*, 6 J. J. Marsh. (Ky.) 165; *Brown v. Richardson*, 20 N. Y. 472; *Hyland v. Blodgett*, 9 Or. 166; *Auerbach v. Pritchett*, 58 Ala. 451; *Seudder v. Clarke*, 1 Colo. 192; *Bradley v. Morris*, 4 Ill. 182, overruled by *Bilderback v. Burlingame*, 27 Ill. 341. So, a promise to pay "one ounce of gold." *Roberts*

tain specified drafts is not a bill of exchange.²³² Neither is an instrument payable in specific goods "or cash" negotiable;²³³ nor one payable in bank stock or lawful money of the United States;²³⁴ or for the delivery of goods and payment of money.²³⁵ But in some states, by force of the statute, negotiable notes and bills may be payable in merchandise.²³⁶ And in such state a note payable in merchandise imports a consideration.²³⁷ And even in New York a note payable in cash, or before its maturity in stock, has been held to be negotiable.²³⁸ And, by bankers' usage, scrip certificates for the delivery of stock to the bearer are now recognized as negotiable instruments.²³⁹

A memorandum written on the back of a note, "This note to be paid in wheat," is part of the note, and makes it a note payable in merchandise.²⁴⁰ And, in general, when a note or bill is payable in

v. Smith, 58 Vt. 492. And an order for delivery of goods on condition of the delivery of a deed is not negotiable. *Kingsbury v. Wall*, 68 Ill. 311.

²³² *Burch v. Newberry*, 1 Barb. (N. Y.) 648.

²³³ *Matthews v. Houghton*, supra. Although an instrument for the payment of cash in four months or goods on demand has been held to be negotiable. *Hosstatter v. Wilson*, 36 Barb. (N. Y.) 307.

²³⁴ *Alexander v. Oaks*, 19 N. C. 513.

²³⁵ *Martin v. Chaunty*, 2 Strange, 1271.

²³⁶ *Smith v. Giegrich*, 36 Mo. 369; *Spears v. Bond*, 79 Mo. 467; *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104; *Rankin v. Sanders*, 6 How. (Miss.) 52; *Bilderback v. Burlingame*, 27 Ill. 341, overruling *Bradley v. Morris*, supra. And in Illinois a note for \$40, "which may be discharged in good sound corn at 20 cents per bushel," is negotiable. *Borah v. Curry*, 12 Ill. 66. Likewise a receipt for hogs, "the product of which we promise to pay," etc. *Stewart v. Smith*, 28 Ill. 397.

²³⁷ *Rogers v. Maxwell*, 4 Ind. 243.

²³⁸ *Hodges v. Shuler*, 22 N. Y. 114.

²³⁹ *Rumball v. Bank*, 2 Q. B. Div. 194.

²⁴⁰ *Polo Mfg. Co. v. Parr*, 8 Neb. 379. So, too, a contemporaneous writing, *Hill v. Huntress*, 43 N. H. 480; or other contemporaneous agreement, *Singer Mfg. Co. v. Haines*, 36 Mich. 385; *Weeks v. Medler*, 20 Kan. 57. But a memorandum on the margin of a note, "This note is secured by real estate for its exclusive payment," does not make it payable in real estate. *Branning v. Markham*, 12 Allen (Mass.) 454. So, evidence of a memorandum that the payee "is to take all the flour that he may want for family use, and such other articles as he may need previous to the day of payment," is no variance from a declaration on a note as payable in money. *Owen v. Barnum*, 7 Ill. 461. But it would be a variance to prove that the note was "to be paid in

property, the property called for must be tendered or paid.²⁴¹ And the maker must hold himself ready to deliver the goods.²⁴² And judgment should be for such property, unless the note has become a money demand.²⁴³ And this is said to be the case in Texas, on a default.²⁴⁴ So, a note payable in corn "estimated at \$20" is satisfied by payment of \$20.²⁴⁵ So, a note for the delivery of 200 barrels of oil in consideration of \$400, "reserving the right to pay 25 cents per barrel on payment of the \$400 above mentioned," may be satisfied at the maker's election by payment of \$450.²⁴⁶ And it is held in Iowa that a note payable in goods is not entitled to grace.²⁴⁷

In like manner, a note payable in labor of any kind is in general not negotiable.²⁴⁸ But it is said that a tender of the amount named in money is a good tender of payment of such note;²⁴⁹ and that, after default in payment, it becomes a money demand, and is assignable as such;²⁵⁰ or, at least, that this is the case where the maker, after the maturity of the note, had an opportunity to perform the work called for, and failed to make a tender of such work.²⁵¹ Moreover, where a note is payable "in wagon work on or before" a certain day, the

notes on the Bank of Kentucky or the Branch Bank at Lawrenceburg." *Osborne v. Fulton*, 1 Blackf. (Ind.) 234.

²⁴¹ *State v. Shupe*, 16 Iowa, 36.

²⁴² *Smith v. Loomis*, 7 Conn. 110; *Johnson v. Baird*, 3 Blackf. (Ind.) 153; *Bailey v. Simonds*, 6 N. H. 159. See, too, *Barnes v. Graham*, 4 Cow. (N. Y.) 452.

²⁴³ *Ransom v. Stanberry*, 22 Iowa, 334.

²⁴⁴ *Short v. Abernathy*, 42 Tex. 94; *Atterbury v. Biggerstaff*, 36 Tex. 177. See, however, *Brasher v. Davidson*, 31 Tex. 190, where the damages awarded on a note payable in cotton were the highest price of the cotton between the maturity of the note and the trial.

²⁴⁵ *Hise v. Foster*, 17 Iowa, 23.

²⁴⁶ *Knight v. Petroleum Co.*, 44 Vt. 472.

²⁴⁷ *McCartney v. Smalley*, 11 Iowa, 85.

²⁴⁸ *Reynolds v. Richards*, 14 Pa. St. 206; *Quinby v. Merritt*, 11 Humph. (Tenn.) 439. And see *Bothick v. Purdy*, 3 Mo. 82, where it is said not to be assignable. So, an instrument in the form of a note payable in services and containing an agreement on the payee's part is not a promissory note. *McClellan v. Coffin*, 93 Ind. 456.

²⁴⁹ *Ferguson v. Hogan*, 25 Minn. 135.

²⁵⁰ *Schnier v. Fay*, 12 Kan. 184.

²⁵¹ *Schuessler v. Watson's Adm'r*, 37 Ala. 98.

work to be done may be selected before maturity by the payee, at maturity by the maker.²⁵²

“Sterling”—“Dollars.”

§ 102. Under the general rule that the place of payment is contemplated in construing the terms of the bill or note, the word “sterling” will be construed to mean *sterling where payable*.²⁵³ If drawn in England, “sterling” means English currency.²⁵⁴

So, in general, the term “dollars” in the United States means lawful currency of the United States.²⁵⁵ But, if made and payable during the war in the seceded states, it will for like reason be construed to be payable in Confederate currency.²⁵⁶ And in such case parol evidence is admissible to show that Confederate currency was intended; ²⁵⁷ or was not intended.²⁵⁸ But it is not admissible to prove

²⁵² Johnson v. Seymour, 19 Ind. 24. But an option to the maker to pay in other designated notes expires at the maturity of the paper. Western Mfg. Co. v. Rogers (Neb.) 74 N. W. 849.

²⁵³ Byles, Bills, 86; Taylor v. Booth, 1 Car. & P. 286.

²⁵⁴ Lansdowne v. Lansdowne, 2 Bligh, 95; Kearney v. King, 2 Barn. & Ald. 301.

²⁵⁵ Bank v. Supervisors, 7 Wall. 26; Thorington v. Smith, 8 Wall. 1. So, Cook v. Lillo, 103 U. S. 792, where the note was executed in the Confederate States, but there was no evidence of an understanding for payment in “Confederate dollars.”

²⁵⁶ Donley v. Tindall, 32 Tex. 43; Confederate Note Case, 19 Wall. 548. These cases are apparently opposed to some earlier cases, which refuse the admission of parol evidence to show that by “dollars” was intended “Commonwealth Paper,” Baugh v. Ramsey, 4 T. B. Mon. (Ky.) 155; or bank notes, Noe v. Hodges, 3 Humph. (Tenn.) 162; Pack v. Thomas, 13 Smedes & M. (Miss.) 11; or depreciated money, McMinn v. Owen, 2 Dall. (Pa.) 173. And any presumption that Confederate currency was intended is rebutted by the expression “current funds at the time the note falls due.” Hilliard v. Moore, 65 N. C. 540.

²⁵⁷ Thorington v. Smith, 8 Wall. 1; Donley v. Tindall, 32 Tex. 43; Carmichael v. White, 11 Heisk. (Tenn.) 262; Lobdell’s Adm’r v. Fowler, 33 Tex. 346; Miller v. Lacy, Id. 351, although in this last case “dollars” are said to mean prima facie United States currency. And, to the same effect, see Cook v. Lillo, 103 U. S. 792. So, in Taylor v. Bland, 60 Tex. 29, the circumstances of the transaction were held to prove the understanding of the parties.

²⁵⁸ Bryan v. Harrison, 76 N. C. 360.

by parol that a certificate of deposit for so many "dollars" meant the depreciated bank notes or other currency in which the deposit had been made;²⁵⁹ or a currency used in the deposit, and since then depreciated.²⁶⁰ And, where a deposit has been made in depreciated bills in a bank keeping also a separate account of specie deposits, the holder's refusal to accept depreciated bills in payment of a check against the deposit does not prejudice his right to protest the check against the maker.²⁶¹

In like manner, a note for so many "dollars" is payable in United States currency, although the consideration for it was a loan in depreciated bank notes.²⁶² And, where a bank is only authorized to issue bills redeemable in gold, it cannot be allowed to set up an agreement to pay in Confederate notes.²⁶³ On a bill payable in "dollars," however, a judgment cannot be rendered for coin.²⁶⁴ Nor, on the other hand, is a tender of cotton any defense to such a bill or note.²⁶⁵

Parol Evidence.

§ 103. Furthermore, it cannot be shown by parol that "lawful money" means "lawful *silver* money";²⁶⁶ nor can "current lawful money" mean other than what is lawful by statute, and it cannot be explained otherwise by parol.²⁶⁷ So, "current money of Missouri"

But, to the effect that parol evidence is inadmissible, see *Austin v. Kinsman*, 13 Rich. Eq. (S. C.) 259; *Leslie v. Langham*, 40 Ala. 524; *Roane v. Green*, 24 Ark. 210. And an agreement to receive Confederate currency in payment, if without consideration and upon an unfulfilled condition, constitutes no defense to a note. *Johnston v. Josey*, 34 Tex. 533.

²⁵⁹ *Osgood v. McConnell*, 32 Ill. 74.

²⁶⁰ *Marine Bank of Chicago v. Chandler*, 27 Ill. 525; *Marine Bank of Chicago v. Ogden*, 29 Ill. 248.

²⁶¹ *Howes v. Austin*, 35 Ill. 396.

²⁶² *Womack v. Walling*, 1 Baxt. (Tenn.) 425.

²⁶³ *Manufacturers' Bank v. Lamar*, 46 Ga. 563, notwithstanding the scaling ordinance of 1863.

²⁶⁴ *Davidson v. Peticolas*, 34 Tex. 27. But see *Harrell v. Barnes*, 34 Tex. 413.

²⁶⁵ *Lang v. Waters' Adm'r*, 47 Ala. 625.

²⁶⁶ *Alsop v. Goodwin*, 1 Root (Conn.) 196.

²⁶⁷ *Lee v. Biddis*, 1 Dall. (Pa.) 175.

cannot be shown to mean paper money;²⁶⁸ or "Illinois currency," or "currency," or "current funds," to mean depreciated bank bills;²⁶⁹ or "current bankable funds";²⁷⁰ or "any current bank paper or state treasury notes of the state of Texas" to mean Confederate currency.²⁷¹ But it may be shown by parol that "current funds" are equivalent to money.²⁷²

Neither is parol evidence admissible to show that it was intended that a note or bill should be paid in work;²⁷³ or in real estate;²⁷⁴ or in Indiana state stock money;²⁷⁵ or in railroad notes;²⁷⁶ or in debts of other persons;²⁷⁷ or in goods;²⁷⁸ or that it should be paid in bank notes, notwithstanding it was expressly "to be canceled by a cotton bond."²⁷⁹ For a consideration of the numerous cases that have arisen under the "scaling" acts and ordinances of some of the Southern states, the reader is referred to the chapter on "Payment," in a later part of this work.

²⁶⁸ Cockrill v. Kirkpatrick, 9 Mo. 697.

²⁶⁹ Marine Bank of Chicago v. Birney, 28 Ill. 90, notwithstanding the custom of Chicago banks to pay depositors in the same depreciated bills in which their deposits were made. See, too, Springfield Marine & Fire Ins. Co. v. Tincher, 30 Ill. 399. So, too, when payable in "current funds." Marc v. Kupfer, 34 Ill. 286. But it was held in Pilmer v. Bank, 16 Iowa, 330, that the parol evidence was admissible to explain an order payable in currency. Dillon, J., saying: "The word 'currency' is far from having a settled, fixed, and precise meaning, and, even if it had such a meaning in general, it might acquire in certain localities or among certain classes a different signification. * * * We believe, upon examination, and contrary to our first impression, that, where a note is payable in currency, no rule is violated in receiving evidence of the general and customary meaning of these words at the place where the draft is payable."

²⁷⁰ Taylor v. Turley, 33 Md. 500; Turley v. Taylor, 6 Baxt. (Tenn.) 376.

²⁷¹ Woods v. Parker, 36 Tex. 131.

²⁷² American Emigrant Co. v. Clark, 47 Iowa, 671.

²⁷³ Bradley v. Anderson, 5 Vt. 152.

²⁷⁴ Linville v. Holden, 2 MacArthur (D. C.) 329.

²⁷⁵ Burns v. Jenkins, 8 Ind. 417.

²⁷⁶ Hair v. La Brouse, 10 Ala. 548.

²⁷⁷ Murchie v. Cook, 1 Ala. 41.

²⁷⁸ Cox v. Wallace, 5 Blackf. (Ind.) 199.

²⁷⁹ Cole v. Hundley, 8 Smedes & M. (Miss.) 473.

IV. ITS CERTAINTY.

A. Certainty as to Amount and Funds.

- § 104. Certainty of Amount Payable.
 105. Marginal Figures—Blanks.
 106. Designation of Currency—Parol Evidence—Statutes.
 107. Payment out of Particular Fund.
 108. Fund Referred to for Reimbursement.

Certainty of Amount Payable.

§ 104. One of the essential elements of negotiable paper is certainty of amount to be paid.²⁸⁰ An order to pay “the net amount of sales” is not a negotiable bill of exchange;²⁸¹ nor one for “the proceeds” of a shipment of goods “valued about £2,000.”²⁸² In like manner, a promise to account for the proceeds of certain notes,²⁸³ or to pay “whatever you may collect for me from A.,”²⁸⁴ is not a negotiable promissory note. So, too, the following instruments have been held to be nonnegotiable: An order for payment for “68 bushels of wheat at three cents below first quality wheat”;²⁸⁵ a promise to pay £100 “and all fines according to rule”;²⁸⁶ or £100 “and all

²⁸⁰ Byles, Bills, 95; Chit. Bills, 154; 1 Daniel, Neg. Inst. 56; 1 Edw. Bills & N. § 153; 1 Pars. Notes & B. 37; Story, Bills, § 42; Story, Prom. Notes, § 20; Smith v. Nightingale, 2 Starkie, 375; Jones v. Simpson, 2 Barn. & C. 318, 3 Dowl. & R. 545; Cushman v. Haynes, 20 Pick. (Mass.) 132; Fiske v. Witt, 22 Pick. (Mass.) 83; Hasbrook v. Palmer, 2 McLean, 10, Fed. Cas. No. 6,188; Legro v. Staples, 16 Me. 252; Gaar v. Banking Co., 11 Bush (Ky.) 180; Matthews v. Redwine, 23 Miss. 233; Stillwell v. Craig, 58 Mo. 24.

²⁸¹ Jackson v. Tilghman, 1 Miles (Pa.) 31.

²⁸² Jones v. Simpson, 2 Barn. & C. 318, 3 Dowl. & R. 545.

²⁸³ Fiske v. Witt, 22 Pick. (Mass.) 83.

²⁸⁴ Legro v. Staples, 16 Me. 252.

²⁸⁵ Lent v. Hodgman, 15 Barb. (N. Y.) 274. But a mortgage securing a note for 20 bales of cotton may be foreclosed, as though payable in cash, on proof of the value of the cotton. Hatcher v. Chancey, 71 Ga. 689.

²⁸⁶ Ayrey v. Fearnside, 4 Mees. & W. 168. So, if it contains an agreement to pay all taxes that may be levied upon it or upon a collateral mortgage. Farquhar v. Insurance Co., 13 Phila. 473; Carmody v. Crane (Mich.) 68 N. W. 268.

other sums which shall be due him";²⁸⁷ or \$100 "and such additional premiums as may become due" on a certain policy of insurance;²⁸⁸ or "deducting all advances and expenses";²⁸⁹ or "first deducting" amount that may be owing from the payee to the maker.²⁹⁰ In Iowa, however, a note for \$100 "due for building my mill, subject to diminution by any excess in certain bills of hardware over the original bills," has been held to be for an amount certain.²⁹¹

In general, the rule requiring certainty as to amount is satisfied if the amount can be ascertained. Thus, "the sum making \$450 on the first day of January next" is sufficiently certain.²⁹² So, too, is a certain sum per acre for a designated tract of land.²⁹³ And an indorsement on a bond, "Pay the within contents to," etc., has been held to constitute a good bill of exchange.²⁹⁴ And the amount is not rendered uncertain by the addition of such words as "with interest,"²⁹⁵ "with current exchange on B.,"²⁹⁶ nor even, it has been

²⁸⁷ *Smith v. Nightingale*, 2 Starkie, 375; *Bolton v. Dugdale*, 4 Barn. & Adol. 619, 1 Nev. & M. 412; *Firbank v. Bell*, 1 Barn. & Ald. 36.

²⁸⁸ *Dodge v. Emerson*, 34 Me. 96; *Marrett v. Insurance Co.*, 54 Me. 537; *Lime Rock Ins. Co. v. Hewett*, 60 Me. 407; *Palmer v. Ward*, 6 Gray (Mass.) 340.

²⁸⁹ *Cushman v. Haynes*, 20 Pick. (Mass.) 132. So, a note containing a provision that a smaller amount, "if paid January 1st, shall cancel this note." *Fralick v. Norton*, 2 Mich. 130.

²⁹⁰ *Barlow v. Broadhurst*, 4 Moore, 471; *Leeds v. Lancashire*, 2 Camp. 205.

²⁹¹ *Green v. Austin*, 7 Iowa, 521.

²⁹² *Knight v. Jones*, 21 Mich. 161.

²⁹³ *Smith v. Clopton*, 4 Tex. 109.

²⁹⁴ *Bay v. Freazer*, 1 Bay (S. C.) 66.

²⁹⁵ Interest from date being intended, and the fact that the note is only payable after the maker's death being immaterial. *Richards v. Richards*, 2 Barn. & Adol. 447; *Roffey v. Greenwell*, 10 Adol. & E. 222. But a note has been held to be nonnegotiable if payable "with interest the same as savings banks pay," *Whitwell v. Winslow*, 134 Mass. 343; or in two years with interest, or without interest if paid within one year, *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87; *Id.*, 52 Mich. 525, 18 N. W. 248. So, a note with 7 per cent. interest, if paid at maturity, otherwise 10 per cent. *Cayuga Co. Nat. Bank v. Purdy*, 56 Mich. 6, 22 N. W. 93. But see, contra, *Smith v. Crane*, 33 Minn. 144, 22 N. W. 633. As to the effect of stipulations for attorney's fees, costs, etc., see §§ 205, 206, *infra*.

²⁹⁶ *Price v. Teal*, 4 McLean, 201, Fed. Cas. No. 11,417; *Grutacup v. Woul-luise*, 2 McLean, 581, Fed. Cas. No. 5,854; *Smith v. Kendall*, 9 Mich. 241; *Leggett v. Jones*, 10 Wis. 34. So, too, *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783, overruling *Lowe v. Bliss*, 24 Ill. 168. The contrary was held in

held, by a provision for interest from date, if not paid at maturity.²⁹⁷ Neither is the mere misspelling of the number of dollars—e. g. “fife hundret,” “thee hundred”—of any consequence if there is no doubt as to the amount intended.²⁹⁸

Marginal Figures—Blanks.

§ 105. It is usual and advisable to express the amount in the body of the instrument in words at length, and also in the margin, at top or bottom, in figures. In checks the marginal figure is usually placed at the lower left-hand corner; in notes at the upper left-hand corner; and in bills of exchange at either left-hand corner indifferently. Unless required by statute, the marginal figures are unnecessary,²⁹⁹ and form no part of the instrument.³⁰⁰ They are of service chiefly in aiding an omission or clearing up a doubt.³⁰¹ Moreover, where the amount is left blank in the body of the instrument, they

Russell v. Russell, 1 MacArthur (D. C.) 263, where the bill was payable and drawn in the same place. See, also, contra, Lowe v. Bliss, 24 Ill. 168; Philadelphia Bank v. Newkirk, 2 Miles (Pa.) 442; Fitzharris v. Leggatt, 10 Mo. App. 527.

²⁹⁷ Parker v. Plymell, 23 Kan. 402.

²⁹⁸ Ohm v. Yung, 63 Ind. 432; Burnham v. Allen, 1 Gray (Mass.) 496; especially if the amount is correctly given in figures in the margin, as in the latter case.

²⁹⁹ Chit. Bills, 172; Elliott's Case, 2 East, P. C. 951; Sweetser v. French, 13 Mete. (Mass.) 262.

³⁰⁰ Riley v. Dickens, 19 Ill. 30; Smith v. Smith, 1 R. I. 398; and it was held in this case that an alteration of the marginal figures was immaterial. And in Hollen v. Davis, 59 Iowa, 444, it was held that there could be no recovery at law on a note containing no other expression of amount than the marginal figures. See, too, Norwich Bank v. Hyde, 13 Conn. 279, in which case Williams, C. J., said: “The aid the margin is to give is to remove an ambiguity in the body of the instrument or to clear up a doubt, not to supply a blank.” To the same effect, see Corgan v. Frew, 39 Ill. 31, in which case, however, the marginal figures are declared to be a part of the note. But the number of a bond on the margin is no such part of it that its alteration is material. Com. v. Emigrant Sav. Bank, 98 Mass. 12. On the other hand, credits indorsed on a note before its delivery reduce the amount, but do not render it uncertain or nonnegotiable. Smith v. Shippey, 182 Pa. St. 24, 37 Atl. 844.

³⁰¹ Where the marginal figure is plain, and the body of the instrument obscure, the amount is a question for the jury. Paine v. Ringold, 43 Mich. 341, 5 N. W. 421.

serve as a restriction upon the holder's authority to fill the blank.³⁰² On the other hand, both the existence of a blank and the authority to fill it are sometimes implied from the figures in the margin.³⁰³ Where the amount in the margin differs from that in the body of the instrument, the latter controls.³⁰⁴ Statutory provision is made in some foreign states for the way in which the amount shall be expressed and for the case of discrepancy between words and figures where both are used.³⁰⁵ In the absence of other statutory require-

³⁰² *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93; *Norwich Bank v. Hyde*, 13 Conn. 279; *Henderson v. Bondurant*, 39 Mo. 369; *Carson v. Hill*, 1 McMul. (S. C.) 76. But see, as to alteration of marginal figures and filling blank for a larger amount, *Shryver v. Hawkes*, 22 Ohio St. 308; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177; *Woolfolk v. Bank of America*, 10 Bush (Ky.) 504; *Hall v. Bank*, 5 Dana (Ky.) 258; *Garrard v. Lewis*, 10 Q. B. Div. 30.

³⁰³ *Witty v. Insurance Co.*, 123 Ind. 411, 24 N. E. 141, as authority to fill a complete blank, and a blank has been implied, and the written amount enlarged. In a case where the marginal figures were "\$334," and the amount in writing "three hundred dollars," with an intervening space, *Clute v. Small*, 17 Wend. (N. Y.) 238; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93, where the writing was only "eight," and the marginal figures "\$800." It being a question of intention for the jury whether the words should be added, *Boyd v. Brotherson*, *supra*. But see *Saunderson v. Piper*, 5 Bing. N. C. 425, 7 Scott 408, where it was held that evidence of such intention was inadmissible, and that the amount written in the body of the instrument could not be enlarged to conform to the marginal figures and stamp. On the other hand, a simple omission, like that of the word "dollars," may be supplied from the marginal figures. *Sweetser v. French*, 13 Metc. (Mass.) 262.

³⁰⁴ *Benj. Chalm. Dig. Bills & N.* 12; *Byles, Bills*, 85; *Chit. Bills*, 173; 1 *Daniel, Neg. Inst.* 94; *Saunderson v. Piper*, 5 Bing. N. C. 425, 7 Scott, 408; *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Payne v. Clark*, 19 Mo. 152. But it was otherwise determined on a question of intention in *Riley v. Dickens*, 19 Ill. 30.

³⁰⁵ The amount to be paid must be expressly stated (Code Napoleon, §§ 110, 188) in BELGIUM, FRANCE, GREECE, HAYTI, SAN DOMINGO, and TURKEY; also in BOLIVIA (Code Com. arts. 349, 463, 468, and the amount must be stated either in money or in currency receivable in trade); CHILI (Code Com. arts. 632, 633, 765, 766, 771); COLOMBIA (Code Com. art. 517); COSTA RICA (Code Com. art. 510); GERMANY (Exch. Law, arts. 4, 96); HOLLAND (Exch. Law, arts. 100, 208, 210); AUSTRIA (Exch. Law, arts. 4, 96); HUNGARY (Exch. Law, c. 1, § 1, as to bills); ECUADOR (same as Spain); MEXICO (Code Com. arts. 223, 447); NICARAGUA (Code Com. arts. 241, 312, 316); HONDURAS, GUATEMALA, and PARAGUAY

ments, the amount to be paid may be expressed either in words or in figures.³⁰⁶

(Ordinances of Bilbao, c. 1, § 2; Id. c. 14, § 1); PERU (Code Com. art. 522, as to drafts and notes); PORTUGAL (Code Com. arts. 321, 426); LOWER CANADA (Civ. Code, §§ 2280, 2344); SPAIN (Code Com. art. 563, as to drafts and notes); SWEDEN and NORWAY (Exch. Law, c. 1, § 1); VENEZUELA (Code Com. art. 1; also Law, art. 1). The sum to be paid and the currency in which it is to be paid must be expressed as an essential part of the instrument in the ARGENTINE REPUBLIC (Code Com. art. 776); BRAZIL (Code Com. arts. 354, 426); COLOMBIA (Code Com. art. 384); COSTA RICA (Code Com. art. 373); PERU (Code Com. art. 381, in bills of exchange); RUSSIA (Exch. Law, art. 541); SALVADOR (Code Com. arts. 381, 510); MEXICO (Code Com. arts. 223, 447); SPAIN (Code Com. art. 426, in bills of exchange); SWITZERLAND (Oblig. R. 722, in words and figures); URUGUAY (Code Com. art. 789); VENEZUELA (Code Com. art. 1, as to bills). The amount to be paid must be expressed "in letters complete" in ITALY (Code Com. art. 196); and "in letters and without abbreviations" in PERU (Code Com. art. 382); and "in the body of the instrument in letters" in SWITZERLAND (Oblig. R. 722). The amount to be paid must in a bill of exchange be expressed both in words and figures in DENMARK (Exch. Law, § 7); and in RUSSIA (Exch. Law, art. 545). If the amount named in the margin and that in the body differ, the latter controls in the ARGENTINE REPUBLIC (Code Com. art. 792); BRAZIL (Code Com. art. 359); CHILI (Code Com. art. 636); GERMANY (Exch. Law, art. 5); AUSTRIA (Exch. Law, art. 5); URUGUAY (Code Com. art. 511). If the words and figures expressing the amount payable differ, the smaller sum governs, unless there is evidence of a contrary intention and an acceptance for the larger sum is at the risk of the acceptor in DENMARK (Exch. Law, § 7). If the amount to be paid, as given several times, varies, whether in words or figures, the smallest sum governs in the ARGENTINE REPUBLIC (Code Com. art. 792); AUSTRIA (Exch. Law, art. 5); GERMANY (Exch. Law, art. 5); SWEDEN and NORWAY (Exch. Law 1851, c. 1, § 4); URUGUAY (Code Com. art. 811). The statutes of UPPER CANADA (volume 1, p. 230; volume 2, p. 150) prohibit any bill or stamped, printed, or engraved plate for the payment of less than one dollar. In NORWAY domestic bills under one hundred species-thaler are prohibited (Law 1830, p. 414).

³⁰⁶ *Nugent v. Roland*, 12 Mart. (La.) 663; *Strickland v. Holbrooke*, 75 Cal. 268, 17 Pac. 204. In *Nugent v. Roland* it was said by Martin, J.: "It is certainly very unsafe and may be said improper to state the sum to be paid in a bill or note in figures; but no law avoids a bill or note on that account, and authorizes us to allow a person who gives such a bill or note to avail himself of his own wrong, and get rid of his obligation." This decision was at once followed by an act providing that "no bill of exchange, promissory note, bank

If the amount is left blank by the maker, it implies an authority to the holder to fill it with any sum.³⁰⁷ In England, if stamped paper is used, the authority is limited to the amount warranted by the stamp.³⁰⁸ If the amount is left blank by the maker or drawer and the blank filled for an amount greater than was authorized, he will still be liable to a bona fide holder for the amount of the instrument as filled in.³⁰⁹

note, draft, or check (and now all obligations for the payment of money) shall be obligatory or admissible as evidence of a debt unless the sum of money mentioned or specified therein to be due or payable *be expressed in words at full length*," an exception being made in favor of instruments executed out of the state, and shown to be in accordance with the law or usages of the place of execution. 1823 P. L. 36. For this exception is now substituted the proviso, "unless the same shall be accompanied by proof that it was given for the sum therein expressed. The cents or fractional parts of a dollar may be in figures." Rev. St. 1870, § 319.

³⁰⁷ Chit. Bills, 38; 1 Edw. Bills & N. § 91; 1 Pars. Notes & B. 109; Bank of Commonwealth v. Curry, 2 Dana (Ky.) 142; Bank of Limestone v. Penick, 5 T. B. Mon. (Ky.) 25; Hall v. Bank, 5 Dana (Ky.) 258; Fullerton v. Sturges, 4 Ohio St. 529; Frazier v. Gains, 2 Baxt. (Tenn.) 92; McArthur v. McLeod, 51 N. C. 475. For authority to fill blanks in general, see chapter 6. But, where the amount to be paid depends on the place of payment to be designated by indorsement on a corporation bond, the blank place in the indorsement cannot be filled without special authority. Parsons v. Jackson, 99 U. S. 434. So, too, a blank for attorney's commissions, without which the amount payable is uncertain and the note nonnegotiable. Johnston v. Speer, 92 Pa. St. 227.

³⁰⁸ Chit. Bills, 38; Collis v. Emmett, 1 H. Bl. 313; Russell v. Langstaffe, 2 Doug. 496; Snaith v. Mingay, 1 Maule & S. 87; Crutchly v. Mann, 5 Taunt. 529. 1 Marsh. 29; Cruchley v. Clarence, 2 Maule & S. 90; Pasmore v. North, 13 East, 517.

³⁰⁹ 1 Daniel, Neg. Inst. 145; 1 Pars. Notes & B. 33, 109; Collis v. Emmett, 1 H. Bl. 313; Russel v. Langstaffe, 2 Doug. 514; Snaith v. Mingay, 1 Maule & S. 87; Leslie v. Hastings, 1 Moody & R. 119; Molloy v. Delves, 7 Bing. 428. 5 Moore & P. 275, 4 Car. & P. 492; Barker v. Sterne, 9 Exch. 684; Bank of Com. v. Curry, 2 Dana (Ky.) 142; Hall v. Bank, 5 Dana (Ky.) 258; Van Duzer v. Howe, 21 N. Y. 531; Herbert v. Huie, 1 Ala. 18; Huntington v. Bank of Mobile, 3 Ala. 186; Decatur Bank v. Spence, 9 Ala. 800; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Johns v. Harrison, 20 Ind. 317; Wilson v. Kinsey, 49 Ind. 35; McArthur v. McLeod, 51 N. C. 475; Frazier v. Gains, supra; Putnam v. Sullivan, 4 Mass. 45; Abbott v. Rose, 62 Me. 194; Smith v. Lockridge, 8 Bush (Ky.) 423; Jones v. Insurance Co., 1 Mete. (Ky.) 58; Bank of Limestone v. Penick, supra; Young v. Ward, 21 Ill. 223; Nichol v.

Designation of Currency—Parol Evidence—Statutes.

§ 106. The amount to be paid may be designated in any currency of ascertainable or known value. For the meaning of such words as "sterling," "currency," "dollars," etc., the reader is referred to another part of this work.³¹⁰ Where such words as "pounds," "shillings," "dollars," are altogether omitted, the instrument will not be vitiated if the meaning is unmistakable.³¹¹ And an amount that has been made too large by mistake may be corrected, or the mistake may be set up in defense, between the original parties.³¹² But parol evidence is inadmissible, as in other cases, to vary the instrument by showing that a different amount was agreed upon, except in cases of fraud and mistake. Thus, if a note be given for \$100, the price of goods purchased, it cannot be shown in defense that a different

Bate, 10 Yerg. (Tenn.) 429; Waldron v. Young, 9 Heisk. (Tenn.) 777; Joseph v. Bank, 17 Kan. 256. And in like case a surety is held where the maker fills the blank contrary to his verbal agreement with the surety. Gothrup v. Williamson, 61 Ind. 599. So, an indorser before delivery is liable to a holder for value without notice for a blank filled in excess of his authority. Diercks v. Roberts, 13 S. C. 338. Leaving blanks, however, for payee's name and amount gives no authority to add "from maturity" to a complete interest clause; and such an alteration is material, and discharges the maker. Curn v. Webb, 56 Ind. 96. As to liability for blanks negligently left and fraudulently filled, as well as liability to holders with notice, see chapter 6.

³¹⁰ See section 102, *supra*. A note for "500 pounds sterling money of the United Kingdom of Great Britain and Ireland" is negotiable. King v. Hamilton, 12 Fed. 478. So, "1,000 Mexican silver dollars." Hogue v. Williamson, 55 Tex. 553, 22 S. W. 580.

³¹¹ Byles, Bills, 86; Elliot's Case, 2 East, P. C. 951; 1 Leach, Crown Cas. 175; Phipps v. Tanner, 5 Car. & P. 488; Williamson v. Smith, 1 Cold. (Tenn.) 1; Booth v. Wallace, 2 Root (Conn.) 247; Harman v. Howe, 27 Grat. (Va.) 677; McCoy v. Gilmore, 7 Ohio, 268; Grant v. Brotherton's Adm'r, 7 Mo. 458; Murrill v. Handy, 17 Mo. 406; Coolbroth v. Purinton, 29 Me. 469; Northrop v. Sanborn, 22 Vt. 433; Corgan v. Frew, 39 Ill. 31; Beardsley v. Hill, 61 Ill. 354; Petty v. Fleishel, 31 Tex. 169; Ohm v. Yung, 63 Ind. 432. See, *contra*, Brown v. Bebee, 1 D. Chp. (Vt.) 227.

³¹² Claxon v. Demaree, 14 Bush (Ky.) 172. So, where an agreement to refund on certain contingency was omitted by fraud. Cogger v. McGee, 2 Bibb (Ky.) 321. So, where it is given for a nominal premium to cover risks that may be afterward indorsed. Maine Mut. Marine Ins. v. Stockwell, 67 Me. 382.

price was agreed upon;³¹³ or, if for the hire of a certain negro, that the wages were to be higher if cotton sold for \$300 per hundred-weight.³¹⁴

It is required by statute of many states, as well as by the common law, that the amount to be paid shall be certain.³¹⁵ The amount for which a bill or note may be issued is in general left unrestricted by statute. In Great Britain certain restrictions exist as to notes and bills under twenty shillings, and bank notes and other notes to bearer under five pounds.³¹⁶ A similar restriction still exists in South Carolina as to bills and notes under one dollar.³¹⁷

³¹³ *Downs v. Webster*, Brayt. (Vt.) 79.

³¹⁴ *Gazoway v. Moore*, Harp. (S. C.) 401.

³¹⁵ In CALIFORNIA, negotiable instruments must be "for the payment of a certain sum of money." Civ. Code, § 8087. In DAKOTA the same provision has been enacted. Rev. Code, § 1821. In GEORGIA a promissory note must be for "a specified amount of money or other articles of value." Code, § 3677. And in IDAHO for "a sum of money therein mentioned." Rev. St. § 2575. In KANSAS, negotiable notes and bills must be "for a sum or sums of money certain." Gen. St. c. 115, § 1. In LOUISIANA, the amount may be expressed in figures only, but in such case there can be no recovery without evidence to support the instrument. Rev. Laws, § 319. In MICHIGAN, promissory notes for the payment of a "sum of money therein mentioned" are made negotiable. Ann. St. § 1577. In NEBRASKA, negotiable instruments must be for a "sum or sums of money certain." Comp. St. § 3380. In NEVADA, negotiable notes must be for "a sum of money therein mentioned." 1 Comp. Laws 1873, c. 5, § 9. So, in NEW JERSEY (Gen. St. p. 2604, § 1); OHIO (Ann. St. § 3171); OREGON (Ann. Laws, § 3188); WISCONSIN (Ann. St. § 1675); and SOUTH DAKOTA (Comp. Laws, §§ 4456, 4457). So, by Negotiable Instrument Law in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 1), and NEW YORK and MARYLAND (§ 20).

³¹⁶ "By 48 Geo. III. c. 88, § 2, negotiable bills, notes, and checks for less than 20s. are made void, and by section 3 a penalty is imposed for issuing or negotiating them. But by 23 & 24 Vict. c. 111, § 19, checks for less than 20s. are made lawful. Bills and notes for less than £5 and over 20s. were regulated by 17 Geo. III. c. 30; but this act was suspended except as to notes payable to bearer on demand by 26 & 27 Vict. c. 105, and the suspension is continued by 39 & 40 Vict. c. 69. There are no restrictions as to amount in respect of nonnegotiable bills and notes." Chalm. Dig. 11. Bank notes under £5 have been prohibited in England since 1829 by 7 Geo. IV. c. 6, § 3. And in the act of 9 Geo. IV. c. 65, prohibited the issue or negotiation

³¹⁷ In SOUTH CAROLINA, bills and notes to order or bearer for any sum under one dollar are void. Rev. St. § 1403.

Payment Out of Particular Fund.

§ 107. As we have seen, the commercial character of an instrument depends upon its being a contract for unconditional payment. From this follows the rule that it must not be made payable out of any particular fund, and, if made so payable, its negotiability is destroyed thereby.³¹⁸

Thus, a bill or note is payable out of a particular fund, and therefore not negotiable, if payable out of the proceeds of certain bonds or drafts,³¹⁹ or other personal property;³²⁰ or on account of cotton

in England of any note for less than £5 payable to bearer on demand, made or issued or purporting to be made or issued "in Scotland or Ireland or elsewhere out of England."

³¹⁸ Byles, Bills, 98; Chit. Bills, 159; 1 Daniel, Neg. Inst. 53; 1 Edw. Bills & N. § 157; 1 Pars. Notes & B. 43; Story, Bills, § 46; Jenny v. Herle, 2 Ld. Raym. 1361; 8 Mod. 266; 1 Strange, 591; Haydock v. Lynch, 2 Ld. Raym. 1563; Dawkes v. De Loraine, 2 W. Bl. 782, 3 Wils. 207; Yeates v. Groves, 1 Ves. Jr. 280; Stevens v. Hill, 5 Esp. 247; Carlos v. Fancourt, 5 Term R. 482; Waters v. Carleton, 4 Port. (Ala.) 205; Gliddon v. McKinstry, 28 Ala. 408; West v. Foreman, 21 Ala. 400; Wilamouicz v. Adams, 13 Ark. 12; Owen v. Lavine, 14 Ark. 389; Hamilton v. Myrick, 3 Ark. 541; Mills v. Kuykendall, 2 Blackf. (Ind.) 47; Strader v. Batchelor, 8 B. Mon. (Ky.) 168; Turner v. Railroad Co., 95 Ill. 134; Second Nat. Bank of Lansing v. Lansing, 1 Brown, N. P. (Mich.) 181; Van Vacter v. Flack, 1 Smedes & M. (Miss.) 393; Wadlington v. Covert, 51 Miss. 631; Harriman v. Sanborn, 43 N. H. 128; Smith v. Wood, 1 N. J. Eq. 90; Herbert v. Tuthill's Ex'r, Id. 147; Rice v. Porter's Adm'r, 16 N. J. Law, 440; Atkinson v. Manks, 1 Cow. (N. Y.) 691, 707; Cook v. Satterlee, 6 Cow. (N. Y.) 108; Worden v. Dodge, 4 Denio (N. Y.) 159; Van Wagner v. Terrett, 27 Barb. (N. Y.) 181; Tradesman's Nat. Bank v. Green, 57 Md. 602; Burch v. Newberry, 1 Barb. (N. Y.) 648; Sheffield School Tp. v. Andress, 56 Ind. 157; Kinney v. Lee, 10 Tex. 155; Andrews v. Harvey, 39 Tex. 123; Averett's Adm'r v. Booker, 15 Grat. (Va.) 163; Jackman v. Bowker, 4 Metc. (Mass.) 235; Raigauel v. Ayliff, 16 Ark. 594; Blevins v. Blevins, 4 Ark. 441; Cota v. Buck, 7 Metc. (Mass.) 589; Carlisle v. Dubree, 3 J. J. Marsh. (Ky.) 542; Reeside v. Knox, 2 Whart. (Pa.) 233; Dyer v. Covington Tp., 19 Pa. St. 200; Nichol's Adm'r v. Davis, 1 Bibb (Ky.) 490; Smurr v. Forman, 1 Ohio, 273; Kelly v. Bronson, 26 Minn. 359; Curle v. Beers, 3 J. J. Marsh (Ky.) 170; Wiggins v. Vaught, Cheves (S. C.) 92; Conroy v. Ferree (Minn.) 71 N. W. 383.

³¹⁹ Kenny v. Hinds, 44 How. Prac. (N. Y.) 7; Raigauel v. Ayliff, 16 Ark. 594; Brill v. Hoile, 53 Wis. 537, 11 N. W. 42.

³²⁰ Worden v. Dodge, 4 Denio (N. Y.) 159; Atkinson v. Manks, 1 Cow.

consigned, with a promise to pay out of the proceeds.³²¹ So, too, if "on account of brick work done" on a certain building,³²² or of freight to be earned;³²³ or an order on a state treasurer by the public printer to pay "out of any moneys in your hands due me for printing";³²⁴ or on the postmaster general by a mail contractor, with the words "and charge the same to my account for transferring the United States mail";³²⁵ or by a private contractor, with the words "and charge the same to my account of grading, &c., as per contract";³²⁶ or an order payable to A. B., "if the same be due him from me, on his and my settlement, out of the last payment due on the houses which I am now building for you";³²⁷ or out of money due for work to be done, which never was done.³²⁸ So, too, if payable out of one's growing subsistence;³²⁹ or "out of my part of the estate";³³⁰ or "as soon as I am in possession of funds from the estate of B.";³³¹ or "on account of my share of rent which will be due June 1st";³³² or a simple order for the payment of rents.³³³ So, too, an order payable out of moneys to be collected by an attorney,

(N. Y.) 691, 707; *Curle v. Beers*, 3 J. J. Marsh. (Ky.) 170; *Owen v. Lavine*, 14 Ark. 389.

³²¹ *Lowery v. Steward*, 25 N. Y. 239, such order amounting in equity to an assignment of the cotton.

³²² *Pitman v. Breckenridge*, 3 Grat. (Va.) 127. But see *Ex parte Shellard*, 22 Wkly. Rep. 152, where an order, payable out of moneys which would become due the drawers on the completion of a certain contract, was held to operate as a bill of exchange, and require a stamp as such.

³²³ *Byles, Bills*, 98; *Banbury v. Lisset*, 2 Strange, 1211. But a like order from the freighter was held to be a good bill, being equivalent to an admission that the money was due. *Pierson v. Dunlop*, Cowp. 571.

³²⁴ *Wilamouicz v. Adams*, supra. So, *Stebbins v. Railroad Co.*, 2 Wyo. 71.

³²⁵ *Reeside v. Knox*, 2 Whart. (Pa.) 233.

³²⁶ *Ehrichs v. De Mill*, 75 N. Y. 370.

³²⁷ *Jackman v. Bowker*, 4 Mete. (Mass.) 235.

³²⁸ *Crowell v. Plant*, 53 Mo. 145.

³²⁹ *Josselyn v. Lacier*, 10 Mod. 294; *Russell v. Powell*, 14 Mees. & W. 418, where the fund referred to was part of a residuary share of an estate payable to the drawer's order by virtue of an order in chancery.

³³⁰ *Mills v. Kuykendall*, 2 Blackf. (Ind.) 47; *Herbert v. Smith*, 1 N. J. Eq. 147.

³³¹ *Wiggins v. Vaught*, Cheves (S. C.) 91.

³³² *Rice v. Porter's Adm'r*, 16 N. J. Law, 440.

³³³ *Morton v. Naylor*, 1 Hill (N. Y.) 583.

on whom the draft is made; ³³⁴ or "out of the demand I have against the estate of A."; ³³⁵ or an order on a sheriff, "out of 12 bales of cotton attached by you"; ³³⁶ or an order on a partner, with the words "and deduct the same from my share of the profits of the partnership"; ³³⁷ or, in general, "out of any money in your hands belonging to me"; ³³⁸ or by an army officer on a regimental paymaster for his pay; ³³⁹ or an order, with the words "being the amount that came to you from B. for me, and this shall be your warrant for so doing, and good as my receipt of said money." ³⁴⁰

On the other hand, the following instruments have been held not to be payable out of a particular fund, and to be negotiable, viz.: "Out of any property I may possess"; ³⁴¹ "out of my separate property and estate"; ³⁴² "out of any funds not before specifically appropriated"; ³⁴³ "as soon and as fast as the money can be collected"; ³⁴⁴ or

³³⁴ *Nichol's Adm'r v. Davis*, 1 Bibb (Ky.) 490; *Hamilton v. Myrick*, 3 Ark. 541; *Blevins v. Blevins*, 4 Ark. 441; *Gliddon v. McKinstry*, 28 Ala. 408; *Shields v. Taylor*, 25 Miss. 13; *Van Vaeter v. Flack*, 1 Smedes & M. (Miss.) 393; *Waters v. Carleton*, 4 Port. (Ala.) 205; *Crawford v. Cully*, *Wright* (Ohio) 453. But such a note has been held not to be payable out of a particular fund where made payable "as soon as the amount can be collected out of the contract, and, if not so collected, in four years." *Smith v. Ellis*, 29 Me. 422.

³³⁵ *West v. Foreman*, 21 Ala. 400.

³³⁶ *Wadlington v. Covert*, 51 Miss. 631.

³³⁷ *Munger v. Shannon*, 61 N. Y. 251. But a note promising to pay "forty dollars *profits*" has been held to be negotiable, parol evidence not being admitted to show that the word imputed a contingency. *Matthews v. Crosby*, 56 N. H. 21. And, to the same effect, see *Sears v. Wright*, 24 Me. 278.

³³⁸ *Averett's Adm'r v. Booker*, 15 Grat. (Va.) 163, *Lee, J.*, distinguishing this case from *Jolliffe v. Higgins*, 6 Munf. (Va.) 3, where the order for payment of a sum certain, which was "lodged in the hands" of the drawee and "was the property of" the payee, was held to be a good bill, not payable out of a particular fund.

³³⁹ *Smurr v. Forman*, 1 Ohio, 272.

³⁴⁰ *Harriman v. Sanborn*, 43 N. H. 128, this paper being without the words "value received," and plainly intended for a mere receipt.

³⁴¹ *Chickering v. Greenleaf*, 6 N. H. 51. So, the note of an incorporated bank "payable out of the joint funds thereof, and no other." *United States v. Smith*, 2 Cranch, C. C. 111, Fed. Cas. No. 16,326.

³⁴² *Skillen v. Richmond*, 48 Barb. 428.

³⁴³ *Bull v. Sims*, 23 N. Y. 570. But see, contra, *Matthis v. Town of Cameron*, 62 Mo. 504.

³⁴⁴ *Smith v. Ellis*, 29 Me. 422. So, a provision that the interest on a bond

one month after a certain life insurance policy becomes due.³⁴⁵ So, a draft in general terms by the secretary of the treasury for money, which was payable by treaty with France.³⁴⁶ So, too, a draft payable "on account of moneys advanced by me for the S. & F. Company."³⁴⁷

Fund Referred to for Reimbursement.

§ 108. Moreover, a fund is often referred to in a bill of exchange to indicate the means of reimbursement to the drawee. The negotiable character of the bill is not prejudiced by any such mention of a fund for reimbursement.³⁴⁸ The following phrases have been held to amount to nothing more than that, viz.: "And charge to my salary account";³⁴⁹ "and charge the same to apply on contract for

should be cumulative, and, if not paid when due, should be paid "as soon thereafter as sufficient money has been earned." *Strauss v. Telegraph Co.*, 164 Mass. 130, 41 N. E. 57.

³⁴⁵ *Herriman v. McKee*, 49 Iowa, 185.

³⁴⁶ *Bank of U. S. v. U. S.*, 2 How. 711, 734.

³⁴⁷ *Griffin v. Weatherby*, L. R. 3 Q. B. 753. "It is objected," said Mr. Justice Leech, "that it is not a bill because it orders payment out of a particular fund by reason of the words 'on account of moneys advanced by me for the Isle of Man Slate Company'; but that appears to me merely to denote the consideration for the order, and is merely an equivalent phrase to 'value received.' If the defendant had accepted generally, would he not have been absolutely bound to pay on the first of August, whether he had funds of the company in his hands or not? Most assuredly, as it seems to me, he would. Therefore this is a bill of exchange."

³⁴⁸ *Byles*, Bills, § 98; *Chit. Bills*, 160; 1 *Daniel*, Neg. Inst. 55; 1 *Edw. Bills*, § 158; 1 *Pars. Notes & B.* 44; *Story*, Prom. Notes, § 26; *Kelley v. City of Brooklyn*, 4 Hill (N. Y.) 263; *Bank of Kentucky v. Sanders*, 3 A. K. Marsh. (Ky.) 184; *Smith v. Ellis*, 29 Me. 422; *Coursin v. Ledlie's Adm'r*, 31 Pa. St. 506; *Matthews v. Crosby*, 56 N. H. 21; *MacLeod v. Snee*, 2 Strange, 762; *Early v. McCart*, 2 Dana (Ky.) 414; *Sears v. Wright*, 24 Me. 278; *Corbett v. Clark*, 45 Wis. 403; *Hollister v. Hopkins*, 13 Hun (N. Y.) 210. As to the effect of such a certificate of deposit on the fund itself, see *Bayor v. Bank*, 157 Ill. 62, 41 N. E. 642.

³⁴⁹ *Shaver v. Telegraph Co.*, 57 N. Y. 459; *MacLeod v. Snee*, supra. But a similar order by a judge upon the state treasurer concluding "and charge the same to account of my salary as judge," was held not to be a negotiable bill of exchange in *Strader v. Batchelor*, 8 B. Mon. (Ky.) 168.

building";³⁵⁰ "and charge to Bedford Road assessment";³⁵¹ "out of my share of the grain";³⁵² "and charge the same against whatever amount may be due me for my share of fish";³⁵³ "and I will credit your note to me for the amount."³⁵⁴ And this is true generally of bills drawn against shipments of goods, whether accompanied by the bills of lading or not.³⁵⁵ For phrases making mention of securities or particularizing the consideration, the reader is referred to a later chapter of this work.

³⁵⁰ *Hollister v. Hopkins*, 13 Hun (N. Y.) 210. So, *Carran v. Little*, 40 Ohio St. 397; *Texas Land & Cattle Co. v. Carroll*, 63 Tex. 48.

³⁵¹ *Kelley v. City of Brooklyn*, 4 Hill (N. Y.) 263.

³⁵² *Corbett v. Clark*, 45 Wis. 403.

³⁵³ *Redman v. Adams*, 51 Me. 429; or "against me and my share of my mother's estate," *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452.

³⁵⁴ *Early v. McCart*, 2 Dana (Ky.) 414.

³⁵⁵ *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416, affirmed 3 N. Y. 243; *Lowery v. Steward*, 3 Bosw. (N. Y.) 505; *Whitney v. Bank*, 137 Mass. 351. But, where a bill is so drawn, parol evidence is admissible to extend the restriction to a general acceptance of the bill. *Schmittler v. Simon*, 114 N. Y. 176, 21 N. E. 162.

B. Certainty as to Time of Payment.

§ 109. Certainty—In General.

110. Indefinite Expressions—Blanks—Omissions.

111. Payment Conditional—"When Able"—"When in Funds."

112. Payable "When Realized from Sales"—"When Collected."

113. — On Death—Marriage—Coming of Age.

114. — In Installments—On Default of Interest—After Notice—Per Annum.

115. — On Return of Papers—Completion of Building—Settlement of Accounts—Arrival of Ship.

116. — On Public Event—Wager.

117. — "On Demand."

118. — On Demand—Equivalent Expressions.

119. — On Demand if no Time Expressed.

120. Time of Payment—Memorandum—Parol Evidence.

Certainty—In General.

§ 109. A negotiable bill of exchange, promissory note, or check must be payable at a time certain. In many countries it is required by statute that the time be expressed in the instrument.³⁵⁶ It is also

³⁵⁶ Expression of the time of payment is essential by statute in the ARGENTINE REPUBLIC (Code Com. arts. 776, 916); AUSTRIA (Exch. Law, arts. 4, 96); BELGIUM (see Code Nap. § 110, and, as to notes, section 188); BOLIVIA (Code Com. arts. 362, 365, 463, 469, and, if no time be expressed, the bill is payable at sight, article 465); BRAZIL (Code Com. arts. 354, 426); CHILI (Code Com. arts. 633, 771; but notes may be without expressed time of payment, and are then payable 10 days after date, article 778); COLOMBIA (Code Com. arts. 384, 517, and, if no time be expressed in a note, it is payable 10 days after date, article 515); COSTA RICA (Code Com. arts. 373, 510, and, if no time be expressed in a note, it is payable 10 days after date, article 508); DENMARK (Exch. Law, § 8); ECUADOR (see "Spain"); FRANCE (Code Com. §§ 110, 188); GENEVA (Code Nap.); GERMANY (Gen. Exch. Law, arts. 4, 96); GREECE (Code Nap.); GUATEMALA (see "Paraguay"); HAYTI (Code Nap.); HOLLAND (Exch. Law, arts. 100, 208, as to bills of exchange, but not as to notes); HONDURAS (see "Paraguay"); HUNGARY (Exch. Law, c. 1, §§ 1, 14); ITALY (Code Com. arts. 196, 273); MEXICO (Code Com. arts. 223, 447); NICARAGUA (Code Com. arts. 241, 312); PARAGUAY (Ord. Bilbao 1774, c. 1, § 2; Id. c. 14, § 1); PERU (Code Com. arts. 381, 522; but notes and certificates of deposit are payable 10 days after date, if no time be expressed, article 520); PORTUGAL (Code Com. arts. 321, 426); RUSSIA

required by some foreign statutes that such instruments be made payable on certain days or within a certain limit of time.³⁵⁷ And it

(Exch. Law, art. 541); SALVADOR (Code Com. arts. 381, 510); SAN DOMINGO (Code Nap.); SPAIN (Code Com. arts. 426, 563; and, if no time be expressed in a note, it is payable 10 days after date, article 561); SWEDEN and NORWAY (Exch. Law, c. 1, § 1); SWITZERLAND (Oblig. R. 722); TURKEY (Code Nap.); URUGUAY (Code Com. art. 789, but drafts are payable at sight, if no time be expressed); VENEZUELA (Code Com. art. 1; Law II. art. 1). By the Civil Code of LOWER CANADA (sections 2283 and 2346) bills and notes are payable on demand if no time be expressed. And in the ARGENTINE REPUBLIC bills are payable at sight if no time be expressed (Code Com. art. 786). If no time of payment be expressed, the bill or note is wholly void as a commercial instrument by the Code Napoleon (Bedarride's Droit Commercial, vol. 1, p. 108; Id. vol. 2, p. 392); but it may be payable on demand (Id.). In such case the phrases "*à volonté*," "*à présentation*," "*toutes fois et quand*," are commonly used as equivalent to the English "on demand." An express time of payment is also indispensable in GERMANY (Thöl, W. R. 151); and in ITALY a certain fixed day must be named for the payment of notes which are payable in produce (Code Com. art. 278).

³⁵⁷ By the Code Napoleon (section 129) a bill of exchange may be made payable at sight or at one or more days, months, or usances after sight or date, or on a fixed day, or at a fair. This is the law in BELGIUM, FRANCE, GREECE, HAYTI, SAN DOMINGO, and TURKEY. Likewise in SPAIN (Code Com. art. 439); COSTA RICA (Code Com. art. 386); HUNGARY (Exch. Law, c. 1, § 89); ECUADOR (Spanish Code); MEXICO (Code Com. art. 334); NICARAGUA (Code Com. art. 250); PORTUGAL (Code Com. arts. 321, 372). So, in PERU (Code Com. art. 399); SALVADOR (Code Com. art. 394); COLOMBIA (Code Com. art. 397), except as to usances; GERMANY (Exch. Law, art. 4); and in GERMANY a bill or note cannot be paid in installments (articles 4, 96). In SWEDEN and NORWAY (Exch. Law, c. 1, § 3), bills may be made payable at sight or on a fixed day or a certain day after sight or date. So, in SWITZERLAND (Oblig. R. 722), or at a fair. Bills and notes may be made payable at sight or on demand, certain days or months after sight or after date, or on a fixed day, in the ARGENTINE REPUBLIC. Code Com. arts. 786, 917. In HOLLAND, bills may be made payable at or after sight or at a time certain. Exch. Law, art. 100. In NICARAGUA (Code Com. art. 312), all drafts are payable at sight, unless expressly payable on a fixed day or a certain time from date, but they cannot be made payable a certain time after sight. In DENMARK (Exch. Law, §§ 8, 9), a bill may be made payable at sight or a certain time after sight or date, or on a fixed day, but must be payable within three months if drawn in Denmark, four months if in the Faro Islands, six months if in Iceland or the West Indies, one year if in Guinea; and by the act of 1843 all bills drawn by the drawer on him-

was formerly required by English statute that all negotiable bills or notes under £5 should be made payable within 21 days from their date.³⁵⁸ In the United States there are but few statutory regulations on the subject.³⁵⁹ In the absence of statute, it is both customary and advisable to express the time of payment in the instrument. Usually, this time is either expressed to be "on demand" or in a designated number of days or months after date. Bills of exchange are also frequently made payable "at sight" or a certain number of days "after sight." This means in the case of a bill of exchange at or after acceptance or protest for nonacceptance.³⁶⁰ In the case of a promissory note it seems to be equivalent to "demand."³⁶¹ In England it is now by statute equivalent in both cases to "demand."³⁶²

Where a time of payment is expressed in a negotiable instrument, it becomes a material part of the contract. In such case it must be

self must be payable within three months. In URUGUAY (Code Com. art. 805), drafts may be made payable at sight, or on a fixed day, or a certain time after sight or date. So, in VENEZUELA (Code Com. art. 16) as to bills.

³⁵⁸ 17 Geo. III. c. 30, now repealed. And it is said: "If a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill." Willes, C. J., in *Colehan v. Cooke*, Willes, 396.

³⁵⁹ In CALIFORNIA, "a negotiable instrument may be with or without designation of the time of payment" (Civ. Code, § 3091); and one "which does not specify the time of payment is payable immediately" (Id. § 3099). In DAKOTA, the above-mentioned provisions of the California Code have been enacted (Rev. Code, §§ 1825, 1830). In GEORGIA, promissory notes must be made for payment "at a specified time" (Code, § 3677). In MINNESOTA, the time fixed by statute as "reasonable" for a demand to hold an indorser on a note payable "on demand" is 60 days. Gen. St. §§ 2231, 2232. Notes payable on demand are not entitled to grace. Id. § 2238. In NEW HAMPSHIRE the provision as to "reasonable time" in the case of demand notes is the same as that of Minnesota. Pub. St. c. 202, § 5.

³⁶⁰ Byles, Bills, 81. "It must be presented for acceptance, and the time of the bill begins to run, not from the mere presentment, but from the presentment and acceptance." Story, J., in *Mitchell v. Degrand*, 1 Mason, 181, Fed. Cas. No. 9,661.

³⁶¹ Byles, Bills, 81; *Holmes v. Kerrison*, 2 Taunt. 323; *Sutton v. Toomer*, 7 Barn. & C. 416, 1 Man. & Ry. 125. At least, it does not mean on or after date. *Sturdy v. Henderson*, 4 Barn. & Ald. 592. "On demand, at sight," is said by Bolland, B., to mean "if you demand it and show it." *Dixon v. Nuttall*, 6 Car. & P. 320, 1 Crompt. M. & R. 307.

³⁶² 34 & 35 Vict. c. 74.

averred in the pleading, and its omission will constitute a fatal variance.³⁶³ And a subsequent readiness to pay is no defense to an action on such an instrument.³⁶⁴

Indefinite Expressions—Blanks—Omissions.

§ 110. Where a bill or note is for the payment of money "by" November 1st, it is due on that day.³⁶⁵ So, if payable "on or by" such a day,³⁶⁶ or "on or before" a day named.³⁶⁷ And, where an instrument was payable "on" a day certain, a description of it in the pleadings as payable "on or before" that day was held to be sufficient.³⁶⁸ But a bill or note payable on a day certain "or at any time before maturity" is not negotiable for want of sufficient certainty.³⁶⁹ And an agreement indorsed on a promissory note to pay

³⁶³ *Sebree v. Dorr*, 9 Wheat. 558.

³⁶⁴ *McCreary v. Newberry*, 25 Ill. 408.

³⁶⁵ *Preston v. Dunham*, 52 Ala. 217.

³⁶⁶ *Massie v. Belford*, 68 Ill. 290. So, if payable "on or after." *Brookshire v. Allen* (Tex. Civ. App.) 32 S. W. 164.

³⁶⁷ *Bates v. Leclair*, 49 Vt. 229; *Jordan v. Tate*, 19 Ohio St. 586; *Mattison v. Marks*, 31 Mich. 421; *Helmer v. Krolick*, 36 Mich. 371, in which case a note payable "on or before three years from date" was held not to mature until the end of the three years. A note payable "on or before the first day of May next" is negotiable. *Curtis v. Horn*, 58 N. H. 504. So, a note payable in six years, "or sooner after five years," on default of interest. *American Nat. Bank v. American Wood-Paper Co.*, 19 R. I. 146, 32 Atl. 305. And the same has been held in Pennsylvania of a note payable on a day certain "or before if made out of the sale" of a machine. *Ernst v. Steckman*, 74 Pa. St. 13. But see, contra, *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64. The following also have been held nonnegotiable: A note payable "on demand or in three years," with interest during said term, "or for such further time as said principal or any part thereof shall remain unpaid," *Mahoney v. Fitzpatrick*, 133 Mass. 151; a note payable "on or before two years from date," without interest if paid within one year, *Lamb v. Story*, 45 Mich. 488, 8 N. W. 87; *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; a note payable "on or before four years," with interest payable annually if convenient, *Humphrey v. Beckwith*, 48 Mich. 151, 12 N. W. 151.

³⁶⁸ *Morton v. Tenny*, 16 Ill. 494.

³⁶⁹ *Hubbard v. Mosely*, 11 Gray (Mass.) 170; *Way v. Smith*, 111 Mass. 523. *Morton, J.*, saying: "This stipulation gives the maker the right to pay the note at any time before its maturity at his option, and such payment would discharge his contract. It renders the contract uncertain and contingent both

it "in any time within six years" does not extend the statute of limitations, but it will commence to run from the date of the agreement.³⁷⁰

Sometimes the time of payment is left blank with the intention that it shall be afterwards filled up by the holder. As we have already seen, authority to any bona fide holder to fill such blank is inferred by law from the delivery of the instrument with the blank.³⁷¹ But, where this authority is not coupled with an interest, it cannot be exercised after the drawer's death.³⁷² Often the blank left is a mere accidental omission of some simple word,—e. g. "day," "year," "month," "date,"—which can be readily supplied.³⁷³ In all such cases, where the omission and intention are perfectly plain, recovery can be had on the instrument without insertion of the word or words omitted. And a similar omission in the pleading, whereby a note payable three months after date is described as payable "three from date," is immaterial, especially where the declaration goes on to recite that "the said three months have elapsed."³⁷⁴

It seems that, where a note dated in December is made payable on a certain day in "December next," it may be shown by parol that December *instant* was intended.³⁷⁵ So, if payable "on the 6-9 Jan.," the usage of indicating the days of grace in this manner may be

as to the time of payment and the amount to be paid, and is inconsistent with the essential character of a negotiable promissory note." So, too, *Stults v. Silva*, 119 Mass. 137. See, however, as to an option to pay before maturity, *Union Loan & Trust Co. v. Road Co.*, 51 Fed. 840.

³⁷⁰ *Young v. Weston*, 39 Me. 492.

³⁷¹ *McGrath v. Clark*, 56 N. Y. 34; *Fullerton v. Sturges*, 4 Ohio St. 529; *Witte v. Williams*, 8 S. C. 290; *Michigan Ins. Co. v. Leavenworth's Estate*, 30 Vt. 11.

³⁷² *Michigan Ins. Co. v. Leavenworth's Estate*, *supra*.

³⁷³ Payable "in the (year) of our Lord, etc.," *Hunt v. Adams*, 6 Mass. 519; "four months after (date)," *Pearson v. Stoddard*, 9 Gray (Mass.) 199; "six (months) after date," *Conner v. Routh*, 7 How. (Miss.) 176; *Nichols v. Frothingham*, 45 Me. 220; "ninety (days) after date," *Deshon v. Leffler*, 7 Mo. App. 595; *Boykin v. Bank of Mobile*, 72 Ala. 262. But parol evidence was held inadmissible to show the intention and clear up the meaning of a note payable "in one from the first of October, in cattle or in grain the first of January following." *Wainwright v. Straw*, 15 Vt. 215.

³⁷⁴ *Passumpsic Bank v. Goss*, 31 Vt. 315.

³⁷⁵ *McCrary v. Caskey*, 27 Ga. 54. But see, *contra*, *Wood v. Goodrich*, 9 Yerg. (Tenn.) 266, where it was held that relief could only be had in equity.

shown by parol.³⁷⁶ And even such a phrase as "when the lumber is run to market" has been held capable of explanation by parol.³⁷⁷

When the time of payment is so wholly uncertain as not to be ascertainable from the instrument, its negotiable character is thereby lost.³⁷⁸ The ambiguity, however, is often more apparent than real, and is in such cases capable of construction by the court without prejudice to the negotiability of the paper. Thus, a bill of exchange in these words, "On the thirty-first of October pay, &c., * * * payable in Paris, December thirty-first," and dated at New York, was held to be payable at option in Paris, in December, or in New York, in October, or else the provision for payment in October was to be rejected as surplusage.³⁷⁹ A note payable "in good notes which is to be due in eighteen months" is for immediate payment in notes of that description.³⁸⁰ A note dated July 20th, and payable "one year, August 15th, after date," is due in one year from the 15th day of August after its date.³⁸¹ In general, a note which is not dated, and is made payable a given time after date, is to be considered as maturing in such given time from the day it is issued.³⁸² But, if it is postdated, the written date is intended, and not the time of delivery.³⁸³

³⁷⁶ *Kelsey v. Hibbs*, 13 Ohio St. 340.

³⁷⁷ *Lamon v. French*, 25 Wis. 37.

³⁷⁸ This is the case where a note contains a power to the payees to demand payment "at any time they may deem this note insecure, even before the maturity of the same." *First Nat. Bank v. Bynum*, 84 N. C. 24.

³⁷⁹ *Henschel v. Mahler*, 3 Denio (N. Y.) 428, Johnson, J., dissenting. But, when the time fixed in the body of the note is distinct, it will not be affected by a marginal memorandum naming a different day. *Fisk v. McNeal*, 23 Neb. 726, 37 N. W. 616.

³⁸⁰ *Wade v. Darrow*, 15 Ind. 212. But action for performance by giving such notes need not be deferred until the expiration of that time. *Id.*

³⁸¹ *Washington Co. Bank v. Jerome*, 8 Mich. 490.

³⁸² *Richardson v. Ellett*, 10 Tex. 190. Therefore, if it is payable "one day after date," it does not mature until the next day, and cannot be sued until the day after. *Raele v. Moore*, 58 Ga. 94.

³⁸³ 1 Edw. Bills & N. § 171; 1 Pars. Notes & B. 49; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Bumpass v. Timms*, 3 Sneed (Tenn.) 459. And such time of delivery may be shown by parol. *Byles, Bills*, 79; *Story, Bills*, 37; *Davis v. Jones*, 17 C. B. 625; *Giles v. Bourne*, 6 Maule & S. 73; *Richardson v. Ellett*, 10 Tex. 190; *Kenner v. Creditors*, 7 Mart. (N. S.; La.) 540. But not to defeat

Payment Conditional—"When Able"—"When in Funds."

§ 111. If the time mentioned for payment is plainly uncertain and conditional, the bill or note thereby becomes nonnegotiable. This is so in the case of a note payable "when my circumstances will admit without detriment to myself or family,"³⁸⁴ or "as soon as my circumstances will permit."³⁸⁵ But a note payable "when convenient" has been held to be payable in a "reasonable time," and therefore negotiable.³⁸⁶ So, a note payable "as soon as I possibly can" has been held to be payable "presently," or on demand.³⁸⁷ And a note "renewed for an indefinite time, * * * the whole amount then to pay when both parties may agree," has been held to fall due in a reasonable time.³⁸⁸ And even a note providing, "I am to

a bona fide holder by proof of delivery on Sunday. *Greathead v. Walton*, 40 Conn. 226.

³⁸⁴ *Chit. Bills*, 156; *Ex parte Tootell*, 4 Ves. 372. So, a note containing a power to sell collateral with a proviso accelerating maturity, if the value depreciates and the sale proves insufficient. *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409.

³⁸⁵ *Salinas v. Wright*, 11 Tex. 572.

³⁸⁶ *Works v. Hershey*, 35 Iowa, 340; *Smithers v. Junker*, 41 Fed. 101. And see *Jones v. Eisler*, 3 Kan. 134. So, a note payable "when payor and payee mutually agree." *Page v. Cook*, 164 Mass. 116, 41 N. E. 115. Not so, however, a note payable "on or before four years," with interest not to be paid annually "unless convenient," and an agreement to take other securities in exchange, *Humphrey v. Beckwith*, 48 Mich. 151, 12 N. W. 28; nor a note providing for indefinite extension by the payee, *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. 90; *Woodbury v. Roberts*, 59 Iowa, 348, 13 N. W. 312. But the words "this note to be extended if desired by makers" have been held too indefinite to affect the note, and could not be rendered more definite by an unauthorized memorandum by the holder. *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241.

³⁸⁷ *Kincaid v. Higgins*, 1 Bibb (Ky.) 396; and parol evidence of an agreement to wait until a certain draft should be received from New Orleans was rejected as tending to vary the meaning of the note.

³⁸⁸ *Ramot v. Schotenfels*, 15 Iowa, 457. So, an agreement for six months' extension, if desired, has been held not to render the note nonnegotiable, or uncertain. *Anniston Loan & Trust Co. v. Stickney*, 108 Ala. 146, 19 South. 63. And see note to this case in 31 Lawy. Rep. Ann. 234. But see, as to stipulation, that it be "renewed from time to time as often as required," *Collin v. Spencer*, 39 Fed. 262; or "from time to time indefinitely, as he may see fit,"

have the privilege of extending the time of payment as long as I choose, by paying the interest annually," has been held valid as a note.³⁸⁹ But a duebill, "to be paid as wanted for her support, and, if no part is wanted, it is not to be paid," is clearly contingent, and not negotiable as a note.³⁹⁰ It is said, however, that a note payable "when able" means "on demand, if then able,"³⁹¹ and that a promise to pay a note "when able" is not sufficient to take it out of the statute of limitations.³⁹²

If a bill or note is made payable "when in funds," it is conditional, and not negotiable.³⁹³ So, if payable "as soon as I am in possession of funds from the estate of B." ³⁹⁴ A note payable "when in funds" need not be protested until such time arrives.³⁹⁵ And in all such cases the burden of showing the maker or acceptor to be in funds is upon the holder of the note or bill.³⁹⁶

Payable "When Realized from Sales"—"When Collected."

§ 112. If an order is made payable "ninety days after sight, or when realized," this means, in the language of Lord Campbell, C. J., "when you are in funds for the purpose," and such instrument was held not to be a bill of exchange.³⁹⁷ In like manner, an instrument payable "when the amount shall be collected" is a conditional agreement, and not a note.³⁹⁸ But it has been held, with apparent con-

Glidden v. Henry, 104 Ind. 278, 1 N. E. 369; or that the maturity may be extended by a majority of the bondholders, *McClelland v. Railroad Co.*, 110 N. Y. 469, 18 N. E. 237.

³⁸⁹ *Maupin v. McCormick*, 2 Bush (Ky.) 206. But is not negotiable. *Citizens' Nat. Bank v. Piollet*, 126 Pa. St. 194, 17 Atl. 603.

³⁹⁰ *Gordon v. Rundlett*, 28 N. H. 435.

³⁹¹ *Veasey v. Reeves*, 6 Ind. 406.

³⁹² *Wilcox v. Williams*, 5 Nev. 206.

³⁹³ *Gillespie v. Mather*, 10 Pa. St. 28. See, too, *Jackson v. Tilghman*, 1 Miles (Pa.) 31.

³⁹⁴ *Wiggins v. Vaught*, Cheves (S. C.) 91.

³⁹⁵ *Harrell v. Marston*, 7 Rob. (La.) 34.

³⁹⁶ *Mason v. Graff*, 35 Pa. St. 418.

³⁹⁷ *Alexander v. Thomas*, 16 Q. B. 333. But see section 92, *supra*.

³⁹⁸ *Corbett v. State*, 24 Ga. 287; *Henry v. Hazen*, 5 Ark. 401. So far at least as to put the sum out of reach of an attachment against the payee. State

tradition, that an instrument payable in one year, "and, if not enough realized in one year, to have more time," is payable in a reasonable time, and negotiable.³⁹⁹ So, too, an instrument payable "as soon as collected from my accounts at P."⁴⁰⁰

It is said that a note payable eight months after date, "to be paid as soon as I can get my returns from New Orleans, or at the above date at the furthest," is sufficiently declared on as payable eight months after date.⁴⁰¹ And there seems to be a reasonable distinction between such instruments as that last mentioned, and instruments payable only when realized or collected. If payable "as soon as can be realized from the property I have this day purchased, * * * to be paid in the course of the season now coming," it is payable certainly at the end of the season (although it may become due sooner in a certain contingency), and is therefore held to be negotiable.⁴⁰² So, too, if payable six months after date, "or sooner if made out of a sale" of certain property,⁴⁰³ "or as soon as I can with due diligence make the money out of said patent right,"⁴⁰⁴ or as soon "as A.'s horse earns the money in the cavalry service."⁴⁰⁵

On the other hand, a promise of payment on the sale of certain property, without other time fixed, is not a promissory note.⁴⁰⁶ *Nei-*

v. Judge of County Court, 11 Wis. 50. And such note cannot mature until the amount has been collected. *Allen v. Davis*, 11 Mo. 479.

³⁹⁹ *Capron v. Capron*, 44 Vt. 410.

⁴⁰⁰ *Ubsdell v. Cunningham*, 22 Mo. 124; *Vaughan v. Dean*, 32 Ga. 502; *Woolbright v. Sneed*, 5 Ga. 167; or "as soon as can be collected out of the contract, and, if not so collected, in four years." *Smith v. Ellis*, 29 Me. 422.

⁴⁰¹ *Hoover v. Johnson*, 6 Blackf. (Ind.) 473.

⁴⁰² *Cota v. Buck*, 7 Metc. (Mass.) 588. *Shaw, C. J.*, saying: "The true test of the negotiability of a note seems to be whether the undertaking of the promissor is to pay the amount at all events at some time which must certainly come." So, a note payable on a given day, with proviso that "it shall become due immediately" on the delivery of certain property. *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356.

⁴⁰³ *Ernst v. Steckman*, 74 Pa. St. 13; *Cisne v. Chidester*, 85 Ill. 523; *McCarty v. Howell*, 24 Ill. 341; *Walker v. Woollen*, 54 Ind. 164; *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Charlton v. Reed*, 61 Iowa, 166. But see, contra, *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. 589.

⁴⁰⁴ *Palmer v. Hummer*, 10 Kan. 464.

⁴⁰⁵ *Gardner v. Barger*, 4 Heisk. (Tenn.) 669.

⁴⁰⁶ *Hill v. Halford*, 2 Bos. & P. 413; *De Forest v. Frary*, 6 Cow. (N. Y.) 151. But in Illinois an agreement to pay "whenever the lands in the late purchase

ther is a promise of payment "as soon as the crop can be sold, or the money raised from any other source," although held to be due in a reasonable time,⁴⁰⁷ or of payment at a time certain, with a stipulation "not to ask or expect payment until the old mill is sold."⁴⁰⁸

Payable on Death—Marriage—Coming of Age.

§ 113. Commercial paper may be made payable on any event, however remote, which must inevitably happen some time or other. Thus, it may be payable *on the death* of a certain person,⁴⁰⁹ or "on demand after my decease,"⁴¹⁰ or "one day after date, or at my death."⁴¹¹ It will, however, be unavailing as a note if delivery is postponed until then,⁴¹² or if the amount is rendered uncertain by the uncertain date of the death, as, if payable in installments, to cease on the death of A. B.⁴¹³

On the other hand, *marriage* is an uncertain event, which may never happen. A note or bill cannot, therefore, be made payable

in Iowa Territory shall be advertised for sale" has been held to be a promissory note. *Glancy v. Elliott*, 14 Ill. 456. So, in Maine, "from the avails of logs bought of A. B. when there is a sale made," *Sears v. Wright*, 24 Me. 278; or "when I sell my place where I now live," i. e. in a reasonable time, *Crooker v. Holmes*, 65 Me. 195.

⁴⁰⁷ *Nunez v. Dautel*, 19 Wall. 560.

⁴⁰⁸ *Blake v. Coleman*, 22 Wis. 396.

⁴⁰⁹ *Cooke v. Colehan*, 2 Strange. 1217; *Roffey v. Greenwell*, 2 Perry & D. 365; 10 Adol. & E. 222.

⁴¹⁰ *Bristol v. Warner*, 19 Conn. 7; or "after my death," *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608; or "when I am gone," *Hathaway v. Roll*, 81 Ind. 567; or "one day after my death," *Price v. Jones*, 105 Ind. 543, 5 N. E. 683; *Hege-man v. Moore*, 131 N. Y. 462, 30 N. E. 487. So, by implication, if payable "out of my estate," *Kelsey v. Chamberlain*, 47 Mich. 241, 10 N. W. 355.

⁴¹¹ *Conn v. Thornton*, 46 Ala. 587.

⁴¹² *Warren v. Durfee*, 126 Mass. 338. In this case the note was found in a sealed envelope, and was without consideration, and not executed as a will, and it was held to be wholly without force. *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835. But in *Fickle v. Snapp*, 97 Ind. 289, notes payable "on the day of my death" found folded in maker's will, and referred to in it, were construed, without delivery, as part of the will.

⁴¹³ *Chit. Bills*, 156; *Worley v. Harrison*, 3 Adol. & E. 669.

"ninety days after my marriage,"⁴¹⁴ or "if I am married in two months,"⁴¹⁵ or "when A. B. shall marry."⁴¹⁶

So, too, the time of a certain person *coming of age* is certain, but his living until then is uncertain. A note, therefore, payable "when A. shall come of age," is not negotiable.⁴¹⁷ But a note payable to A. B. "when he shall come of age, to wit, 12th June, 1750," is payable at all events on the day named, and therefore negotiable.⁴¹⁸

Payable in Installments—On Default of Interest—After Notice.

§ 114. A bill or note may be made payable in installments, unless prohibited by statute.⁴¹⁹ And where a note is given for \$1,200, "\$200 in each year," the installments will be due at the end of each year, reckoned from the date of the note.⁴²⁰ So, a time may be named for the entire payment to be made, with installments in the meantime at intervals.⁴²¹

Or a negotiable note may be made payable in installments, and the whole be made payable on default in any installment,"⁴²² or, at the holder's option, on default in the payment of interest.⁴²³ But

⁴¹⁴ Beardsley v. Baldwin, 2 Strange, 1151. And see, Pearson v. Garrett, 4 Mod. 242.

⁴¹⁵ Chit. Bills, 156; Pearson v. Garrett, 4 Mod. 242.

⁴¹⁶ Id.

⁴¹⁷ Kelley v. Hemmingway, 13 Ill. 604.

⁴¹⁸ Chit. Bills, 158; 2 Bl. Comm. 513; Goss v. Nelson, 1 Burrows, 226.

⁴¹⁹ Wright v. Irwin, 33 Mich. 32.

⁴²⁰ Rideout v. Woods, 30 N. H. 375.

⁴²¹ Ewer v. Myrick, 1 Cush. (Mass.) 16. This was a note for \$750 payable in ten years, "\$50 of the principal to be paid annually until the whole is paid." The whole note became due in ten years. So, where the installments were payable at the maker's option. Riker v. Manufacturing Co., 14 R. I. 402.

⁴²² Carlon v. Kenealy, 12 Mees. & W. 139; Cooke v. Horn, 29 Law T. (N. S.) 369. See, too, German Mut. Fire Ins. Co. v. Franck, 22 Ind. 364; Mayor & Council of Griffin v. City Bank of Macon, 58 Ga. 584; Kirkwood v. Smith [1896] 1 Q. B. 582; De Hass v. Roberts, 59 Fed. 853; Chambers v. Marks, 93 Ala. 412, 9 South. 74. But, in the absence of express provision for the whole to become due on default in installments, parol evidence is inadmissible to show an agreement to that effect. Blakemore v. Wood, 3 Sneed (Tenn.) 470.

⁴²³ Chicago Ry. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999; Sea v. Glover, 1 Ill. App. 335; Wright v. Morgan (Tex. Civ. App.)

where a trust deed securing several notes contains a provision making all due in default of any one, and this provision is not in the notes, it will only take effect so far as it regards the proceeds of sale under the trust deed.⁴²⁴ So, a note may be made payable "in such portions and at such times as the directors (payees) may require," and it is then equivalent to a note payable on demand.⁴²⁵ This is a common form of notes given for insurance premiums.

A note may also be payable in a certain time after notice.⁴²⁶ In such case it is payable forthwith on notice and expiration of time fixed, although there may be a provision "not to draw interest unless it remains three months."⁴²⁷

If interest is designated at a certain rate "per annum," it is payable yearly.⁴²⁸

Payable on Return of Papers—Completion of Building—Settlement of Accounts—Arrival of Ship.

§ 115. Again, a certificate payable "on return of this certificate" is negotiable;⁴²⁹ but not if payable on the return of another paper,

37 S. W. 627; *Markey v. Corey* (Mich.) 66 N. W. 493; *Wilson v. Campbell* (Mich.) 68 N. W. 278; *American Nat. Bank v. American Paper Co.*, 19 R. I. 149, 32 Atl. 305; *Phelps v. Sargent* (Minn.) 71 N. W. 927. But see, contra, *Warren v. Gruwell*, 5 Kan. App. 523, 48 Pac. 205. And a note is not negotiable if the payee has an option to declare it due whenever he may deem it insecure. *First Nat. Bank v. Bynum*, 84 N. C. 24; *Savings Bank v. Strother*, 28 S. C. 505. So, too, a note with proviso that it shall become due, if the maker remove certain goods pledged as security. *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. 589.

⁴²⁴ *Morgan v. Martien*, 32 Mo. 438.

⁴²⁵ *Colgate v. Buckingham*, 39 Barb. (N. Y.) 177; *Savage v. Medbury*, 19 N. Y. 32; *Howland v. Edmonds*, 24 N. Y. 307; *Protection Ins. Co. v. Bill*, 31 Conn. 534; *White v. Smith*, 77 Ill. 351; *Goshen & M. Turnpike Road v. Hurtin*, 9 Johns. (N. Y.) 217; *Dutchess Cotton Mfg. Co. v. Davis*, 14 Johns. (N. Y.) 244; *Gaytes v. Hibbard*, 5 Biss. 100, Fed. Cas. No. 5,287. But see, contra, *Washington Mut. Ins. v. Miller*, 26 Vt. 77. See, also, *Stillwell v. Craig*, 58 Mo. 24.

⁴²⁶ *Clayton v. Gosling*, 5 Barn. & C. 360, 8 Dowl. & R. 110.

⁴²⁷ *Richer v. Voyer*, L. R. 5 P. C. 461.

⁴²⁸ *Murphy v. City of San Luis Obispo* (Cal.) 48 Pac. 974.

⁴²⁹ *Smilie v. Stevens*, 39 Vt. 315; *Hunt v. Divine*, 37 Ill. 137. So, a receipt for "\$2,400 paper currency from A. B., which I promise to pay to said A. B. or order on return of this receipt," is a negotiable note in New York. *Frank*

e. g. a guaranty of another note.⁴³⁰ And a negotiable note, payable in four years, "or, upon surrender of note at any time before maturity, to issue stock for it," is not made nonnegotiable by the last provision.⁴³¹

A negotiable note may be made payable when the payee shall have constructed a certain railroad,⁴³² or completed a certain building according to contract.⁴³³ But a note given for the construction of a canal, payable "on the final estimate of said section," is uncertain and nonnegotiable.⁴³⁴

If the time fixed for payment is the settlement of an estate, account, or litigation, it is necessarily uncertain, and may never arrive. In all such cases the instrument is conditional, and not negotiable; e. g. if payable "when the estate of A. is settled,"⁴³⁵ or "ninety days after dissolution of the partnership and settlement of its books,"⁴³⁶ or when a dividend is declared,⁴³⁷ or when a suit is determined between A. and B.,⁴³⁸ or "as soon as you receive the amount of my

v. Wessels, 64 N. Y. 158. If it is payable on return of this certificate, "to be left six months," it will be due after six months. *Towle v. Starz*, 67 Minn. 370, 69 N. W. 1098.

⁴³⁰ *Smilie v. Stevens*, 39 Vt. 315.

⁴³¹ *Hodges v. Shuler*, 22 N. Y. 114.

⁴³² *Rose v. Railroad Co.*, 31 Tex. 49. But the renewal of such a note, made payable in four years, and not referring to the construction of the road, will fall due in four years without reference to the completion of the railroad. *Four Mile Valley R. Co. v. Bailey*, 18 Ohio St. 208.

⁴³³ *Stevens v. Blunt*, 7 Mass. 240; *Bristol v. Warner*, 19 Conn. 7; *Goodloe v. Taylor*, 10 N. C. 458; *Levally v. Harmon's Adm'r.*, 20 Iowa, 533; until which time there is no liability, *Home Bank v. Drumgoole*, 109 N. Y. 63, 15 N. E. 747; and no interest accruing. *Peck v. Association*, 21 Misc. Rep. 84, 46 N. Y. Supp. 1042.

⁴³⁴ *Weidler v. Kauffman*, 14 Ohio, 455. So, an order payable "in installments, \$200 out of the first estimate or when the first floor joists are in, \$200 when the building is ready for the roof," etc. *Miller v. Stone Co.*, 1 Ill. App. 273. So, a promise to pay on the completion of certain work. *Chandler v. Carey*, 64 Mich. 237, 31 N. W. 309.

⁴³⁵ *Husband v. Epling*, 81 Ill. 172.

⁴³⁶ *Sackett v. Palmer*, 25 Barb. (N. Y.) 179. But in *Scull v. Roane*, Hemp. 103, Fed. Cas. No. 12,570, it was held that a note payable on settlement of accounts was due in a reasonable time, and might be sued after one year.

⁴³⁷ *Brooks v. Hargreaves*, 21 Mich. 254.

⁴³⁸ *Shelton v. Bruce*, 9 Yerg. (Tenn.) 24; *Burgess v. Fairbanks*, 83 Cal. 215, 23 Pac. 292.

account of the government from A. B.”⁴³⁹ But a note made payable January 1, 1865, “on condition that the banks of Tennessee have resumed specie payment at that time; if not, as soon as they do resume,”—was held to be due January 1, 1865, on waiver of claim to payment in coin.⁴⁴⁰

The arrival of a ship is also an uncertain event, and an order payable at such time is not a bill of exchange;⁴⁴¹ for, being payable only on the ship’s safe arrival, it is never due if the ship be lost.⁴⁴² But it is said that the paying off of a king’s ship is a thing of a public nature, to be regarded in law as certain to happen, and that a bill payable on such event is unconditional.⁴⁴³

Payable on Public Event—Wager.

§ 116. It sometimes occurs that the time of payment mentioned in the bill or note refers to some public event in a manner that gives it the appearance of a wager rather than a bona fide contract. This was plainly the case in a note made payable “on the election of R. B. Hayes to the office of president of the United States,” with a provision that, if he was not elected, the note should be void.⁴⁴⁴ In like manner, a note payable when the legislature shall have recognized certain bonds is contingent, and nonnegotiable.⁴⁴⁵ But it

⁴³⁹ *Henry v. Hazen*, 5 Ark. 401. But see, contra, *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356, where the note was due on a day certain, to “become due immediately upon A. B. delivering possession of the land.”

⁴⁴⁰ *Walters v. McBee*, 1 Lea (Tenn.) 364.

⁴⁴¹ *Palmer v. Pratt*, 2 Bing. 185; *The Lykus*, 36 Fed. 919. So, too, if payable after arrival and discharge of coal by the brig *G. Grant v. Wood*, 12 Gray (Mass.) 220.

⁴⁴² *Tueker v. Maxwell*, 11 Mass. 143.

⁴⁴³ *Andrews v. Franklin*, 1 Strange. 24; *Evans v. Underwood*, 1 Wils. 262; but this decision is called “questionable,” Chit. Bills, 159. See, too, *Haus-soullier v. Hartsinck*, 7 Term R. 733; *Dixon v. Nuttall*, 6 Car. & P. 320.

⁴⁴⁴ *Lockhart v. Hullinger*, 2 Ill. App. 465. And see, in other similar cases, *Gordon v. Casey*, 23 Ill. 70; *Gurman v. Burlingame*, 36 Ill. 201; *Gregory v. King*, 58 Ill. 169; *Danforth v. Evans*, 16 Vt. 538. But in *Williams v. Smith*, 4 Ill. 524, it was held that an action would lie on a note payable “when William H. Harrison shall be elected president of the United States,” on proper averment and proof that the contingency had happened.

⁴⁴⁵ *Leak v. Bear*, 80 N. C. 271.

has been held in California that a note payable out of a certain appropriation, "when made," was payable, irrespective of the appropriation, when the contractor was paid, and might be collected on proof of the happening of that event.⁴⁴⁶ In North Carolina a note payable at a given time "after peace between the United States of America and the Confederate States" was held to be void as a wager contract.⁴⁴⁷ But such notes have been sustained in other states as payable unconditionally.⁴⁴⁸ Where, however, the note was made payable "after the ratification of peace," etc., the want of an averment that the event had happened was held to be fatal to the declaration on such note.⁴⁴⁹

Payable "on Demand."

§ 117. Bills and notes are frequently made payable on demand. Except as otherwise provided by statute, such notes and bills are due immediately,⁴⁵⁰ and without grace.⁴⁵¹ And such a note, in Connecticut, is, between the original parties, due immediately, notwithstanding a statute of Connecticut fixing the term of four months for the maturity of demand notes.⁴⁵² In Georgia demand notes are by

⁴⁴⁶ *Nagle v. Homer*, 8 Cal. 353.

⁴⁴⁷ *McNinch v. Ramsay*, 66 N. C. 229. But see *Chapman v. Wacaser*, 64 N. C. 532.

⁴⁴⁸ *Gaines v. Dorsett*, 18 La. Ann. 563; *Mortee v. Edwards*, 20 La. Ann. 236; *Brewster v. Williams*, 2 S. C. 455; *Knight v. McReynolds*, 37 Tex. 204; *Atcheson v. Scott*, 51 Tex. 213, overruling *Thompson v. Houston*, 31 Tex. 610. See, too, *Shaw v. Trunsler*, 30 Tex. 390; *Nelson v. Manning*, 53 Ala. 549. But in *Brewster v. Williams*, supra, it was held that peace, as contemplated, was never made, and the time for payment never arrived.

⁴⁴⁹ *Harris v. Lewis*, 5 W. Va. 575.

⁴⁵⁰ *Wheeler v. Warner*, 47 N. Y. 519; *Howland v. Edmonds*, 24 N. Y. 307; *Herrick v. Woolverton*, 41 N. Y. 591; *Palmer v. Palmer*, 36 Mich. 487; *Norton v. Ellam*, 2 Mees. & W. 461; *Cammer v. Harrison*, 2 McCord (S. C.) 246; *Easton v. McAllister*, 1 Mo. 662; *Caldwell v. Rodman*, 50 N. C. 139 (1857). And such a note will be regarded as overdue after the lapse of a reasonable time. *Herrick v. Woolverton*, 41 N. Y. 581.

⁴⁵¹ *Cammer v. Harrison*, 2 McCord (S. C.) 246; *First Nat. Bank of Davenport v. Price*, 52 Iowa, 570, 3 N. W. 639. And this is provided by statute in MINNESOTA (Gen. St. c. 23, § 2238) and VERMONT (Pub. Laws. p. 91).

⁴⁵² *Seymour v. Continental Life Ins. Co.*, 44 Conn. 300; Gen. St. p. 405. § 1859. MASSACHUSETTS has the same statute. Pub. St. c. 77, § 13. Similar

statute made due immediately.⁴⁵³ In Missouri bills of exchange, drafts, and orders, payable at sight or on demand, become due when presented for payment;⁴⁵⁴ and in North Carolina, "when demandable."⁴⁵⁵ This is also held to be the law in Ohio.⁴⁵⁶ It is said that, when a note is payable on demand, the maker may pay it at any time, without waiting for a demand.⁴⁵⁷ But a note given for Confederate notes borrowed, and made payable on demand, cannot be shown by parol to have intended a payment *in* Confederate notes at any time; and a tender, without demand, of such notes, in March, 1863, in payment of a promissory note dated July, 1862, is no defense to an action on the demand note.⁴⁵⁸

Payable on Demand—Equivalent Expressions.

§ 118. Demand notes and bills are not necessarily payable in words "on demand." The purpose of making them so payable may be expressed in other equivalent words. The following have been held to be equivalent expressions: "When demanded";⁴⁵⁹ "when called for";⁴⁶⁰ "on request," or "on being called";⁴⁶¹ "at any time

statutes, fixing 60 days, and having for their object the protection of indorsers against stale claims, are found in MINNESOTA (St. § 2231); NEW HAMPSHIRE (Pub. St. c. 202, § 5).

⁴⁵³ Code, § 3700.

⁴⁵⁴ 1 Rev. St. c. 10, § 550; Gen. St. p. 397, § 18.

⁴⁵⁵ Battle's Revisal, c. 10, § 5.

⁴⁵⁶ Gordon v. Preston, Wright (Ohio) 341; McLure v. Longworth, Id. 582. And in these cases it was held that interest only ran from the time of such demand.

⁴⁵⁷ Stover v. Hamilton, 21 Grat. (Va.) 273.

⁴⁵⁸ Terrell v. Walker, 66 N. C. 244.

⁴⁵⁹ Kingsbury v. Butler, 4 Vt. 458; or "on demand after date," Hitchings v. Edmands, 132 Mass. 338; Fenno v. Gay, 146 Mass. 118, 15 N. E. 87; or "after date" simply, Morrison v. Morrison (Ga.) 29 S. E. 125. So, a certificate of deposit subject to the depositor's order, with interest payable on call at 7 per cent., or by the year at 10 per cent., is negotiable and due immediately. Lynch v. Goldsmith, 64 Ga. 42. But a note expressing no time of payment, "with ten per cent. after maturity," was held not to be payable on demand. First Nat. Bank v. Price, 52 Iowa, 575, 3 N. W. 639.

⁴⁶⁰ Bilderback v. Burlingame, 27 Ill. 338; or "on call," Mobile Sav. Bank v. McDonnell, 83 Ala. 595, 4 South. 346.

⁴⁶¹ Howland v. Edmonds, 24 N. Y. 307.

called for";⁴⁶² "at such times as A. may need for her support."⁴⁶³

Sometimes the intention is less clear, by reason of another time being mentioned, from which it is to draw interest. Thus, a note payable "on demand, the first of January next," has been held to be payable immediately, but to draw interest only from January 1st.⁴⁶⁴ So, too, if payable "on demand, with interest after six months,"⁴⁶⁵ or "on demand, * * * not to draw interest during my life,"⁴⁶⁶ or "on demand, with interest annually four months from date."⁴⁶⁷ But if the instrument was originally payable "on demand, with interest after six months," and the words "on demand" have been erased, principal as well as interest is only payable after six months.⁴⁶⁸

On the other hand, the words indicating immediate payment may be controlled by other words or conditions, rendering them nugatory. Thus, a note payable "six months after date, * * * in current funds, when called for," is only payable after six months.⁴⁶⁹ So, a note payable "on demand," with interest, "but no demand is to be made as long as the interest is paid," is only payable in the alternative.⁴⁷⁰

Payable on Demand if No Time Expressed.

§ 119. If no time of payment is expressed (which is usually the case in checks, and frequently so in promissory notes and drafts), the instrument is, by intendment of law, payable on demand, and is as valid and negotiable as though the time of payment were fully expressed.⁴⁷¹ And a lost note will be presumed to have been pay-

⁴⁶² Bowman v. McChesney, 22 Grat. (Va.) 609.

⁴⁶³ Corbitt v. Stonemetz, 15 Wis. 187.

⁴⁶⁴ Brett v. Ming, 1 Fla. 447.

⁴⁶⁵ Rice v. West, 11 Me. 323. But "on demand with interest within six months from date," means within six months at all events, and sooner if demanded. Jillson v. Hill, 4 Gray (Mass.) 316.

⁴⁶⁶ Newman v. Kettelle, 13 Pick. (Mass.) 418.

⁴⁶⁷ Shaw v. Shaw, 43 N. H. 170.

⁴⁶⁸ Hobart v. Dodge, 10 Me. 156.

⁴⁶⁹ Davis v. Glenn, 72 N. C. 519.

⁴⁷⁰ Seacord v. Burling, 5 Denio (N. Y.) 444.

⁴⁷¹ Byles, Bills, 81; Chit. Bills, 173; Boehm v. Sterling, 7 Term R. 427; Whitlock v. Underwood, 3 Dowl. & R. 356, 2 Barn. & C. 157; Down v. Halling,

able on demand.⁴⁷² But if a note is postdated, and no time of payment is expressed, it will be due on and after the day of its date.⁴⁷³ If, however, it is made payable in installments, and no time of payment is named, it is not a valid negotiable instrument.⁴⁷⁴ It is said that a duebill for the delivery of sheep, expressing no time for such delivery, falls due in a "reasonable time," and that a different time for payment cannot be proved by parol.⁴⁷⁵

The rule that, where no time of payment is expressed, the bill or note is payable on demand, applies to instruments naming a time for payment of interest, but none for payment of principal. In this case the principal is payable on demand.⁴⁷⁶ But the converse of this is not true. Thus, if a note be for five years, "with interest from

4 Barn. & C. 333; *Id.*, 6 Dowl. & R. 455; *Id.*, 2 Car. & P. 11; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 146; *Bacon v. Page*, 1 Conn. 404; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Mason v. Patton*, 1 Mo. 279; *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308; *Kendall v. Galvin*, 15 Me. 131; *Burthe v. Donaldson*, 15 La. 382; *Cornell v. Moulton*, 3 Denio (N. Y.) 12; *Green v. Drebilis*, 1 G. Greene (Iowa) 552; *Freeman v. Ross*, 15 Ga. 252; *Sackett v. Spencer*, 29 Barb. 180; *Plndar v. Barlow*, 31 Vt. 529; *Jones v. Brown*, 11 Ohio St. 601; *Messmore v. Morrison*, 172 Pa. St. 300, 34 Atl. 45; *Roberts v. Snow*, 27 Neb. 425, 43 N. W. 241; *Ervin v. Brooks*, 111 N. C. 358, 16 S. E. 240; *Kampmann v. Williams*, 70 Tex. 568, 8 S. W. 310; *Holmes v. West*, 17 Cal. 623; *Porter v. Porter*, 51 Me. 376; *Keyes v. Fenstermaker*, 24 Cal. 329; *Huyck v. Meador*, 24 Ark. 191; *Meador v. Bank*, 56 Ga. 605; *Dodd v. Denny*, 6 Or. 156; *Salinas v. Wright*, 11 Tex. 572; *First Nat. Bank of Davenport v. Preece*, 52 Iowa, 570, 3 N. W. 639; *Libby v. Mikelborg*, 28 Minn. 38, 8 N. W. 903. And the addition of the words "on demand" does not constitute a material alteration in such case. *Aldous v. Cornwell*, L. R. 3 Q. B. 573. Where the year was not expressed, a note dated in June, and payable in March, was held to be a demand note. *Collins v. Trotter*, 81 Mo. 275.

⁴⁷² *Tucker v. Tucker*, 119 Mass. 79.

⁴⁷³ *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304, affirmed 13 Wend. (N. Y.) 133; *Gough v. Staats*, *Id.* 549.

⁴⁷⁴ *Moffat v. Edwards*, Car. & M. 16.

⁴⁷⁵ *Self v. King*, 28 Tex. 552. So, a note payable "in sawing at my mill" is due upon request within a reasonable time. *Weymouth v. Gile*, 83 Me. 437, 22 Atl. 375.

⁴⁷⁶ *Loring v. Gurney*, 5 Pick. (Mass.) 15; *Meador v. Bank*, 56 Ga. 605; *Holmes v. West*, 17 Cal. 623. So, "with interest payable annually." *Converse v. Johnson*, 146 Mass. 20, 14 N. E. 925; *Roberts v. Snow*, 27 Neb. 425, 43 N. W. 241. So, a fortiori, if only generally "with interest." *Hall v. Toby*, 110 Pa. St. 318, 1 Atl. 369.

date," the interest was held to be payable only on the maturity of the principal.⁴⁷⁷ If, however, it be "with interest annually," the interest will become due at the end of each year.⁴⁷⁸ Where a bill is overdue, and therefore payable immediately, an agreement to pay "ten per cent. on this bill until paid" does not extend the time of payment by implication.⁴⁷⁹ But, conversely, an agreement for allowance of interest on payments of principal, which may be made before they are due, is equivalent to an agreement giving the maker the privilege of paying the principal before maturity.⁴⁸⁰

Memorandum as to Time of Payment—Parol Evidence.

§ 120. A bill or note may, in terms, be payable on demand, with a memorandum at the foot of the instrument that the maker shall not be compelled to pay it before a certain day named. This memorandum is part of the contract, and controls the time of payment.⁴⁸¹ So, too, an indorsement that the whole shall be due on default in paying any interest coupon.⁴⁸² And the same thing, it has been held, may be accomplished by a contemporaneous agreement, though not written on the paper.⁴⁸³ But a verbal agreement between indorser and indorsee at the time of the indorsement, made without

⁴⁷⁷ *Koehring v. Muemminghoff*, 61 Mo. 403. But in a similar case, where a mortgage securing the note provided for the payment of the interest annually, the interest was held to become due according to the terms of the mortgage. *Meyer v. Graeber*, 19 Kan. 165.

⁴⁷⁸ *Walker v. Kimball*, 22 Ill. 537; *Failing v. Clemmer*, 49 Iowa, 104.

⁴⁷⁹ *Alston v. Wingfield*, 53 Ga. 18, and parol evidence of an agreement to pay in 10 years is not admissible.

⁴⁸⁰ *Crocker v. Green*, 54 Ga. 494.

⁴⁸¹ *Franklin Sav. Inst. v. Reed*, 125 Mass. 365. So, a note payable one day after date, with a memorandum indorsed, "to be paid when A. collects a certain note of B." *McCalla v. McCalla*, 48 Ga. 503; or, "one-half to be paid in twelve months, the balance in twenty-four months." *Heywood v. Perlin*, 10 Pick. (Mass.) 228; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; or, "this note to be extended if desired by makers," *Krouskop v. Shontz*, 51 Wis. 204, S N. W. 241. And a provision in a collateral mortgage, securing several notes, and postponing the maturity of all until the last should become payable, will control the notes. *Brownlee v. Arnold*, 60 Mo. 79. See, too, section 110, note, *supra*.

⁴⁸² *Mayor, etc., of Griffin v. City Bank of Macon*, 58 Ga. 584.

⁴⁸³ *Round v. Donnel*, 5 Kan. 54.

any consideration, for a postponement of the time of payment, is without force, and furnishes no excuse to the holder for nonpresentment at maturity.⁴⁸⁴

Like other material parts of a bill or note, the time of payment cannot be varied by parol.⁴⁸⁵ And, even if it recites as a consideration services to be rendered, it cannot be shown by parol that, although made payable in six months, it was not to be paid until the services were rendered.⁴⁸⁶ And even although the time is not expressed, and the instrument is payable on demand only by implication of law, it cannot be shown by parol to be payable at some other time.⁴⁸⁷

⁴⁸⁴ *Michaud v. Lagarde*, 4 Minn. 43 (Gil. 21).

⁴⁸⁵ *Woodbridge v. Spooner*, 3 Barn. & Ald. 233; *Eaton v. Emerson*, 14 Me. 335; *Graves v. Clark*, 6 Blackf. (Ind.) 183. Nor can parol evidence be admitted to show a contemporaneous agreement for renewal or forbearance. *Diercks v. Roberts*, 13 S. C. 338. Although in the case of a note payable one day after date, and indorsed in blank, it was held that the indorsement was only *prima facie* a guaranty of payment, and that a parol agreement by the indorser giving a reasonable time to collect might be shown. *Clark v. Merriam*, 25 Conn. 578.

⁴⁸⁶ *Walker v. Clay*, 21 Ala. 797.

⁴⁸⁷ *Thompson v. Ketcham*, 8 Johns. (N. Y.) 146; *Koehring v. Muemminghoff*, 61 Mo. 403; *Self v. King*, 28 Tex. 552; e. g. that it was not to be due until demanded, *Sheldon v. Heaton*, 34 N. Y. Supp. 556. But see, as to parol evidence between immediate parties showing a contemporaneous agreement for a fixed time, *Horner v. Horner*, 145 Pa. St. 258, 23 Atl. 441.

C. Certainty as to Place of Payment.

- § 121. Place of Payment should be Designated—Foreign Statutes.
- 122. — Not Expressed in Bill of Acceptance.
- 123. — Memorandum—Blank.
- 124. — Mistakes—Parol Evidence—Presumptions.
- 125. — Several Places Named—Pleading.
- 126. — Presentment—How Far Governed by Designation of Place.
- 128. American Statutes as to Place of Payment.

Place of Payment should be Designated—Foreign Statutes.

§ 121. It is usual, both in bills and notes, to designate a place of payment. In bills of exchange, this is ordinarily expressed in the drawee's address, either at the top or bottom of the bill. In promissory notes, it is generally expressed in the concluding words before the signature by the phrase "payable at," etc., or simply "at," etc. By the common law, it is not necessary to the completeness or negotiability of any commercial or negotiable instrument.⁴⁸⁸ And, as between the immediate parties to the paper, it is said to be "merely modal, forming no essential part of the contract."⁴⁸⁹

Bills and notes drawn in foreign countries are generally required by statute to designate a place of payment.⁴⁹⁰ And, in conformity

⁴⁸⁸ Chit. Bills, 174; 1 Daniel, Neg. Inst. 99; Story, Bills, § 48; Story, Prom. Notes, § 49; 1 Edw. § 183; Mitchell v. Baring, 10 Barn. & C. 4; Taylor v. Snyder, 3 Denio (N. Y.) 150; Bank of America v. Woodworth, 18 Johns. (N. Y.) 315; Id., 19 Johns. (N. Y.) 391; Blodgett v. Durgin, 32 Vt. 361; Bank of Newbury v. Richards, 35 Vt. 281; Craig v. Price, 23 Ark. 633; Holtz v. Boppe, 37 N. Y. 634; Kendall v. Galvin, 15 Me. 131.

⁴⁸⁹ See opinions of Spencer, C. J., in Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 254; and Senator Skinner in Woodworth v. Bank of America, 19 Johns. (N. Y.) 420. And in Illinois even municipal bonds may designate a place of payment in another state. Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803. And a statute providing for such bonds is unconstitutional in California. Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 580.

⁴⁹⁰ Story, Prom. Notes, § 49. And see Code Napoleon, in Appendix. If no place of payment be expressed in a bill or note, it is payable at the place where it is made in the ARGENTINE REPUBLIC (Code Com. arts. 783, 917). In DENMARK (Exch. Law, § 7) every bill must indicate its place of payment, if other than at the drawee's residence, and this will be presumed to be the

with the original idea and purpose of a bill of exchange, it is still necessary, in some countries, that it be made payable at a place different from that where it is drawn.⁴⁹¹

place of payment if none is expressed. In GERMANY (Exch. Law, art. 4) a bill of exchange must indicate its place of payment, but the drawee's address will suffice for this, and in a note the place of making will be taken for the maker's residence and the place of payment, if no other is expressed (article 97). So, in AUSTRIA (Exch. Law). In HOLLAND (Exch. Law, art. 208) a note may be made payable at the maker's residence or elsewhere. In HUNGARY (Exch. Law, c. 1, §§ 1, 14) bills must express a place of payment, and, if several places are named, the first place named shall govern (section 18). In BOLIVIA (Code Com. art. 463) drafts must express a place of payment, although this is not required for bills of exchange. This is also the law as regards notes, if they are payable at any other place than the maker's residence (article 469). In BRAZIL bills and notes must indicate the place of payment (Code Com. arts. 354, 426). In CHILI bills of exchange must indicate the place of payment, if other than the residence of the drawee (Code Com. art. 633); likewise drafts and notes, if payable otherwise than at the place where made (article 771). In ITALY bills and notes must indicate the place of payment (Code Com. arts. 196, 273). So, in MEXICO, all bills, notes, and drafts (Code Com. arts. 223, 447). So, in NICARAGUA, bills of exchange and notes (Code Com. arts. 241, 316). So, in HONDURAS, GUATEMALA, and PARAGUAY (Ord. Bilbao, c. 13, § 2; c. 14, § 1). In SPAIN (Code Com. art. 563) drafts and notes must indicate the place of payment, although the statute makes no such requirement for bills of exchange. So, too, in COLOMBIA (Code Com. art. 517); SALVADOR (Code Com. art. 510); URUGUAY (Code Com. art. 789). In LOWER CANADA (Civ. Code, § 2283) if a bill does not indicate its place of payment it is payable generally. In SWITZERLAND (Oblig. R. 722) a bill of exchange must indicate its place of payment, which may be done by the drawee's address. In PORTUGAL (Code Com. arts. 427, 428) a promissory note may be made payable at the maker's residence or elsewhere, but in the latter case it receives the qualities of a bill of exchange only by its transfer from one place to another. In SWEDEN and NORWAY (Exch. Law, c. 1, §§ 1, 2) bills may be made payable at the drawee's residence or elsewhere, and must express the place of payment, but the drawee's address will suffice for this. In VENEZUELA (Code Com. art. 1) bills of exchange must express a place of payment.

⁴⁹¹ A bill of exchange must be payable in a different place from that where it is drawn in BELGIUM (Code Napoleon, § 110); BOLIVIA (Code Com. art. 349); CHILI (Code Com. art. 637); COLOMBIA (Code Com. art. 387); COSTA RICA (Code Com. art. 376); ECUADOR (Spanish Code); FRANCE (Code Com. § 110); GENEVA (Code Napoleon); GREECE (Code Napoleon); HAYTI (Code Napoleon); HOLLAND (Exch. Law, art. 100); ITALY (Code Com.

In Great Britain, promissory notes for less than £20, payable to bearer on demand, must be made payable where they are issued, but may be also payable elsewhere.⁴⁹² It is also provided by statute in Great Britain that Bank of England notes shall be payable only at the bank in London, unless specially made payable at a branch bank, and that the notes of its branch banks shall be made payable where they are issued.⁴⁹³ All bills or notes drawn by co-partnerships or corporations of more than six persons were required formerly to specify the place of payment, and that place not to be in London, or within 65 miles of London, excepting, however, bills of £50 and upward payable at some period after date or sight, drawn by such co-partnerships or corporations carrying on business more than 65 miles from London.⁴⁹⁴ The restriction as to the amount was afterwards removed by a statute which empowered other corporations and co-partnerships of more than six persons to carry on business in London, provided they should not issue bills or notes at not less than six months.⁴⁹⁵ But this restriction, also, has now been removed.⁴⁹⁶

Place not Expressed in Bill or Acceptance.

§ 122. Where no place of payment is named in a bill or note, it is understood to be payable at the residence of the drawee of the bill or the maker of the note.⁴⁹⁷ And in such case a lawful tender can only

art. 196); MEXICO (Code Com. art. 323); PORTUGAL (Code Com. art. 321); SALVADOR (Code Com. art. 384); SPAIN (Code Com. art. 429). In PERU (Code Com. art. 385) it is merely an evidence of debt, if not made payable at a different place from its date. In SWITZERLAND (Oblig. R. 724) the drawer can only draw on himself at another place. In GERMANY the drawer of a bill of exchange can only be the drawee, if it is made payable at a different place from that of its date (Exch. Law, art. 6).

⁴⁹² 7 Geo. IV. c. 6, § 10.

⁴⁹³ 3 & 4 Wm. IV. c. 98, §§ 4, 6.

⁴⁹⁴ 7 Geo. IV. c. 46, § 1.

⁴⁹⁵ 3 & 4 Wm. IV. c. 83, § 2; 3 & 4 Wm. IV. c. 98, §§ 2, 3. By this latter act a banking partnership of more than six persons in, or within six miles of, London could not accept a bill drawn on it at less than six months. *Bank of England v. Anderson*, 3 Bing. N. C. 589.

⁴⁹⁶ 7 & 8 Vict. c. 32, § 26.

⁴⁹⁷ Chit. Bills, 174; 1 Daniel, Neg. Inst. 99; Story, Bills, § 48; *Mitchell v.*

be made to the holder personally, or at such residence.⁴⁹⁸ Where a bill is made expressly payable at the drawer's own house, this is said to raise a presumption that it is accommodation paper.⁴⁹⁹ As has been more fully considered elsewhere, the contracts of drawer, acceptor, and indorser are so many distinct contracts. From this it follows that, if default is made in acceptance or payment of a bill of exchange at the place on which it is drawn, the contract of the drawer makes him liable for its payment at the place where it is drawn.⁵⁰⁰

If a place of payment is named in a bill, the acceptance in blank is a contract to pay at that place. If no place be named, the acceptance, like the contract of one who makes a note, is to pay generally. An acceptor may, however, qualify and limit his contract to one for payment at a particular place. This he may do by accepting "payable at," etc., or simply by adding his address to his signature.⁵⁰¹ But in England an acceptor must now specially accept a bill, to be paid at a specified place "only, and not elsewhere," in order to qualify and limit his liability to payment at such place.⁵⁰²

Place of Payment in Memorandum—Blank.

§ 123. The place of payment is frequently expressed by a memorandum printed or written at the foot of the note or bill. A mere memorandum of this sort, intended for the direction of the holder, is not a part of the instrument.⁵⁰³ This must, however, depend in a

Baring, 10 Barn. & C. 4; *Id.*, 4 Car. & P. 35. If addressed to the drawee, at New York, it is payable there, *Cox v. National Bank*, 100 U. S. 704.

⁴⁹⁸ *Collins v. Sabatier*, 19 La. Ann. 299.

⁴⁹⁹ Byles, Bills, 90; *Sharp v. Bailey*, 9 Barn. & C. 44; *Id.*, 4 Man. & R. 4.

⁵⁰⁰ *Freese v. Brownell*, 35 N. J. Law, 285; Story, Conf. Laws, § 314. This is also the rule as to the indorser's contract. *Potter v. Brown*, 5 East, 124; *Powers v. Lynch*, 3 Mass. 77; *Prentiss v. Savage*, 13 Mass. 20; *Hicks v. Brown*, 12 Johns. (N. Y.) 142.

⁵⁰¹ Chit. Bills, 175; 1 Pard. Droit Commer. 354.

⁵⁰² 1 & 2 Geo. IV. c. 78; Byles, Bills, 90; Chit. Bills, 175; *Selby v. Eden*, 3 Bing. 611; 11 Moore, 511; *Fayle v. Bird*, 6 Barn. & C. 531; 9 Dowl. & R. 639. For construction of Acts 1 & 2 Geo. IV. c. 78, see *Rowe v. Young*, 2 Brod. & B. 165; *Siggers v. Nicholls*, Bail Ct. Hil. Term 1839, 3 Jur. 341. See, also, notes, § 126, *infra*.

⁵⁰³ Byles, Bills, 90; *American Nat. Bank v. Bangs*, 42 Mo. 450. See, too, *Bank of America v. Woodworth*, 18 Johns. (N. Y.) 315, reversed 19 Johns.

measure on the intention and the circumstances of its making. When it was written, and with what intention, are questions of fact for the jury.⁵⁰⁴ And it has been held that the addition of such a memorandum is a material alteration, discharging an accommodation indorser, although made by the maker after receiving the note from the indorser, and before discounting it.⁵⁰⁵ When the memorandum is printed like the rest of the note, although below the signature, it is held to be part of it.⁵⁰⁶

Sometimes a blank is left for the place of payment. When delivered by the maker in this condition, authority to fill it is implied as in case of other blanks, and a bona fide holder may fill the blank with such place as seems most convenient.⁵⁰⁷

(N. Y.) 391. And see contra, *Tuckerman v. Hartwell*, 3 Me. 147, where the memorandum was made by the acceptor at the time of the acceptance. And it seems that even in England it is not necessary to make presentment at the place designated in such memorandum. *Price v. Mitchell*, 4 Camp. 200; *Exon v. Russell*, 4 Maule & S. 506; *Williams v. Waring*, 10 Barn. & C. 2; *Id.*, 5 Man. & R. 9. But such a presentment is sufficient. *Kent, C.*, in *Woodworth v. Bank*, 19 Johns. (N. Y.) 411.

⁵⁰⁴ *Tuckerman v. Hartwell*, supra.

⁵⁰⁵ *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, reversing *Bank of America v. Woodworth*, 18 Johns. (N. Y.) 315. It is to be observed that Chancellor Kent in the appellate court, sustained, by an elaborate dissenting opinion, the judgment of Spencer, C. J., in the court below.

⁵⁰⁶ *Turnbull v. Thomas*, 1 Hughes, 172, Fed. Cas. No. 14,243. And in such a case a special presentment at that place has been held necessary in England. *Trecothick v. Edwin*, 1 Starkie, 468. And a printed memorandum in blank on the back of a railroad bond, referred to in the body of the instrument as left to be filled in with a place of payment by the president, must be so filled before the bond can become negotiable. *Parsons v. Jackson*, 99 U. S. 434.

⁵⁰⁷ *Redlich v. Doll*, 54 N. Y. 234; *McGrath v. Clark*, 56 N. Y. 34; *Waggoner v. Eager*, 8 Hun (N. Y.) 142; *Kitchen v. Place*, 41 Barb. (N. Y.) 465; *Marshall v. Drescher*, 68 Ind. 359; *Gillaspie v. Kelley*, 41 Ind. 158; *Shepard v. Whetstone*, 51 Iowa, 457, 1 N. W. 753. And a blank acceptance may be filled in payable at a particular place. *Todd v. Bank*, 3 Bush (Ky.) 626. But where no blank has been intentionally left, the insertion of a place of payment in a bill of exchange or promissory note is an alteration which makes it void. *Simpson v. Stackhouse*, 9 Pa. St. 186; *Morehead v. Bank*, 5 W. Va. 74; *McCoy v. Lockwood*, 71 Ind. 319. In *Marshall v. Drescher*, 68 Ind. 359, the blank space followed the printed words "payable at." Where the amount is determinable by the place of payment, which is to be indorsed on a corporation bond

Mistakes—Parol Evidence—Presumptions.

§ 124. If the place is incorrectly named, it may be corrected.⁵⁰⁸ It is said that where no place is mentioned the parties may agree upon a place by parol.⁵⁰⁹ But parol evidence is not admissible to show a contemporaneous agreement as to a place of payment, and that the same was omitted by mistake or fraud.⁵¹⁰

Neither can the place of date be assumed to be the place of payment, in the absence of other express provision.⁵¹¹ And making a note negotiable at a certain place is not the same thing as making it payable there.⁵¹²

Several Places Named—Pleading.

§ 125. A bill or note may, however, be made payable at one of two or more places, and in such case the maker has the choice of place, by its president, the blank left for that purpose in a printed indorsement signed by him cannot be filled without special authority. *Parsons v. Jackson*, 99 U. S. 434.

⁵⁰⁸ *Bank of Missouri v. Vaughan*, 36 Mo. 90. In this case the Bank of the State of Missouri, at St. Louis, was held to be intended by the "Bank of Missouri, at," etc. See, too, *Stix v. Mathews*, 63 Mo. 371.

⁵⁰⁹ *Meyer v. Hibsher*, 47 N. Y. 265; *Pearson v. Bank*, 1 Pet. 89. In this case it is said by Marshall, C. J.: "This is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand."

⁵¹⁰ *Specht v. Howard*, 16 Wall. 564; *Spitler v. James*, 32 Ind. 202; *Pierce v. Whitney*, 29 Me. 188.

⁵¹¹ *Lightner v. Will*, 2 Watts & S. (Pa.) 140; *Taylor v. Snyder*, 3 Denio (N. Y.) 145; *Blodgett v. Durgin*, 32 Vt. 361; *Anderson v. Drake*, 14 Johns. (N. Y.) 114; *Bank of America v. Woodworth*, 18 Johns. (N. Y.) 322; *Pierce v. Whitney*, 22 Me. 113, 29 Me. 188. From such date, however, it has been inferred that the maker contemplated payment at that place, *Stewart v. Eden*, 2 Caines (N. Y.) 121; *Bullard v. Thompson*, 35 Tex. 313; *Orcutt v. Hough*, 54 N. H. 472; and that such was prima facie the place of payment, *Ricketts v. Pendleton*, 14 Md. 320.

⁵¹² *Pearson v. Bank*, 1 Pet. 89. Neither will it render a note nonnegotiable elsewhere to make it "negotiable and payable at B." *Schoharie Co. Nat. Bank v. Bevard*, 51 Iowa, 257, 1 N. W. 524.

unless expressly given to the holder.⁵¹³ But where it is made payable "at any bank in Savannah," or "at either bank in Boston," presentment at any bank there is sufficient.⁵¹⁴ And in such case the holder need not give notice to the maker where he will present it.⁵¹⁵ Where a note was made payable either in Colorado or Nevada, the option thus left as to the place of payment was held to defeat the construction of the instrument as a Nevada contract governed by the Nevada statute of limitations.⁵¹⁶

Care should be observed as to the description of the note or bill in the pleadings in this respect. Thus, it has been held to be a variance, if a corporation note, dated in Chicago, and payable "at the office," be described in the declaration as payable at the Cook county office, there being two offices, and the one not in Cook county having been intended.⁵¹⁷ Where a bank is named as the place of payment, this does not, it seems, make the bank an agent for collection of the money.⁵¹⁸ But, in the language of Chief Justice Marshall, "by making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face."⁵¹⁹

If a bill or note is made payable at a particular place, the failure to set this out in the declaration constitutes a variance.⁵²⁰ In Alabama,

⁵¹³ *Womack v. Jenkins*, 17 Ind. 137; *Wilcox v. Williams*, 5 Nev. 206; and see *Pollard v. Herries*, 3 Bos. & P. 335.

⁵¹⁴ *Boit v. Corr*, 54 Ala. 112; *Allen v. Avery*, 47 Me. 287.

⁵¹⁵ *Allen v. Avery*, 47 Me. 287; *Brickett v. Spaulding*, 33 Vt. 107; unless the maker select a particular bank, and notify the holder, or call upon the holder to make a selection. "At any bank in Boston," refers, however, only to incorporated banks. *Way v. Butterworth*, 106 Mass. 75; *Id.*, 108 Mass. 509.

⁵¹⁶ *Wilcox v. Williams*, 5 Nev. 206.

⁵¹⁷ *Childs v. Lafin*, 55 Ill. 156.

⁵¹⁸ *Hills v. Place*, 48 N. Y. 520; *Caldwell v. Evans*, 5 Bush (Ky.) 380. A contrary doctrine seems to have been held in *Griffin v. Rice*, 1 Hilt. (N. Y.) 184.

⁵¹⁹ *Mandeville v. Bank*, 9 Cranch, 9. And see § 1441, *infra*.

⁵²⁰ *Lowe v. Bliss*, 24 Ill. 168; *Hodge v. Fillis*, 3 Camp. 463; *Sebree v. Dorr*, 9 Wheat. 558. So, too, the setting out of a place of payment not named in the bill, *Exon v. Russell*, 4 Maule & S. 505; or of the wrong place, e. g. where a note was payable "at the office," and there were two offices, of which the one not intended was designated in the pleadings, *Childs v. Lafin*, 55 Ill. 156.

nevertheless, a different rule prevails by statute, unless a bill or note is made payable at a certain place, and there only.⁵²¹

Presentment—How Far Governed by Designation of Place.

§ 126. It was formerly laid down as the rule that the place of payment mentioned in a bill or note governed both the matter of presentment and of pleading,⁵²² and that, if the bill or note mentioned the place of payment, presentment there was necessary to hold the drawer or maker.⁵²³ This rule was subsequently extended by the house of lords to bills payable generally on their face, but accepted payable at a particular place.⁵²⁴ This decision led, in England, to the passage of an act of parliament, already mentioned, which provides that "if any person shall accept a bill of exchange payable at the house of a banker or other place without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall, in his acceptance, express that he accepts the bill payable at the banker's house or other place *only and not otherwise or elsewhere*, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been demanded at such banker's house or other place."⁵²⁵

⁵²¹ Code, § 1765; *Clark v. Moses*, 50 Ala. 326. So, *Montgomery v. Elliott*, 6 Ala. 701, the defendant being left to disprove such a demand as matter of defense. By the act of 1872, bills of exchange and notes, payable in money at a bank or at a certain place therein designated, are governed by the commercial law. *Oates v. Bank*, 100 U. S. 239. This statute changes the commercial law as to notes only, *Gwathmay v. Clisby*, 31 Fed. 220. Designating a town or village generally is not enough, *Haden v. Lehman*, 83 Ala. 243, 3 South. 528; but it is sufficient, if the place is designated in the local date only, *Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314; but not in a printed letter head, *Renfro v. Bank*, 83 Ala. 425, 13 South. 776.

⁵²² *Byles, Bills*, 90; *Sanderson v. Bowes*, 14 East, 500; *Roche v. Campbell*, 3 Camp. 247.

⁵²³ *Byles, Bills*, 91; *Gibb v. Mather*, 8 Bing. 214, 1 Moore & S. 387, 2 Crompt. & J. 254; *Hodge v. Fillis*, 3 Camp. 463.

⁵²⁴ *Rowe v. Young*, 2 Brod. & B. 165, 2 Bligh, 391.

⁵²⁵ *Chit. Bills*, 332; *Byles, Bills*, 215; 1 & 2 Geo. IV. c. 78. And the act extends to an action by the drawer against the acceptor of a bill drawn payable in London, and accepted payable "at W. Metcalf, Esq., Coal Exchange,"

This act extends, however, only to actions against the acceptor.⁵²⁶ To hold the drawer, presentment at the place of payment named in the bill is still necessary in England.⁵²⁷ This is likewise the English rule as to the liability of the maker of a promissory note, which mentions a place of payment; the statute of 1 & 2 Geo. IV. having no application to notes.⁵²⁸ A mere memorandum, however, at the foot of a bill or note, though proved to have been there before the signatures, has not the same effect as mention of the place of payment in the body of the instrument; and presentment at the place named in such memorandum is not necessary,⁵²⁹ even though the memorandum be printed.⁵³⁰ But the separation of such words from the body of the note by a period (e. g. "At M. L.") does not make them a mere memorandum, when they are part of the note, and in that case the words necessitate presentment there.⁵³¹ Presentment at the place of payment mentioned in the bill or note being, as we have seen, requisite in England, it should be averred in the pleading to have so made,⁵³² although this has been questioned in some earlier cases.⁵³³

without the statutory words. *Fayle v. Bird*, 6 Barn. & C. 531, 9 Dowl. & R. 639, and 2 Car. & P. 303; *Selby v. Eden*, 3 Bing. 611, 11 Moore 511. See, too, *Turner v. Hayden*, 4 Barn. & C. 1, *Ryan & M.* 215.

⁵²⁶ *Bytes, Bills*, 215; *Chit. Bills*, 176; *Gibb v. Mather*, 8 Bing. 214; *Parks v. Edge*, 1 Crompt. & M. 429, 3 Tyrw. 364; *Harris v. Packer*, Id. 370; *Boydell v. Harkness*, 3 C. B. 168; *Walter v. Cubley*, 2 Crompt. & M. 151, 4 Tyrw. 87.

⁵²⁷ *Chit. Bills*, 176; *Saul v. Jones*, 1 El. & El. 59; *Gibb v. Mather*, *supra*; *Ambrose v. Hopwood*, 2 Taunt. 61; *Garnett v. Woodcock*, 1 Starkie, 475.

⁵²⁸ *Bytes, Bills*, 216; *Chit. Bills*, 177; 1 *Edw. Bills & N.* § 183; *Sanderson v. Bowes*, 14 East, 507; *Howe v. Bowes*, 16 East, 112; *Rowe v. Young*, 2 Brod. & B. 165; *Williams v. Waring*, 10 Barn. & C. 2; *Emblin v. Dartnell*, 12 Mees. & W. 830; *Spindler v. Grellett*, 1 Exch. 384. But see *Nicholls v. Bowes*, 2 Camp. 498.

⁵²⁹ *Bytes, Bills*, 90; *Chit. Bills*, 177; *Price v. Mitchell*, 4 Camp. 200; *Exon v. Russell*, 4 Maule & S. 506; *Williams v. Waring*, 10 Barn. & C. 2, 5 Man. & R. 9; *Wild v. Rennards*, 1 Camp. 425, note; *Callaghan v. Aylett*, 2 Camp. 551; *Saunderson v. Judge*, 2 H. Bl. 509; and see *Masters v. Barretto*, 8 C. B. 433. As to the sufficiency of presentment at such place, see opinion of Chancellor Kent in *Woodworth v. Bank*, 19 Johns. (N. Y.) 411.

⁵³⁰ *Chit. Bills*, 177; *Trecothick v. Edwin*, 1 Starkie, 468.

⁵³¹ *Vander Donckt v. Thellusson*, 8 C. B. 812.

⁵³² *Sanderson v. Bowes*, 14 East, 500; *Dickinson v. Bowes*, 16 East, 110; *Bowes v. Howe*, 5 Taunt. 30; *Ambrose v. Hopwood*, 2 Taunt. 61; *Callaghan v.*

⁵³³ See note 533 on following page.

§ 127. The American rule differs from the English one, both as to presentment and pleading; that is to say, presentment at the place named for payment in a bill or note is not necessary in order to charge maker, drawer, or acceptor.⁵³⁴ From this it follows that it is unnecessary to aver such presentment in the declaration against such parties.⁵³⁵ Presentment at the place named is, however, often necessary to the recovery of costs and damages against any party.⁵³⁶ And, if the maker or acceptor can show that any injury has been caused to him by failure to make presentment and demand payment at the place mentioned in the instrument, it seems that he may avail himself of such matter of defense.⁵³⁷ And nothing in this section is to be understood as affecting the rights of an indorser to require presentment at the place designated.⁵³⁸

American Statutes as to Place of Payment.

§ 128. Provisions for payment at bank, and other provisions relating to place of payment, are made by statute in some of the

Aylett, 3 Taunt. 397; Gammon v. Schmoll, 5 Taunt. 344; Rowe v. Young, 2 Brod. & B. 165; Cowie v. Halsall, 4 Barn. & Ald. 197; at least as to promissory notes, Chit. Bills, 404.

⁵³³ Saunderson v. Judge, 2 H. Bl. 509; Fenton v. Goundry, 13 East, 459; Lyon v. Sundius, 1 Camp. 423; Head v. Sewell, Holt, N. P. 363; Rowe v. Williams, Id. 363, note.

⁵³⁴ Bank of U. S. v. Smith, 11 Wheat. 171; Wallace v. McConnell, 13 Pet. 136; Foden v. Sharp, 4 Johns. (N. Y.) 183; Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; Caldwell v. Cassidy, 8 Cow. (N. Y.) 271; Watkins v. Crouch, 5 Leigh (Va.) 522; Bowie v. Duvall, 1 Gill & J. (Md.) 175; Ruggles v. Patten, 8 Mass. 480; Herring v. Sanger, 3 Johns. Cas. (N. Y.) 71; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; Blair v. Bank, 11 Humph. (Tenn.) 88; McNairy v. Bell, 1 Yerg. (Tenn.) 502; Mulherrin v. Hannum, 2 Yerg. (Tenn.) 81; Weed v. Van Houten, 9 N. J. Law, 189; Fuller v. Dingman, 41 Iowa, 506.

⁵³⁵ Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; Carley v. Vance, 17 Mass. 389; Weed v. Van Houten, 9 N. J. Law, 189. And see remarks of Thompson, J., to the same effect in Bank of U. S. v. Smith, 11 Wheat. 175.

⁵³⁶ Caldwell v. Cassidy, 8 Cow. (N. Y.) 271; Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; Fuller v. Dingman, 41 Iowa, 506.

⁵³⁷ Nichols v. Pool, 47 N. C. 23. And in Louisiana such failure is no defense without proof of special damage. McCalop v. Fluker, 12 La. Ann. 551.

⁵³⁸ Ferner v. Williams, 37 Barb. (N. Y.) 9.

states.⁵³⁹ Thus, by the Indiana statute a note is not governed by mercantile law unless made payable at a bank in that state.⁵⁴⁰ The

⁵³⁹ In ALABAMA promissory notes, to be negotiable, must be made payable "at a bank or private banking house." Code, § 1765. But all "bills and notes payable at a banker's or a designated place of payment are negotiable instruments." *Oates v. Bank*, 100 U. S. 239. And parol evidence is admissible to show that the place named is such. *Anniston Loan & Trust Co. v. Stickney*, 108 Ala. 146, 19 So. 63. In CALIFORNIA "a negotiable instrument may be with or without designation of the place of payment" (Civ. Code, § 8091), and "a negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker, or where he may be found" (Id. § 8100). In NORTH DAKOTA (Code, § 4857) and WYOMING (Rev. St. c. 70, art. 1, § 6) the provisions of the California Code have been copied. In INDIANA promissory notes, to be negotiable independent of equities, must be payable to order or bearer and in a bank in Indiana (Horner's St. § 5506). But, if payable at a particular place, demand at such place need not be pleaded or proved (Id. § 368). In KENTUCKY only such promissory notes as are made payable and negotiable at a bank incorporated by Kentucky law, and are indorsed and discounted by the said bank or some other bank in Kentucky, are negotiable like foreign bills of exchange (St. § 483). All other bonds, bills, and notes, whether for money or property, are assignable subject to defense (Id. § 474). In VIRGINIA formerly (Code, § 2849; repealed in 1898) and in WEST VIRGINIA (Code, c. 99, § 7) negotiable notes and checks must be made payable in the state, "at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution or savings bank, or at the place of business of a licensed broker." And see *Bank of Huntington v. Hysell*, 22 W. Va. 142. As to the construction of these statutes, see *Freeman's Bank v. Ruckman*, 16 Grat. (Va.) 126; *Bradley v. Patton*, 51 Ala. 108; *Cook v. Insurance Co.*, 53 Ala. 37; *Holloway v. Porter*, 46 Ind. 62; *Parkinson v. Finch*, 45 Ind. 122; *Musselman v. McElhenny*, 23 Ind. 4; *Stapp v. Anderson*, 1 A. K. Marsh. (Ky.) 398; *Jones v. Wood*, 3 A. K. Marsh. (Ky.) 1047.

⁵⁴⁰ *Woodward v. Mathews*, 15 Ind. 339; *Bremmerman v. Jennings*, 60 Ind. 175; *Crossan v. May*, 68 Ind. 242; *Zook v. Simonson*, 72 Ind. 83; *Ruddell v. Phalor*, Id. 533; *Woollen v. Whitacre*, 73 Ind. 198; *Woollen v. Wise*, Id. 212; *Second Nat. Bank v. Brady*, 96 Ind. 498; *Scotten v. Randolph*, Id. 581. But if transferred by delivery only, such note is subject to equities. *Foreman v. Beckwith*, 73 Ind. 515. And, if the bank has ceased to exist before the transfer of the note, it becomes nonnegotiable. *Brown v. Hull*, 33 Grat. (Va.) 23. A note "payable at the Indiana Banking Company of Indianapolis" is not, however, entitled to the protection of the statute as a negotiable note, *Rominger v. Keyes*, 73 Ind. 375; nor a note payable "at the bank at Goshen," without more particular designation, *Butterfield v. Davenport*, 84 Ind. 590;

courts in that state, however, favor the presumption that if a bank is mentioned, without designating its location, it is an Indiana bank.⁵⁴¹ Prior to 1843, negotiable notes in Indiana had to be paid at a chartered or incorporated bank, and, if not so payable, could not be transferred by delivery, although payable to bearer.⁵⁴² This has now been changed in Indiana,⁵⁴³ but is still the law of Kentucky.⁵⁴⁴ Where the bank named as place of payment is incorporated, the courts of the state by whose laws it is incorporated will take notice of that fact.⁵⁴⁵ But the courts will not, in general, take notice that the office of a firm in another state is a bank.⁵⁴⁶ Where a bank is required by the statute, the name of a fictitious bank is no compliance.⁵⁴⁷ The name may, however, be left blank, and filled in afterwards, as in the case of other blanks.⁵⁴⁸ It has been further held

although there may be only one bank in the place, *Coffing v. Hardy*, 86 Ind. 369; *Hardy v. Brier*, 91 Ind. 91. If payable at a New York bank it is not governed by the *lex mercatoria*. *Mix v. Bank*, 13 Ind. 521. And it seems that the statute of Anne is not in force in Indiana, and notes depend for their commercial qualities wholly on the Indiana statute. *Mix v. Bank*, *supra*; *Hunt v. Standart*, 15 Ind. 33, 160. But an Indiana note, if otherwise negotiable, may be payable to bearer, *Melton v. Gibson*, 97 Ind. 158; and the bank named for place of payment may be the payee, *De Pauw v. Bank*, 126 Ind. 553, 25 N. E. 705.

⁵⁴¹ *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258; and especially if payable at the "City Bank, Shelbyville, Ind.," *Henderson v. Ackelmire*, 59 Ind. 540; *Burroughs v. Wilson*, *Id.* 536; *Roach v. Hill*, 54 Ind. 245; *Walker v. Woollen*, *Id.* 164.

⁵⁴² Rev. Code, p. 93; *McNitt v. Hatch*, 4 Blackf. Ind. 531.

⁵⁴³ *Davis v. McAlpine*, 10 Ind. 137; *Reed v. Trentman*, 53 Ind. 438. And it need not be a national bank. *Reed v. Trentman*, *supra*.

⁵⁴⁴ *Campbell's Ex'r v. Bank*, 10 Bush, 152; Gen. St. c. 22, § 21. See, too, *Payne v. Bank*, 10 Bush, 176; *Gaines v. Bank (Ky.)* 39 S. W. 438.

⁵⁴⁵ *Gordon v. Montgomery*, 19 Ind. 110. But see *Salmons v. Hoyt*, 53 Ga. 493.

⁵⁴⁶ *Crossan v. May*, 68 Ind. 242.

⁵⁴⁷ *Parkinson v. Finch*, 45 Ind. 122. And in such case the maker is not estopped from showing the designated bank to be a fictitious one. *Parkinson v. Finch*, *supra*. But see, *contra*, *Hall v. Harris*, 16 Ind. 180.

⁵⁴⁸ *Spitler v. James*, 32 Ind. 203; *Gillaspie v. Kelley*, 41 Ind. 158. And at suit of a bona fide holder such filling of a blank, though made in disregard of a verbal agreement between the original parties, binds the maker. *Spitler v. James*, *supra*.

in Indiana that notes payable to order are negotiable, although not payable in bank,⁵⁴⁹ and that notes which are nonnegotiable under the statute are nevertheless assignable,⁵⁵⁰ though subject to defense,⁵⁵¹ but that they are not *prima facie* payment of prior indebtedness, like negotiable notes.⁵⁵²

In Maine, if a note is payable at a place certain, it must be presented there before suit can be brought against the maker,⁵⁵³ but making it payable at a town generally is not such designation of a place certain.⁵⁵⁴

Municipal bonds may be made payable in another state, where the statute authorizing them contains no restriction as to the place of payment.⁵⁵⁵

⁵⁴⁹ *Snyder v. Oatman*, 16 Ind. 265.

⁵⁵⁰ *Parkinson v. Finch*, 45 Ind. 122; *King v. Vance*, 46 Ind. 246.

⁵⁵¹ *Reagan v. Burton*, 67 Ind. 347; *Woodward v. Mathews*, 15 Ind. 339.

⁵⁵² *Lindeman v. Rosenfield*, 67 Ind. 246; *Rhodes v. Webb-Jameson Co.*, (Ind. App.) 49 N. E. 283.

⁵⁵³ Rev. St. c. 32, § 10.

⁵⁵⁴ *Greenlief v. Watson*, 83 Me. 266, 22 Atl. 165.

⁵⁵⁵ *Meyer v. City of Muscatine*, 1 Wall. 384.

CHAPTER V.

FORM—THE PARTIES DESIGNATED.

- I. THE MAKER OR DRAWER.
 - II. THE PAYEE.
 - III. THE DRAWEE.
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I. THE MAKER OR DRAWER.

- § 129. Name of Party—In General.
- 130. Execution by Partners—Partnership Name.
- 130a. — By Partners—Joint Names.
- 130b. — By Partners—Individual Name—When Binding on Firm.
- 130c. — By Partners—Individual Name—Firm Contract.
- 130d. — By Partners—Individual Name Same as Firm Name.
- 130e. — By Partners—Presumption as to Individual Name.
- 131. — By Agent—*Principal not Named*.
- 132. — By Public Officer.
- 133. Official Signature—"Agent," etc.—Principal not Named.
- 134. Signature as "Executor"—"Administrator"—"Guardian."
- 135. *In Principal's Name*—Corporation and Official Signatures.
- 136. *Principal Named Only* in Agent's Official Title in Body of Instrument.
- 137. — In His Signature.
- 138. *Principal Indicated* by Corporation Seal or Paper.
- 139. — By Words "on Behalf of," etc.
- 140. — By Charging to His Account.
- 141. — By Recital of Consideration Moving to Him.
- 142. — By Form of Promise—"I Promise."
- 143. — "We or Either of Us"—"Jointly and Severally."
- 144. — By Agent's Promise "as" Such.
- 145. — *As Acceptor or Indorser* by Drawee's or Payee's Name.
- 146. Foreign Statutes as to Signature by Agent.
- 147. Parol Evidence—Disclosing Principal—Discharging Agent.
- 148. Maker's or Drawer's Name—Fictitious—Uncertain.
- 149. Joint and Several Notes.

Name of Party—In General.

§ 129. It is an essential requisite of all commercial paper that the parties to it should appear by name or other plain designation in the instrument itself. Thus, it must appear from the instrument who is

to be bound by it as maker or drawer.¹ This is usually made apparent by the signature subscribed to the paper. It may, however, as we have seen, appear in the body of the instrument, e. g. "I, A. B., promise," etc., instead of at the bottom,² although this is unusual, and cannot be recommended. And in some states it is required by statute that the name of maker or drawer be subscribed to the instrument.³

Although, in the absence of statutory provisions, it may not be necessary for the name or the full name of the maker or drawer to appear, the person to be charged must be designated with certainty. Thus, it is not sufficient for a promissory note that it be signed, "J. C., or else H. B."⁴ A maker may, however, be bound by an assumed name,⁵ or by initials.⁶ But it has been held that one signing a fictitious name as maker for the accommodation of the payee is not liable on the instrument, as no credit was given to him.⁷ Some foreign statutes require that the name of the maker or drawer be expressed in full.⁸ And this is recommended as the only satisfactory rule in the matter. In practice, however, it is far from being generally observed.

Execution by Partners—Partnership Name.

§ 130. Partnership bills and notes should be executed in the proper name of the firm.

A note made by an individual partner in the firm name is *prima facie* the act of the firm done in the course of its partnership busi-

¹ 1 Daniel, Neg. Inst. 101; 1 Edw. Bills & N. § 143; 1 Pars. Bills & N. 36; Story, Bills, § 53; Story, Prom. Notes, § 34.

² May v. Miller, 27 Ala. 515; Tevis v. Young, 1 Mete. (Ky.) 199. See, also, chapter III.

³ See chapter III.

⁴ Ferris v. Bond, 4 Barn. & Ald. 679. See, too, Wilkinson v. Lutwidge, 1 Strange, 648.

⁵ Melledge v. Iron Co., 5 Cush. (Mass.) 158.

⁶ See chapter III. And a party signing a bill, note, or check by initial or contraction of his Christian name may be sued in the same way in New Jersey. Gen. St. p. 2537, § 28; Pub. Laws 1870, p. 59.

⁷ Bartlett v. Tucker, 104 Mass. 336.

⁸ See chapter III.

ness.⁹ And, even where there is no firm, a negotiable instrument executed by B., in the firm name of "A. & Co.," with A.'s knowledge, will be binding upon both persons as partners.¹⁰

If the name be changed, the firm will not, in general, be liable without its consent to the name used, unless such name substantially describes the firm.¹¹ Thus, it has been held that a firm, doing business as "John Blurton," will not be liable on a note executed in the name of "John Blurton & Co.";¹² nor a firm named "Wm. Smith & Co.," on an indorsement in the name of "Wm. Smith."¹³ But an indorsement in the name of "A. & Co." was held,

⁹ *Adams v. Ruggles*, 17 Kan. 237; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; *Thurston v. Lloyd*, 4 Md. 283; *Manning v. Hays*, 6 Md. 5; *Mitlin v. Smith*, 17 Serg. & R. (Pa.) 165; *Ensminger v. Marvin*, 5 Blackf. (Ind.) 210; *Carrier v. Cameron*, 31 Mich. 373; *Wilson v. Richards*, 28 Minn. 337; *National Union Bank v. Landon*, 66 Barb. (N. Y.) 193. Thus, it is said by Chancellor Walworth in *Whitaker v. Brown*, 16 Wend. (N. Y.) 507: "A note given by one partner in the name of the firm is of itself presumptive evidence of the existence of a partnership debt, as each partner has a general authority to contract debts in the business of the firm. The burden of proof therefore lay upon the plaintiff in this case to show that this note was not given for such a debt." The same rule applies to indorsements in a firm name, *Moorehead v. Gilmore*, 77 Pa. St. 118. And it is said by Judge Marshall in *Hamilton v. Summers*, 12 B. Mon. (Ky.) 12, that "the belief of the payee that the money was borrowed for individual purposes, though it might prove an intention on his part to do an unjust act, would have no effect in law, unless the fact correspond with his belief. And even if the money was avowedly borrowed for a private purpose, with the knowledge of the payee, still, if it was in fact used for the purpose of the firm, we are not prepared to say that the note executed in the firm name should not be binding upon all the partners."

¹⁰ *Smith v. Hill*, 45 Vt. 90.

¹¹ *Byles, Bills*, 45; 1 *Daniel, Neg. Inst.* 331; 1 *Pars. Notes & B.* 135; *Williamson v. Johnson*, 1 Barn. & C. 146; 2 *Dowl. & R.* 281; *Faith v. Richmond*, 11 Adol. & E. 339; *Id.*, 3 *Perry & D.* 187; *Forbes v. Marshall*, 11 Exch. 166; *Stephens v. Reynolds*, 5 Hurl. & N. 513, 29 *Law J. Exch.* 278.

¹² *Kirk v. Blurton*, 9 Mees. & W. 284; *Faith v. Richmond*, 11 Adol. & E. 339. But see *Stephens v. Reynolds*, 5 Hurl. & N. 513; *MacLae v. Sutherland*, 3 El. & Bl. 36.

¹³ *Alabama Coal-Min. Co. v. Brainard*, 35 Ala. 476. But such indorsement will effect an equitable transfer of the interest of the firm. *Id.* And, where the payees named as a firm were named by a fictitious name, rightful title will be presumed in a bona fide holder from possession under an indorsement in the assumed name by one of the actual payees. *Blodgett v. Jackson*, 40 N. H. 21.

in an early New York case, sufficient to bind a firm which consisted of A. and B., and had always been known by the name of "B. & Co."¹⁴

A different name from that actually belonging to the firm, and commonly used by it, may be adopted by it, and will then be sufficient to bind it, e. g. "Elias Malone & Co., Still House," instead of the regular firm name, "Elias Malone."¹⁵ And, where a fictitious name is used by the firm, this will bind it.¹⁶ So, where a partnership is formed for the publication of a newspaper called "The Opinion," an acceptance given by one partner before the formation of the firm, in his own name, "For the Opinion," for goods purchased for, and afterwards used by, the firm, will be binding upon it.¹⁷ This has been held, too, of a note signed by the individual name of one partner "for the use of" the firm.¹⁸ And where a firm consisting of two partners has been dissolved, and a new firm formed under a new name by the addition of a third partner, a bill signed by one of the original partners in the name of the old firm, and indorsed by the new partner for the use of the new firm, in its new name, will be binding upon the other original partner also as a member of the new firm.¹⁹

Joint Names.

§ 130a. It will be sufficient execution by a firm, if the joint names of all the partners be signed to the paper.²⁰ But where a joint note

¹⁴ Drake v. Elwyn, 1 Caines, 184.

¹⁵ Moffat v. McKissick, 8 Baxt. (Tenn.) 517. See, too, Melsheimer v. Hommel, 15 Colo. 475, 24 Pac. 1079.

¹⁶ Thieknesse v. Bromilow, 2 Crompt. & J. 425.

¹⁷ Markham v. Hazen, 48 Ga. 570.

¹⁸ Dow v. Moore, 47 N. H. 419.

¹⁹ Bacon v. Hutchings, 5 Bush (Ky.) 595.

²⁰ Chit. Bills, 72; 1 Daniel, Neg. Inst. 331; 1 Pars. Notes & B. 136; MacLae v. Sutherland, 3 El. & Bl. 36; Norton v. Seymour, 3 C. B. 792; In re Warren. Davies, 320, Fed. Cas. No. 17,191; Filley v. Phelps, 18 Conn. 301; Trowbridge v. Cushman, 24 Pick. (Mass.) 310; National Exch. Bank v. Wilgus' Ex'rs, 95 Ky. 309, 25 S. W. 2; Meier v. Bank (Ohio) 45 N. E. 907. But see, contra, Buffum v. Seaver, 16 N. H. 160; Gay v. Johnson, 45 N. H. 587. At least, it is not prima facie a firm bill or note, Richardson v. Huggins, 23 N. H. 106; unless it be shown that the firm has no firm name, McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

was made by partners in their individual names, payable to their own order, an indorsement by one only was held to be insufficient by the custom of London, notwithstanding that such persons had been found to be partners in the transaction.²¹ But a note executed in the joint names of all the partners is not *prima facie* a partnership note, nor evidence of a partnership debt.²²

In like manner, joint debtors who are not partners will both be bound by a note given in their joint names by one, if the other has promised to pay it with full knowledge of the way in which it was signed.²³ So, a partner may be bound by a note given in the firm business by his partner in their individual names, although he had issued a circular stating that the firm business would be carried on in another name.²⁴ And, where a partnership note is renewed after dissolution of the firm by a note signed by the individual names of the partners, there will be no change of liability unless specially so intended, and both partners will remain liable.²⁵

In like manner, where a note was signed by two partners in their

²¹ *Carvick v. Vickery*, Doug. 653. As to this case, see Chit. Bills, 72.

²² *Byles*, Bills, 44; *Gay v. Johnson*, 45 N. H. 587; *Buffum v. Seaver*, 16 N. H. 160; *Richardson v. Huggins*, 23 N. H. 106; *Ellinger's Appeal*, 114 Pa. St. 505, 7 Atl. 180; *Dunnica v. Clinkseales*, 73 Mo. 500. But a note signed by one partner, and indorsed by the other, for partnership purposes, may be shown to be a partnership obligation; the burden of such proof being on the holder, *City Bank of New Haven's Appeal*, 54 Conn. 269. So, as between the parties, the note of one for the firm debt. *Kenney v. Howard*, 68 Vt. 197, 34 Atl. 700. But unless there be evidence of a partnership, and no evidence of a partnership name other than that signed, a note signed with the full names of the partners, F. C. and R. C., is *prima facie* a firm note, although it appear that in two instances the name of F. & R. Cleveland had been used. *McGregor v. Cleveland*, 5 Wend. (N. Y.) 475. But such a note, given after the dissolution of a partnership, as a substitute for a previous partnership note, does not make the debt an individual debt. *Maynard v. Fellows*, 43 N. H. 255. So, where it is given in such form, after dissolution, and without notice of the dissolution, for a firm debt. *Iddings v. Pierson*, 100 Ind. 418. As to the power of a partner to bind his firm by signing the full individual names instead of the firm name, see *Norton v. Seymour*, 3 C. B. 792; *Maclae v. Sutherland*, 3 El. & Bl. 36; Chit. Bills, 72.

²³ *Waite v. Foster*, 33 Me. 424.

²⁴ *Norton v. Seymour*, 3 C. B. 792.

²⁵ *Maynard v. Fellows*, 43 N. H. 255; *National Exch. Bank v. Wilgus*, 95 Ky. 309, 25 S. W. 2.

individual names and by sureties who were induced to sign by a representation that it was for the accommodation of the firm, the proceeds having been used by the firm, the firm will not be discharged by a renewal afterwards by one partner with the same sureties.²⁶ So, one partner cannot deny the authority of the other to bind him before the adoption of a firm name, by a note signed by him with their individual names, and given for goods purchased by him, which have been entered in the books of the firm and sold for its benefit.²⁷ And where an accommodation indorser for a firm has paid a note signed by one partner as maker and by the other as indorser, it has been held that the action will lie against the firm for money paid for its use.²⁸ But it has been held, on a question of priority among creditors, that a note signed by the individual names of the partners is not of itself evidence of a partnership debt.²⁹ And neither maker can set up that the firm is in the hands of a receiver as a defense.³⁰

Individual Name—When Binding on Firm.

§ 130b. One partner may bind a partnership by a bill drawn on it in his individual name for a firm debt,³¹ or by an acceptance in his individual name of a bill drawn on the firm,³² or by an indorsement in the firm name of a bill drawn in a fictitious name.³³ And

²⁶ *McKee v. Hamilton*, 33 Ohio St. 7.

²⁷ *Kitner v. Whitlock*, 88 Ill. 513.

²⁸ *Thayer v. Smith*, 116 Mass. 363. See, too, *In re Warren, Davies*, 320, Fed. Cas. No. 17,191.

²⁹ *Gay v. Johnson*, 45 N. H. 587.

³⁰ *C. & C. Electric Co. v. St. Clair*, 182 Pa. St. 274. 37 Atl. 814.

³¹ *Dougal v. Cowles*, 5 Day (Conn.) 511. And such bill is equivalent to an acceptance by the firm, *Id.*; 1 Pars. Notes & B. 135; especially where the firm had authorized the bill, as well as accepting similar ones drawn before that, *Denton v. Rodie*, 3 Camp. 493.

³² *Bytes, Bills*, 44; *Chit. Bills*, 73; 1 *Daniel, Neg. Inst.* 332; 1 *Edw. Bills*, § 107; 1 *Pars. Notes & B.* 135; *Mason v. Rumsey*, 1 Camp. 384; *Jenkins v. Morris*, 16 Mees. & W. 879; *Stephens v. Reynolds*, 5 Hurl. & N. 513, 29 *Law J. Exch.* 278; *Tolman v. Hanrahan*, 44 *Wis.* 133; *Pannell v. Phillips*, 55 *Ga.* 618. But see, contra, *Heenan v. Nash*, 8 *Minn.* 407 (*Gil.* 363), where it is held that such acceptance will not even bind the partner who gives it.

³³ *Bytes, Bills*, 45; 1 *Pars. Notes & B.* 130; *Thicknesse v. Bromilow*, 2 *Crompt. & J.* 425. And it seems that an indorsement may be sufficient to effect

it is said that, where a note is made payable to two persons by name and indorsed by one in his own name, it will be presumed that the payees are a firm, and that the indorser is one of them.³⁴ But where the agent of a company drew a bill in his own name upon some of the members, with their consent, to discharge a debt of the company, and the bill was accepted by such drawees, and afterwards transferred, only those accepting it (and not the company as such) were held to be liable on it to the holder.³⁵ But if their name had been adopted and used for the company by its consent and with the intention of binding it, it would have been otherwise. So, an agent authorized to make notes for a firm cannot by a note in the individual name of one partner bind either the individual or the firm, unless that name is adopted by the firm.³⁶

It is often a question of fact whether a bill or note is the promise of a firm or that of an individual. Thus, where a note read, "I promise," etc., and was signed, "Samuel W. Snow, Snow, Foote & Co.," the question as to whether it was the note of the individual or of the firm was left to the jury.³⁷

The individual names of the partners may be so used as to give

a transfer, although insufficient to bind the firm as indorsers, *Smith v. Johnson*, 3 Hurl. & N. 222; at least, to transfer the equitable title, *Alabama Coal-Min. Co. v. Brainard*, 35 Ala. 476.

³⁴ *McConeghy v. Kirk*, 68 Pa. St. 200. The sufficiency of the indorsement in this case was admitted by a subsequent indorsement.

³⁵ *Rogers v. Coit*, 6 Hill (N. Y.) 322.

³⁶ *Palmer v. Stephens*, 1 Denio (N. Y.) 471. And he may show an adoption of such name by the firm, or even, it seems, by its managing partner for it, *Id.*

³⁷ *Sherwood v. Snow*, 46 Iowa, 481. The words "I promise," etc., in the body of a note signed in the firm name, do not affect its character as a firm note. *Doty v. Bates*, 11 Johns. (N. Y.) 544. So, too, *Lord Galway v. Matthew*, 1 Camp. 403; *Smith v. Jarves, Ltd.* Raym. 1484. And where the individual names of all the partners are signed by one partner to a note beginning, "I promise," etc., "for A., B. & Co. A.," it is held, in England, that the signer, A., is not severally liable. *Ex parte Buckley, In re Clarke*, 14 Mees. & W. 469, overruling *Hall v. Smith*, 1 Barn. & C. 407. A similar note, however, has been held to be joint and several in Massachusetts, *Hemmenway v. Stone*, 7 Mass. 58. See, too, *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531, 47 N. E. 227; *Armstrong v. Canal Co. (Utah)* 48 Pac. 690. Where a bill of exchange, drawn against the firm of B. & Co., was accepted by writing across it, "B. & Co. A. B.," the partner A. B. was held not to be liable separately. *Edwards v. Barnard*, 32 Ch. Div. 447.

the appearance of a joint or partnership obligation. Thus, where one person has obtained the signature of another without any indication of the character of the second as a surety, and a third person has afterwards signed the note as surety, supposing the first two to be joint principals, the first two being in fact partners, the second signer will have no claim for contribution against the third as a co-surety.³⁸ Or, if the consideration is a joint one, the contract in the individual names may also be joint. Thus, if one member of the firm makes a note which is indorsed successively by the other members and given for money used by the firm, such indorsers are sometimes presumed to be guarantors, and in such case an alteration by the partner making the note will not discharge the partners indorsing it, but all will be liable as a firm.³⁹

Individual Name—Firm Contract.

§ 130c. In general, however, a firm will not be bound by a bill or note given by one partner in his own name,⁴⁰ even though the proceeds go to the firm or are applied in payment of its debts,⁴¹ and though the firm may be liable to suit for the debts;⁴² and this is

³⁸ Wells v. Miller, 66 N. Y. 255.

³⁹ Pahlman v. Taylor, 75 Ill. 629.

⁴⁰ Byles, Bills, 44; Chit. Bills, 72; 1 Daniel, Neg. Inst. 335; Siffkin v. Walker, 2 Camp. 308; Emly v. Lye, 15 East, 7; Smith v. Craven, 1 Crompt. & J. 500; Nicholson v. Ricketts, 29 Law J. Q. B. 55; In re Adanson Fibre Co., 9 Ch. App. 635; Bank of Commerce v. Selden, 3 Minn. 155 (Gil. 99). So, too, a check drawn in the name of one partner on a firm bank account in violation of agreement requiring both signatures, and known to the bank. Granby Mining & Smelting Co. v. Laverty, 159 Pa. St. 287, 28 Atl. 207. And a note made in one partner's name will be treated as evidence of the creditor's election to trust the maker only, unless the note has been given in the firm business, and for its benefit, and the credit appears to have been given to the firm. Foster v. Hall, 4 Humph. (Tenn.) 346.

⁴¹ 1 Pars. Bills & N. 130; Tallmadge v. Penoyer, 35 Barb. (N. Y.) 120; Logan v. Bond, 13 Ga. 192; McCauley v. Gordon, 64 Ga. 221; Holmes v. Burton, 9 Vt. 252; Macklin's Ex'r v. Crutcher, 6 Bush (Ky.) 401, overruling Hikes v. Crawford, 4 Bush (Ky.) 19; Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. 67. But see Smith v. Turner's Adm'r, 9 Bush (Ky.) 417, where the construction was determined as a question of intention purely. So, Carter v. Mitchell, 94 Ky. 261, 22 S. W. 83, where the firm was bound by its consent to the drawing of such a note.

⁴² Ontario Bank v. Hennessey, 48 N. Y. 545; Emly v. Lye, 15 East, 7.

true although the bill be expressed to be drawn "on account of" the firm.⁴³ In many such cases the intention to substitute an individual liability is apparent. Thus, if a partnership debt be paid by the note of an individual partner with outside collateral given to secure it, the firm will be discharged.⁴⁴

So, where several firms are associated in a joint business, but not incorporated, bills and acceptances drawn in the joint business, some by one firm and some by another, will bind the firms signing or accepting them, and not the associated firms.⁴⁵ But where a note payable on demand is given by one partner after the absconding of the other, in renewal of a note payable at a future time, the absconding partner will not be bound by the renewal.⁴⁶

But it has been held that if a note is given by one partner in his own name for money loaned to the firm, and the proceeds are received and used by the firm, it will be bound by the note.⁴⁷ This liability extends, however, only to cases where, if the firm name has not been used, credit has at least been given to the firm.⁴⁸ A firm will be liable on such paper where the benefit has been received by it and the credit given to it.⁴⁹ And in such case an indorser, who has been obliged to pay the note, may enforce a lien for the claim against partnership assets in his hands.⁵⁰ Even where a firm business has been carried on in the name of one partner, it has been held that indorsements in his name will only bind the firm where they were received as its indorsements upon a representation to that effect and were made in the firm business.⁵¹ So, where a note has been given by one partner for corn sold to both, on a representation

⁴³ *Cunningham v. Smithson*, 12 Leigh (Va.) 32.

⁴⁴ *Adams v. Reid*, 56 Ga. 214.

⁴⁵ *In re Adanson Fibre Co.*, 9 Ch. App. 635.

⁴⁶ *Whitman v. Leonard*, 3 Pick. (Mass.) 177.

⁴⁷ *Whitaker v. Brown*, 16 Wend. (N. Y.) 505.

⁴⁸ *National Bank of Salem v. Thomas*, 47 N. Y. 15.

⁴⁹ *Puckett v. Stokes*, 2 Baxt. (Tenn.) 442. See, too, *In re Warren, Davies*, 320, Fed. Cas. No. 17,191, where it is said that such name will be presumed to have been taken by choice by the partners for their use. But this presumption may be rebutted by proof to the contrary. *Id.*

⁵⁰ *Foster v. Hall*, 4 Humph. (Tenn.) 345.

⁵¹ *U. S. Bank v. Binney*, 5 Mason, 176, Fed. Cas. No. 16,791.

by the maker that he gave the note on the partnership account, both have been held liable on it.⁵²

A firm may become liable on paper executed in its name, though running in the words, "I promise," etc.⁵³ Again, two partners may become severally liable upon a joint and several note executed in the firm name by one and ratified afterwards by a confession of judgment by the other.⁵⁴

Individual Name Same as Firm Name.

§ 130d. Where the name of an individual partner is also the name of the firm, and the bill or note in question is given in such name and for the benefit of the firm, all the partners will, of course, be liable on it.⁵⁵ So, where the firm business is carried on in the name of

⁵² *Seekell v. Fletcher*, 53 Iowa, 330, 5 N. W. 200; *Ontario Bank v. Hennessey*, 48 N. Y. 545; *Woodward v. Winship*, 12 Pick. (Mass.) 430.

⁵³ *Doty v. Bates*, 11 Johns. (N. Y.) 544. Especially where the note was signed, "For A. B. & Co. A." *Lord Galway v. Matthew*, 1 Camp. 403; *Smith v. Jarves*, 2 Ld. Raym. 1484; *In re Clarke*, 14 Mees. & W. 469; *Staats v. Howlett*, 4 Denio (N. Y.) 559. And it has been held in such case that the holder might sue the individual signer or the firm. *Hall v. Smith*, 1 Barn. & C. 407; *Id.*, 2 Dowl. & R. 584; *March v. Ward, Peake*, 130; *Clerk v. Blackstock, Holt*, N. P. 474. But, as to this point, see, contra, *In re Clarke*, 14 Mees. & W. 469, overruling *Hall v. Smith*, 1 Barn. & C. 407; *Id.*, 2 Dowl. & R. 584. And the holder of such note cannot prove his claim in bankruptcy against the separate estate of the individual signer. *Ex parte Christie*, 3 Mont. D. & D. 736.

⁵⁴ *Sherman v. Christy*, 17 Iowa, 322.

⁵⁵ *Byles, Bills*, 44; *Chit. Bills*, 56, 73; *Bank of South Carolina v. Case*, 8 Barn. & C. 427; *Id.*, 2 Man. & R. 459; *Smith v. Craven*, 1 Crompt. & J. 507; *Nicholson v. Ricketts*, 29 Law J. 55; *Ex parte Bolitho, Buck*, 100; *Wintle v. Crowther*, 1 Tyrw. 214; *Lloyd v. Ashby*, 2 Barn. & Adol. 29; *Nicholson v. Patton*, 2 Cranch, 164, Fed. Cas. No. 10,250; *Kinsman v. Dallam*, 5 T. B. Mon. (Ky.) 382; *Macklin v. Crutcher*, 6 Bush (Ky.) 401. The name adopted by the partnership seldom contains the names of all the partners. It may even be a name containing none of the individual names. The firm name will, however, bind all the members of the firm, whether their names appear or not. Thus, four partners may do business in the name of two, and all be bound by a note in that name. *Voorhees v. Jones*, 29 N. J. Law, 270. Or the individual name may be used by the firm only for some special purpose, such as a bank account. Where this is the case, the firm is liable on a check drawn on such account by the individual partner, *Crocker v. Colwell*, 46 N. Y. 212;

one partner, and a bill addressed to such name is accepted by the other partner in his own name, and the proceeds go to the partnership business, the firm will be bound by the acceptance.⁵⁶ If a firm without indorsement holds a note made payable to one of its members, and given for money loaned by the firm, it will not be such a bona fide holder for value as to exclude the defense of illegality of consideration.⁵⁷ But where a note is given to one partner, and suit is brought on it by him for the use of the firm, it is unnecessary to join the other partners as plaintiffs, and a counterclaim against the firm cannot be set up in defense.⁵⁸ And the mere fact of money obtained on one partner's individual note being applied to the business of the firm will not make the note a partnership debt, but a dormant partner will be liable in such case on the common counts.⁵⁹ Where two partners transact business in the name of one, and give notes as such in that business, the surviving dormant partner may be sued by an indorsee after the death of the partner whose name was used.⁶⁰ If the bank account of a firm is kept in the name of one partner, this is so far an adoption of that name by the firm, and his check will bind the firm.⁶¹ But where a firm transacts business in the individual name of one, and a bill is drawn in that name and accepted by the other in his individual name, and both partners become bankrupt, their separate estates will be liable to a holder not knowing of the partnership, and not their joint estate.⁶²

Presumption as to Individual Name.

§ 130e. Where the name of an individual partner is the same as that of the firm, the paper executed in such name is presumptively

or on a note made in the partnership business, *Buckner v. Lee*, 8 Ga. 285; especially where it is supported by the admissions or representations of the other partner as to consideration and partnership, *Brannon v. Hursell*, 112 Mass. 63; *Seekell v. Fletcher*, 53 Iowa, 330, 5 N. W. 200.

⁵⁶ *Stephens v. Reynolds*, 5 Hurl. & N. 513.

⁵⁷ *Norton v. Pickens*, 21 La. Ann. 575.

⁵⁸ *Mynderse v. Snook*, 1 Lans. (N. Y.) 488.

⁵⁹ *Graeff v. Hitchman*, 5 Watts (Pa.) 454.

⁶⁰ *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416. See, too, *In re Warren, Davies*, 320, Fed. Cas. No. 17,191.

⁶¹ *Crocker v. Colwell*, 46 N. Y. 212.

⁶² *Ex parte Husbands*, 2 Glyn & J. 4.

that of the individual, and not of the firm.⁶³ But this presumption may be rebutted by parol evidence.⁶⁴ And a contrary presumption has been made in the case of a loan to one who carried on his partnership and private business in the same individual name and gave his check in payment.⁶⁵ Bills and notes given to a person carrying on business in such a way are presumably made to him individually.⁶⁶ Although it was formerly held that, where the individual and the firm name were the same, the holder of paper given in such name might elect between them.⁶⁷

⁶³ Chit. Bills, 56; Byles, Bills, 49; 1 Daniel, Neg. Inst. 334; 1 Edw. Bills & N. § 107; Ex parte Bolitho, Buck, 100; Wintle v. Crowther, 1 Crompt. & J. 316; Id., 1 Tyrw. 210; Furze v. Sharwood, 2 Q. B. 388; Bank of Rochester v. Monteath, 1 Denio (N. Y.) 402; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11; Mercantile Bank v. Cox, 38 Me. 500; National Bank v. Ingraham, 58 Barb. (N. Y.) 290. But, where the individual partner carried on no separate business, a contrary presumption was had in Yorkshire Banking Co. v. Beatson, L. R. 5 C. P. Div. 109, affirming L. R. 4 C. P. Div. 204. In this case the note was proved to have been authorized by the firm, and made in its business. A promissory note made to such firm is generally, in like manner, prima facie the property of the individual partner named. Boyle v. Skinner, 19 Mo. 82; Oliphant v. Mathews, 16 Barb. (N. Y.) 608; U. S. Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791. In this case, Story, J., says (5 Mason, 184, 28 Fed. Cas. 814): "Where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary, not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion and for that purpose. * * * The proof of the signature is not enough. The plaintiffs must go further, and show that it is a partnership signature."

⁶⁴ Trowbridge v. Cushman, 24 Pick. (Mass.) 310.

⁶⁵ Mifflin v. Smith, 17 Serg. & R. (Pa.) 165.

⁶⁶ 1 Pars. Bills & N. 131; Boyle v. Skinner, 19 Mo. 82.

⁶⁷ Byles, Bills, 45; Hall v. Smith, 1 Barn. & C. 407; Id., 2 Dowl. & R. 584; March v. Ward, Peake, 130; Wilks v. Back, 2 East, 142. So, where two firms have the same name, and a bill is drawn by a partner common to both, the holder may elect to hold either firm. Baker v. Charlton, Peake, 80; McNair v. Fleming, Mont. Partn. 32; Swan v. Steele, 7 East, 210. But see Ex parte Buckley, 14 Mees. & W. 469. And such right to elect may be often controlled by the circumstances under which the paper is taken, 1 Pars. Notes & B. 137; one who is a dormant partner in only one of the firms being held only on proof against his firm, Fosdick v. Van Horn, 40 Ohio St. 459.

Execution by Agent—Principal not Named.

§ 131. As has been said, the party to be charged by commercial paper must be shown by the instrument itself. This principle finds its most frequent application in contracts executed by agents. As to such instruments, it is a general rule that the agent's authority need not appear,⁶⁸ nor even the agent's own name,⁶⁹ but the principal for whom the agent acts must appear in the paper, and that otherwise the agent executing it is individually liable on it as his own contract.⁷⁰ And this is true, although the instrument be given in the principal's business and for a consideration beneficial to him.⁷¹ This is illustrated by the case of a seller's agent taking a note for the goods payable to himself individually, and indorsing it over to his

⁶⁸ *Neaves v. Mining Co.*, 90 N. C. 412; *Bettis v. Bristol*, 56 Iowa, 41, 8 N. W. 808.

⁶⁹ *First Nat. Bank v. Loyhed*, 28 Minn. 396, 10 N. W. 421.

⁷⁰ *Byles, Bills*, 37; *Chit. Bills*, 43; 1 *Daniel, Neg. Inst.* 285; 1 *Edw. Bills & N.* § 77; 1 *Pars. Notes & B.* 92; *Story, Prom. Notes*, §§ 65, 68; *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132; *Stackpole v. Arnold*, 11 Mass. 27; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402; *Snelling v. Howard*, 51 N. Y. 373; *Id.*, 7 Rob. (N. Y.) 400; *Hancock v. Fairfield*, 30 Me. 299; *Snow v. Goodrich*, 14 Me. 235; *Graham v. Campbell*, 56 Ga. 258; *Bass v. Randall*, 1 Minn. 404 (Gil. 292); *Hopkins v. Blane*, 1 Call (Va.) 361. But see *Wolfe v. Jewett*, 10 La. 383; *Leadbitter v. Farrow*, 5 Maule & S. 345; *Sowerby v. Butcher*, 2 Crompt. & M. 268; *Id.*, 4 Tyrw. 320; *Alexander v. Sizer*, L. R. 4 Exch. 105; *Burrell v. Jones*, 3 Barn. & Ald. 47; *Bult v. Morrell*, 12 Adol. & El. 750; *Ducarrey v. Gill*, Moody & M. 450; *Id.*, 4 Car. & P. 121; *Thomas v. Bishop*, 2 Strange, 955; *Frontin v. Small*, *Id.* 705; *Wilks v. Back*, 2 East, 142; *Barlow v. Bishop*, 1 East, 434; *Id.*, 3 Esp. 266; *White v. Cuyler*, 6 Term R. 176; *Goupy v. Harden*, 7 Taunt. 159; *Appleton v. Binks*, 5 East, 148; *In re Adansonion*, 43 Law J. Ch. 732. And even although known by the other party to be acting merely as an agent of others. *French v. Price*, 24 Pick. (Mass.) 13; *Hastings v. Lovering*, 2 Pick. (Mass.) 214; *Story, Prom. Notes*, § 65. But a bill drawn on the principal, but accepted by the agent in his own name, has been held to be binding on the principal. *Lindus v. Bradwell*, 5 C. B. 583. And see *Gurney v. Evans*, 3 Hurl. & N. 122; *Id.*, 27 Law J. Exch. 166; *Edmunds v. Bushell*, 35 Law J. Q. B. 20. See, too, section 147, *infra*.

⁷¹ *Bradlee v. Glass Manufactory*, 16 Pick. (Mass.) 347; *Snow v. Goodrich*, 14 Me. 235; *Crum v. Boyd*, 9 Ind. 289. But a duebill given to the employé of a corporation by the president, without release of the corporation, or other consideration, has been held to create no personal liability. *Ward v. Barrows*, 86 Me. 147, 29 Atl. 922.

principal,⁷² or drawing in his own name on the purchaser in favor of his principal.⁷³ The agent is individually liable on such an instrument, although he had authority from his principal to give the bill or note in question for the principal;⁷⁴ and notwithstanding subsequent ratification of his act by the principal;⁷⁵ and notwithstanding that the principal may have been disclosed, and the maker known to be but an agent;⁷⁶ and even though a direction be added to charge to the account of the principal.⁷⁷ And the principal is not

⁷² *Heubach v. Mollmann*, 2 Duer (N. Y.) 227. But in such case the agent's indorsement to his principal does not make him liable individually to the principal. *Sharp v. Emmet*, 5 Whart. (Pa.) 288. He is, however, liable on such an indorsement, even to his principal, if acting under a *del credere* commission. *Mackenzie v. Scott*, 6 Brown, Parl. Cas. 280; *Goupy v. Harden*, 7 Taunt. 160; 2 Marsh. C. P. 454. In DENMARK (Exch. Law, § 14) an agent buying a bill of exchange for, and indorsing it to, his principal, is individually liable to all persons except the principal.

⁷³ In this case he is liable even to his principal on such a bill. *Le Fevre v. Lloyd*, 5 Taunt. 749. But not if the transaction was known to and accepted by the principal. *Jones v. Lathrop*, 44 Ga. 398; *Kimmell v. Bittner*, 62 Pa. St. 203. And see *Sharp v. Emmet*, *supra*.

⁷⁴ *Bradlee v. Glass Co.*, 16 Pick. (Mass.) 347; *Snow v. Goodrich*, 14 Me. 235. But contra if he signed as agent, and was authorized to do so. *Bank of Cape Fear v. Wright*, 48 N. C. 376.

⁷⁵ *Sturdivant v. Hull*, 59 Me. 172. But where a contract was made by "C. L., as agent for, and on the part and behalf of, S. R.," and afterwards ratified in writing by S. R., although C. L. have signed it simply with his individual name, he cannot be holden on it. *Spittle v. Lavender*, 2 Brod. & B. 452. And it is well established that the principal may render himself liable upon a contract made by the agent in his own name, by subsequent ratification of it. *Evans v. Wells*, 22 Wend. (N. Y.) 324.

⁷⁶ 1 Pars. Notes & B. 93; *Arnold v. Sprague*, 34 Vt. 402; *Bedford Commercial Ins. Co. v. Covell*, 8 Metc. (Mass.) 442; *Collins v. Insurance Co.*, 17 Ohio St. 215; *Andrews v. Allen*, 4 Har. (Del.) 452. But in Louisiana an agent executing a note in his individual name, with no additional words of agency, is not held liable, if his principal was known to the payee at the time of making the note. *Milligan v. Lyle*, 24 La. Ann. 144. So, too, where the drawer signed a bill as agent of the drawee, in his individual name, with the knowledge of the payee, and in the drawee's business, he was held not individually liable in *Roberts v. Austin*, 5 Whart. (Pa.) 313.

⁷⁷ *Byles, Bills*, 37; *Goupy v. Harden*, 7 Taunt. 159; 2 Marsh. C. P. 454; *Leadbitter v. Farrow*, 5 Maule & S. 345; *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567; *Bass v. O'Brien*, 12 Gray (Mass.) 477 (the principal referred to in this case being the bark *Dublin*); *Mayhew v. Prince*, 11

liable on a note or bill given by his agent in his individual name, although he has admitted the agent's authority.⁷⁸ But if such bill or note was given in the principal's business and for his benefit, he can be held in an action for the original consideration,⁷⁹ unless he has been discharged by the act of the payee. And the payee's taking the agent's note with full knowledge of the agency and of the principal's liability is construed to be such an act, amounting, as it does, to a choice of the agent as debtor instead of the principal.⁸⁰

Execution by Public Officer.

§ 132. An exception is made to the rule of an agent's individual liability in favor of public officers, acting in their public capacity with the knowledge of the other contracting party. In such case the officer is not individually liable, *in whatever manner* he may make the contract or sign the bill of exchange, draft, or note in question.⁸¹

Mass. 54; Newhall v. Dunlap, 14 Me. 180; Snow v. Goodrich, Id. 235; Tannatt v. Bank, 1 Colo. 278 (the drawer in this case being agent for the drawee, but adding no words indicative of agency to his individual signature). This case was disapproved in Hager v. Rice, 4 Colo. 90. And, to like effect, see Maher v. Overton, 9 La. 115; Martin, J., saying: "We are of opinion that the agency of the drawer is apparent on the face of the bill. This clearly results from the tenor of it, in which the plaintiffs are directed to charge the same to the account of the steamer U. S., and which excludes or negatives the idea of a personal charge." And see, as to the effect of such a clause in other cases, section 140, *infra*.

⁷⁸ Brown v. Parker, 7 Allen (Mass.) 337. But the principal can be held by a ratification of his agent's act. Walter v. Trustees, 12 Ill. 64; Paul v. Berry, 78 Ill. 158; Dow's Ex'r v. Spenny's Ex'r, 29 Mo. 386; First Nat. Bank v. Gay, 63 Mo. 33. And see Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. (U. S.) 326, where a cashier signed a check simply in his individual name, and parol evidence was admitted to hold the bank for the act as theirs.

⁷⁹ 1 Pars. Notes & B. 93; Sauer v. Brinker, 77 Mo. 289; Harper v. Bank, 54 Ohio St. 425, 44 N. E. 97. So, in some states, on the note itself, by the payee. Second Baptist Church v. Furber, 109 Ind. 492, 10 N. E. 118. But, if sued as individuals, the makers must specially deny individual liability in their plea. Fulton v. Loughlin, 118 Ind. 286, 20 N. E. 796.

⁸⁰ Hyde v. Paige, 9 Barb. (N. Y.) 150; Rankin v. Deforest, 18 Barb. (N. Y.) 143. But parol evidence is admissible to show that the agent's note was taken as security only, and to charge the principal with the original debt. Van Haagen Soap Co.'s Estate, 141 Pa. St. 214, 21 Atl. 598.

⁸¹ Thus, county commissioners may cause the county bonds to be signed by

An official designation is not necessary in the instrument itself for his protection, but it is usual and advisable to add such title. In all contracts by a public officer it is presumed that a party dealing with him as such gives credit to the government represented, and not to the individual.⁸² A public officer may, however, become liable by reason of fraud or of any act on his part preventing payment by the government which he represents.⁸³

Among the public officers who have been held to be exempted from individual liability may be enumerated cabinet officers,⁸⁴ officers in

their chairman, and the coupons by their clerk. *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. 44. But see, contra (where bonds were executed, "A. B., agent of Lewis county," and the county had no authority to issue them), *Exchange Bank v. Lewis Co.*, 28 W. Va. 273.

⁸² A public officer is not individually liable on his bill or note made in that capacity. See *Chit. Bills*, 44; 1 *Daniel, Neg. Inst.* 417; 1 *Pars. Notes & B.* 122; *Story, Prom. Notes*, § 65; *Macbeath v. Haldimand*, 1 Term R. 172; *Unwin v. Wolseley*, Id. 674; *Myrtle v. Beaver*, 1 East, 135; *Rice v. Chute*, Id. 579; *Allen v. Waldegrave*, 2 Moore, 621; *Gidley v. Palmerstone*, 7 Moore, 91; Id., 3 *Brod. & B.* 275; *Prosser v. Allen, Gow*, 117; *Jones v. Le Tombe*, 3 Dall. (U. S.) 384; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Bank of Kentucky v. Sanders*, 3 A. K. Marsh. (Ky.) 184; *Amison v. Ewing*, 2 Cold. (Tenn.) 366. This is true as to contracts in general. *Brown v. Austin*, 1 Mass. 208; *Freeman v. Otis*, 9 Mass. 272; *Nichols v. Moody*, 22 Barb. (N. Y.) 611; *Dawes v. Jackson*, 9 Mass. 490; *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Osborne v. Kerr*, 12 Wend. (N. Y.) 179; *Fox v. Drake*, 8 Cow. (N. Y.) 191; *Walker v. Swartwout*, 12 Johns. (N. Y.) 444; *Olney v. Wickes*, 18 Johns. (N. Y.) 122. But this was held to be a question of intention, to be ascertained from the terms of the contract, in *Perry v. Hyde*, 10 Conn. 330; e. g. where the treasurer of a town fraudulently induced a creditor of the town to accept his individual note, *Atkinson v. Minot*, 75 Me. 189.

⁸³ *Freeman v. Otis*, 9 Mass. 272. And in *Savage v. Rix*, 9 N. H. 263, road commissioners were held personally liable on a joint and several note executed "in official capacity," by reason of their having acted without authority. So, in *Ross v. Brown*, 74 Me. 352, a town treasurer, describing himself as such in the body of the note, and signing it, "A. B., Treasurer," but having no authority to execute it. So, a note signed "A. B., C. D., School Trustees," after their term of office had expired. *Trustees of Schools of Cahokia v. Rautenberg*, 88 Ill. 219.

⁸⁴ *Hodgson v. Dexter*, 1 Cranch, 345 (draft by the secretary of war). As to the liability of the government on such draft, see *Floyd Acceptances*, 7 Wall. 666.

the army⁸⁵ and navy, collectors,⁸⁶ and other treasury officers, foreign ministers, and consuls,⁸⁷ state superintendents of canals,⁸⁸ and of state prisons,⁸⁹ sheriffs,⁹⁰ state and county building committees,⁹¹ and municipal officers.⁹²

⁸⁵ Walker v. Swartwout, 12 Johns. (N. Y.) 444. So, Syme v. Butler, 1 Call (Va.) 105 (deputy commissary general signing a contract for army stores. "Wm. Aylett, D. C. G. P.").

⁸⁶ Nichols v. Moody, 22 Barb. (N. Y.) 611.

⁸⁷ Jones v. Le Tombe, 3 Dall. 384.

⁸⁸ Osborne v. Kerr, 12 Wend. (N. Y.) 179; or superintendent of state fair grounds, Bingham v. Kimball, 17 Ind. 396.

⁸⁹ Dawes v. Jackson, 9 Mass. 490.

⁹⁰ Enloe v. Hall, 1 Humph. (Tenn.) 303.

⁹¹ Fox v. Drake, 8 Cow. (N. Y.) 191, commissioners appointed by statute for building a court house, or county trustees on a contract for building a bridge. Tucker v. Justices, 35 N. C. 434; Dameron v. Irwin, 30 N. C. 421. But a town committee for such purpose, in the form, "said committee agrees," etc., was held to be individually liable in Simonds v. Heard, 23 Pick. (Mass.) 120; Shaw, C. J., saying that the payees' "knowledge that the work was done for the town, and was ultimately to be paid for by them, was perfectly consistent with the fact that they had the personal obligation of the committee to pay them for it."

⁹² An overseer of the poor is such public officer. Olney v. Wickes, 18 Johns. (N. Y.) 122. So, a municipal committee appointed for a special purpose, Randall v. Van Vechten, 19 Johns. (N. Y.) 60. And see sections 136, 137, infra. Selectmen making and signing a promissory note in their official name without authority have been held upon it individually. Underhill v. Gibson, 2 N. H. 352. So, too, "the intendant and council of Eutaw," making a contract in such name, concluding "witness their hands and seals. A. B., Int. [Seal.] C. D. [Seal.] E. F. [Seal.]" Hall v. Cockrell, 28 Ala. 507. So, commissioners for a river improvement, notwithstanding misnomer of the official title. Allen v. Sisson, 66 Hun, 140, 20 N. Y. Supp. 971, affirmed 148 N. Y. 728, 42 N. E. 721. But a note for a school debt, signed, "A. B., Pres.; C. D., Secy.; E. F., G. H., Directors," although afterwards legalized, was held to render them liable individually. American Ins. Co. v. Stratton, 59 Iowa, 696. So, a note, "I promise, * * * A. B., Agent of Lewis County." Exchange Bank v. Lewis Co., 28 W. Va. 273.

Official Additions to Agent's Signature, "Agent," etc.— Principal not Named.

§ 133. The signer of a bill or note is no less liable individually because he adds the word "Agent" to his name.⁹³ And his individual liability is not affected by his having ceased to be the agent before the maturity of the note, or by the fact of no demand having been made of the principal when disclosed.⁹⁴ But it has been held, in New York, that a person signing a draft simply, "A. B., Agent," and disclosing his principal to the payee, cannot be held individually;⁹⁵ and that a principal who has not been named in giving such a note in his business may be held,⁹⁶ and may be shown by parol to

⁹³ 1 Daniel, Neg. Inst. 285; 1 Pars. Notes & B. 96; *Bartlett v. Hawley*, 120 Mass. 92; *Anderton v. Shoup*, 17 Ohio St. 125; *Collins v. Insurance Co.*, Id. 215; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271; *Bank v. Cook*, 38 Ohio St. 442; *Thurston v. Mauro*, 1 G. Greene (Iowa) 231; *Williams v. Robbins*, 16 Gray (Mass.) 77; *Manufacturers' & Merchants' Bank v. Follett*, 11 R. I. 92; *Stinson v. Lee*, 68 Miss. 113, 8 South. 272; *Cortland Wagon Co. v. Lynch*, 82 Hun, 173, 31 N. Y. Supp. 325. Or on a check signed "A. B., Fr." (foreman). *Barclay v. Pursley*, 110 Pa. St. 13, 20 Atl. 411; especially where he has deposited the fund in his individual name; *Armstrong v. Brolaski*, 46 Fed. 903. But it has been held that a note payable to the order of A. B. may be indorsed "A. B., Agent," without individual liability; such indorsement being, under special circumstances, in that case, considered equivalent to a special indorsement without recourse. *Mott v. Hicks*, 1 Cow. (N. Y.) 539. As to principal's liability on a note payable to, and indorsed by, "A. B., Agent," see *Merchants' Bank of Macon v. Central Bank of Georgia*, 1 Ga. 418.

⁹⁴ *Hall v. Bradbury*, 40 Conn. 32.

⁹⁵ *Hicks v. Hinde*, 9 Barb. 528; *Rathbon v. Bullong*, 15 Johns. 1. And it seems that there is no difference whether such person be a private agent, or an agent of the government. Id. It is said in *Conro v. Iron Co.*, 12 Barb. 27, that the addition of the word "agent" to the signature is of itself notice that the party meant not to be bound personally. The principal was, however, held in that case, because the name used on the bill was held to be one which the principal had adopted and used for his business as his own.

⁹⁶ *Moore v. McClure*, 8 Hun, 558; *Green v. Skeel*, 2 Hun, 485. *Mullin, P. J.*, refused in this case to follow *De Witt v. Walton*, 9 N. Y. 571, "if it is to be understood as deciding that the principal is not bound in any case by a writing signed by the agent in his own name, with the word 'Agent' added." And the principal may be disclosed and held on such note by parol evidence, *Moore v. McClure*, supra; but only on proof of his use of the name signed in

be the principal, although not indicated by anything in the note but the signature, "A. B., Agent."⁹⁷

In like manner the mere addition of an official title, without naming or otherwise indicating, either in the signature or in the body of the instrument, the person or corporation in whose behalf the instrument is given, leaves the maker or drawer in general individually liable. Such words are "President," "Secretary," "Treasurer," "Trustee," "Supervisors."⁹⁸ And it has been held that the cutting off

his business, *Manufacturers' & Traders' Bank v. Love*, 13 App. Div. 561, 43 N. Y. Supp. 812. In INDIANA the principal is liable on such note in equity, but not at law. *Kenyon v. Williams*, 19 Ind. 44.

⁹⁷ *Rathbon v. Budlong*, 15 Johns. 1; *Hicks v. Hinde*, 9 Barb. 528; *Green v. Skeel*, 2 Hun, 485; *Pease v. Pease*, 35 Conn. 131. Or to show a corporation intended by the simple signature, "A. B., President." *Devendorf v. Oil Co.*, 17 W. Va. 135. But see, contra, in Ohio, *Collins v. Insurance Co.*, 17 Ohio St. 215.

⁹⁸ *Chemung Canal Bank v. Supervisors*, 5 Denio (N. Y.) 517; *Pease v. Pease*, 35 Conn. 131; *Bank v. Cook*, 38 Ohio St. 442; *Thackaray v. Hanson*, 1 Celo. 365; *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 959; *Tradesmen's Nat. Bank v. Leoney* (Tenn. Sup.) 42 S. W. 149; at least prima facie, *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1116. So, *Witte v. Derby*, 2 C nn. 26), the bill being signed, "C. G., President," by a usage of the corporation, while the statute made only such bills binding on the corporation as were signed by the president and secretary. So, on the note of a corporation to "A. B., President," his indorsement in that form binds only himself. *Hately v. Pike*, 162 Ill. 241, 44 N. E. 441. And even a note made as follows: "I, A. B., as trustee of the La. Company, promise," etc. "* * * A. B., Trustee La. Co.,"—binds only the individual maker. *Rupert v. Madden*, 1 Chand. (Wis.) 146. So, a note for A. B.'s individual debt, signed, "A. B., Trustee of C. D." *Conn v. Scruggs*, 5 Baxt. (Tenn.) 567. So, the indorsement, "A. B., President, A. B.," of a note to "A. B., President" binds A. B. individually. *Hately v. Pike*, 162 Ill. 241, 44 N. E. 441.

But a note running, "We, as trustees, but not individually, promise," etc., signed, "A. B., Trustees," and secured by a trust deed, does not bind the makers individually. *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148. So, too, a note signed, "A. B., by Her Trustee, C. D.," binds the trust estate. *Taylor v. Shelton*, 30 Conn. 122. So, a note given for the purchase of trust property, and signed, "A. B., Trustee for C. D." *Lewis v. Harris*, 4 Mete. (Ky.) 353. But a note indorsed, "A. B., Receiver," binds only A. B. individually. *Towne v. Rice*, 122 Mass. 67.

So, the makers have been held to be individually liable on the following notes: "We promise * * *. I. M. Co. A. B., Pres. C. D., Sec." *Heffner v. Brownell*, 70 Iowa, 591, 31 N. W. 947; *McCandless v. Belle Plaine Can-*

of the words "President" and "Secretary" is not a material alteration, where the execution of the instrument is not denied in the plea.⁹⁹ But where a note was made payable to "R. B., Treasurer," and indorsed in like manner to one who received it for a debt of the corporation of which R. B. was treasurer, knowing him to be acting as such officer, R. B. was held not to be liable individually on his indorsement.¹⁰⁰

An exception to the above rule as to the addition of an official title is made in favor of the ordinary usage by banks of the word "Cashier" and its abbreviations. It is customary to make negotiable paper intended for banks payable to its cashier as cashier, with or with-

ning Co., 78 Iowa, 161, 42 N. W. 635. "We promise * * *. A. B., C. D., Trustees Omega Lodge." *Coburn v. Omega Lodge*, 71 Iowa, 581, 32 N. W. 513. So, *prima facie*, "We promise * * *. A. B., Pres. C. D., Sec." *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261. And a note signed, "A. B., by Her Trustee, C. D.," binds the trust estate. *Taylor v. Secretary*,—has been held to put the holder on inquiry, so as to admit an amendment to read "by C. D., Secy." *Capital Sav. Bank & Trust Co. v. Swan*, 100 Iowa, 718, 69 N. W. 1065.

But a note by the "Pen. Cigar Co., G. M., Sec. and Treas'r," payable to "G. M., Sec'y & Treas.," and so indorsed, is the note and indorsement of the corporation. *Falk v. Moebis*, 127 U. S. 597, 8 Sup. Ct. 1319. So, a note, "We promise * * * to pay at our office. H. F. Co. A. B., Pres.," is the note of the company only. *Latham v. Flour Mills*, 68 Tex. 127, 3 S. W. 462. So, "We promise * * *. Warwick Glass Works. A. B., Pres." *Reeve v. Bank*, 54 N. J. Law, 209, 23 Atl. 853.

In *Metcalf v. Williams*, 104 U. S. 93, where the drawers signed a draft, "A. B., Pres. C. D., Secy.," it was held not to bind them individually, in the hands of a party with notice of its corporate character; *Bradley, J.*, saying (page 97): "The fact that it bore two official signatures * * * is so unusual, on the hypothesis of its being an individual transaction, and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character."

⁹⁹ *Thackaray v. Hanson*, 1 Colo. 365.

¹⁰⁰ *Babcock v. Beman*, 11 N. Y. 200, affirming 1 E. D. Smith (N. Y.) 593; *Passmore v. Mott*, 2 Bin. (Pa.) 201. See, too, *Tradesmen's Bank v. Astor*, 11 Wend. (N. Y.) 87, where an association was held upon a check by its treasurer, drawn as treasurer of the association, and overdrawing its account. So, too, where a note or bill is given for a corporation debt, the corporation has been held liable on the signature, "A. B., President," *Sharpe v. Bellis*, 61 Pa. St. 69; or "A. B., Treasurer," *Carpenter v. Farnsworth*, 106 Mass. 561; or "A. B. C., Rector and Wardens," *Episcopal Charitable Soc. v. Episcopal Church in Dedham*, 1 Pick. (Mass.) 372.

out the corporate name of the bank superadded. Paper made payable in this way belongs to the bank, and may be sued by it.¹⁰¹ And an indorsement by the cashier as "A. B., Cashier," renders the bank, and not the individual, liable as indorser.¹⁰² And this is the usual and proper form of an indorsement or acceptance for a bank.¹⁰³

Signature as "Executor"—"Administrator"—"Guardian."

§ 134. Where an executor or administrator gives a note or bill, and signs it "A. B., Executor," or "A. B., Administrator," he is individually liable on the paper.¹⁰⁴ And the estate which he repre-

¹⁰¹ *First Nat. Bank v. Hall*, 44 N. Y. 395; *Watervliet Bank v. White*, 1 Denio (N. Y.) 613; *Folger v. Chase*, 18 Pick. (Mass.) 63. See, also, *Hartford Bank v. Barry*, 17 Mass. 94. So, of an agreement signed, "E. L., Cashier of the F. & M. Bank," an effort being made to hold him personally in an action after he had left his position in the bank. *Barbour v. Litchfield*, 4 Abb. Dec. (N. Y.) 653.

¹⁰² 1 *Daniel, Neg. Inst.* 389; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309, 19 N. Y. 312; *Bank of State v. Wheeler*, 21 Ind. 90; *Collins v. Johnson*, 16 Ga. 458; *Houghton v. Bank*, 26 Wis. 663. And this is true even where the bill so indorsed was made payable to the order of "A. B., Cashier." *Bank of State of New York v. Muskingum Branch of Bank of Ohio*, 29 N. Y. 619, affirming 36 Barb. (N. Y.) 332.

¹⁰³ *Fleckner v. Bank*, 8 Wheat. 338, 355; *Folger v. Chase*, 18 Pick. (Mass.) 63; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *Burnham v. Webster*, 19 Me. 232; *Corser v. Paul*, 41 N. H. 24; *Chillicothe Branch of State Bank of Ohio v. Fox*, 3 Blatchf. 433, Fed. Cas. No. 2683; *Houghton v. Bank*, 26 Wis. 663; *Potter v. Bank*, 28 N. Y. 641; *Bank of State of New York v. Farmers' Branch*, 36 Barb. (N. Y.) 332, affirmed 29 N. Y. 619, *supra*.

¹⁰⁴ *Byles, Bills*, 58; *Chit. Bills*, 231; 1 *Daniel, Neg. Inst.* 253; 1 *Pars. Notes & B.* 161; *Story, Prom. Notes*, § 63; *Peter v. Beverly*, 10 Pet. 532; *Tryon v. Oxley*, 3 Iowa. 289; *Child v. Monins*, 2 Brod. & B. 460, 5 Moore, 282; *Ridout v. Bristow*, 1 Tyrw. 90, 1 *Crompt. & J.* 231; *Serle v. Waterworth*, 6 Dowl. 684, 4 Mees. & W. 9; *King v. Thom.*, 1 Term R. 489; *Nelson v. Serle*, 4 Mees. & W. 795; *Liverpool Borough Bank v. Walker*, 4 De Gex & J. 24; *Gibson v. Minet*, 1 H. Bl. 622; *Tassey v. Church*, 4 Watts & S. (Pa.) 346; *Gregory v. Leigh*, 33 Tex. 813; *McGrath v. Barnes*, 13 S. C. 328; *Greening v. Sheffield*, 1 Ala. 276; *Hostetter v. Hoke*, 17 Kan. 81; *Harrison v. McClelland*, 57 Ga. 531; *Cornthwaite v. Bank*, 57 Ind. 268; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804; *Plimpton v. Goodell*, 126 Mass. 119; *Kessler v. Hall*, 64 N. C. 60; *Yerger v. Foote*, 48 Miss. 62; *Christian v. Morris*, 50 Ala. 585; *Livingston v. Gaussen*, 21 La. Ann. 286. And it is plain that a decedent's

sents is not liable on the instrument, even though it be given for a debt of the estate or in other way for the estate's benefit.¹⁰⁵ By such signature the individual becomes liable, although the estate which he represents be named, e. g. "A. B., Executor of the Estate of C. D.,"¹⁰⁶ and although he promises "as executor," etc., to pay.¹⁰⁷ But a different rule prevails in Maine, where judgment must be rendered *de bonis testatoris* on such note.¹⁰⁸ So, in Alabama, if the note is made under a valid order of the probate court and for a debt of the estate.¹⁰⁹

estate cannot be bound by the signature of his executor on a note without any words indicating that he is such executor. *Martin v. Fitch*, 65 Ind. 216. So, an acceptance by an executor or administrator makes him individually liable. *Chit. Bills*, 346; *King v. Thom*, *supra*; *Ridout v. Bristow*, *supra*; *Aspinall v. Wake*, 10 Bing. 51, 3 Moore & S. 423. And this is true even in the case of a draft by a distributee of the testator's estate on the executor as such, accepted in like manner. *Wisdom v. Becker*, 52 Ill. 342; *Mills v. Kuykendall*, 2 Blackf. (Ind.) 47.

¹⁰⁵ But he may look to the estate for reimbursement. *Peter v. Beverly*, 10 Pet. 532. And in Louisiana the executor may exonerate himself from individual liability, and charge the estate. *Livingston v. Gaussen*, 21 La. Ann. 286. And a chattel mortgage may be enforced against the estate. *Iowa Loan & Trust Co. v. Holderbaum*, 86 Iowa, 1, 52 N. W. 550.

¹⁰⁶ *Liverpool Borough Bank v. Walker*, 4 De Gex & J. 24; *Curtis' Ex'x v. Bank*, 7 Har. & J. (Md.) 25; *Lovelace v. Smith*, 39 Ga. 130; *McFarlin v. Stinson*, 56 Ga. 396; *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.) 742; *Higgins v. Driggs*, 21 Fla. 103. Or, "A., B., C., Trustees of the estate of X." *Williams Nat. Bank v. Manufacturing Co.*, 16 R. I. 504, 17 Atl. 170. But not so where the administratrix is an infant executing the note as her husband's personal representative. *Poole v. Hines*, 52 Ga. 500; *Kirkman v. Benham*, 28 Ala. 501; *Rittenhouse v. Ammerman*, 64 Mo. 197; *Snead v. Coleman*, 7 Grat. (Va.) 305; *Erwin v. Carroll*, 1 Yerg. (Tenn.) 145; *Bradly v. Heath*, 3 Sim. 543. But it has been held that, where such an acceptance has been given for a debt properly due from the estate, the estate may be held in an action against the maker as administrator. *Steele v. McDowell*, 9 Smedes & M. (Miss.) 193.

¹⁰⁷ *Childs v. Monins*, 2 Brod. & B. 460; *Ashby v. Ashby*, 7 Barn. & C. 446; 1 Man. & R. 180; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101. So, in *East Tennessee Iron Mfg. Co. v. Gaskell*, *supra*, where the note was signed, "A., B., C., Executors," and read, "We, the executors of C. D., promise, as such executors," etc.

¹⁰⁸ *Davis v. French*, 20 Me. 21. But signing in a representative capacity

¹⁰⁹ *McCalley v. Wilburn*, 77 Ala. 549.

An executor or administrator may exonerate himself from personal liability by confining his promise to a payment "out of the estate of A. B.," etc., by words to that effect.¹¹⁰ It is also to be remembered that a valid consideration is no less necessary in promises by an executor or administrator than in other cases. The debt of the deceased is not of itself a sufficient consideration to make the executor or administrator liable beyond such assets of the estate as may remain in his hands.¹¹¹ In general, a bill or note by a personal representative of the deceased debtor requires some such consideration as assets in hand or forbearance on the creditor's part to make it binding upon the individual maker.¹¹² Such bill or note is, however, *prima facie* evidence of assets in the maker's hands.¹¹³

In like manner, a guardian signing a bill or note as such is individually liable on it,¹¹⁴ even though he "promise as guardian."¹¹⁵ And such liability is not affected by the fact that the so-called "guardian" has received his discharge as guardian, and cannot reimburse himself out of his ward's estate.¹¹⁶

So, the addition of the word "Surety" to a maker's signature is unavailing, and he will be held individually notwithstanding such

will not protect him from individual liability if his promise be founded on a sufficient consideration. *Walker v. Patterson*, 36 Me. 273.

¹¹⁰ Byles, Bills, 58; 1 Daniel, Neg. Inst. 255; 1 Pars. Notes & B. 161; Story, Prom. Notes, § 63; *Studebaker Bros. Mfg. Co. v. Montgomery*, supra.

¹¹¹ *Byrd v. Holloway*, 6 Smedes & M. (Miss.) 199; *Rucker v. Wadlington*, 5 J. J. Marsh. (Ky.) 238.

¹¹² *Rittenhouse v. Ammerman*, 64 Mo. 197.

¹¹³ *Snead v. Coleman*, 7 Grat. (Va.) 305.

¹¹⁴ *Robertson v. Banks*, 1 Smedes & M. (Miss.) 666; *Poole v. Wilkinson*, 42 Ga. 539; *Coons v. Kendall*, 27 La. Ann. 443; *Carter v. Wolfe*, 1 Heisk. (Tenn.) 694. So, as to covenants in a deed. *Whiting v. Dewey*, 15 Pick. (Mass.) 428. But the rule is different in Louisiana, and the ward's estate may be charged by a note made in conformity with an order of the probate court, and signed by "A. B., Tutor," *Coons v. Kendall*, 27 La. Ann. 443; or even by drafts drawn by "A. B., Tutor," to his own order, for supplies of his ward's plantation, and indorsed simply, "A. B.," *Lapeyre v. Weeks*, 28 La. Ann. 664.

¹¹⁵ *Forster v. Fuller*, 6 Mass. 58, the words relating to the guardianship being only inserted, as was held, "to entitle himself to indemnity from his ward."

¹¹⁶ *Thacher v. Dinsmore*, 5 Mass. 209.

addition.¹¹⁷ Such addition has been held to be wholly immaterial,¹¹⁸ but in another case it is said to be a material alteration.¹¹⁹ On the other hand, a note made to and indorsed by "A. B., Assignee," has been held not to make A. B. individually liable.¹²⁰

Corporation and Official Signatures—In Principal's Name.

§ 135. Where a commercial instrument is made expressly in the name of a corporation or other principal, the intention to bind the principal is manifest, and the paper drawn or signed in this way will be taken to be his contract and not that of the agent. To avoid personal liability, the corporation officer or other agent signing a bill, note, or check should make the promise expressly in his principal's name, either by the words of promise in the body of the instrument or by the signature. As in other parts of a bill or note, no particular form is requisite, but all uncertainty must be carefully avoided.

A promise in the name of the principal, although not signed by his name, is the contract of the principal, and not of the agent. Thus, a promissory note reading, "The Patent Cloth Manufacturing Company promise," etc., and signed "W. S., Agent," is the note of the corporation.¹²¹ So, a note running thus, "The Newport Manufac-

¹¹⁷ *Inkster v. Bank*, 30 Mich. 143. "The case of *Pain v. Packard*, 13 Johns. (N. Y.) 174 (which has been followed in New York, not without some vigorous protests, and to some extent in some other states), was, we think, a clear departure from the common law, and we find nothing in the English decisions to warrant the qualifications of surety's liabilities there recognized." *Christiancy, J.*, Id., p. 148. So, too, *Rice v. Cook*, 71 Me. 559; *Hughes v. Littlefield*, 18 Me. 400. So, although he signed as "surety" for the accommodation of his co-maker. *Southern California Nat. Bank v. Wyatt*, 87 Cal. 616, 25 Pac. 918.

¹¹⁸ *Kleckner v. Klapp*, 2 Watts & S. (Pa.) 44.

¹¹⁹ *Laub v. Paine*, 46 Iowa, 550.

¹²⁰ *Bowne v. Douglass*, 38 Barb. (N. Y.) 312.

¹²¹ *Shotwell v. McKown*, 5 N. J. Law, 828. See, too, *Jefts v. York*, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392, where the note ran thus: "The pastor and deacons of the First Baptist Church, in behalf of said church, promise," etc. "* * * S. D. G., Agent for the First Bapt. Ch." So, a bank note signed with the individual name of the cashier (required by statute). *Bank of Utica v. Magher*, 18 Johns. (N. Y.) 341. But a note, "The W. S. Society agrees," etc., signed, "A. B., Gen. Supt.," was held to be open to either construction,

turing Company promises," etc., and signed, "J. W. T., Treasurer";¹²² or, "The Ocean Mining Company promises," and signed, "A. B., Trustee."¹²³ So, too, a contract in the words, "We, the Appleton Fire Insurance Co., by A. B., President, are held," etc., signed, "A. B., President," with a common seal affixed to the signature, was held to be obligatory only on the corporation.¹²⁴ In like manner, the note of a voluntary association, "The M. M. Co. promises," etc., signed, "A. B., C. D., Directors," is binding upon all the members of the association.¹²⁵ So, the note of a partnership using a corporation name, and signed, "A. B., Treasurer."¹²⁶

A promise signed in the principal's name is also his contract, and not that of the agent, although the principal be not indicated in the body of the instrument.¹²⁷ This is true of an indorsement in the

as a question of fact, to be settled by parol evidence. *Frankland v. Johnson*, 147 Ill. 520, 35 N. E. 480.

¹²² *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13; *Moor v. Wilson*, 26 N. H. 332. See, too, *Hall v. Turnpike Co.*, 27 Cal. 255; *Hall v. Crandall*, 29 Cal. 567. And such a contract is binding upon the corporation, and not the individual, although a common seal is added to the signature, "A. B., President." *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 126. This is also the character and proper construction of a note, in form, "We, the inhabitants of school district No. 12, promise," etc., signed, "A. B., Treasurer." *Whitney v. Inhabitants of Stow*, 111 Mass. 368. So, a note, "We, the H. C. Agric. Association, by her directors, do promise," etc. "A. B., Secretary, C. D., E. F., Directors of the H. C.," etc., "*Assoc.*" *Armstrong v. Kirkpatrick*, 79 Ind. 527.

¹²³ *Shaver v. Mining Co.*, 21 Cal. 46. So, a township certificate "that there is due from the township * * * for school furniture." signed, "H. B., Trustee of Johnson Township," binds the township. *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 515. But in Iowa the individual officer is held liable on a note in the corporate name signed, "A. B., Pres. C. D., Sec'y," *Day v. Ramsdell*, 90 Iowa, 731, 52 N. W. 208, 57 N. W. 630; although sealed with the corporate seal, *Tama Water-Power Co. v. Ramsdell*, 90 Iowa, 747, 52 N. W. 209, 57 N. W. 631.

¹²⁴ *Ellis v. Pulsifer*, 4 Allen (Mass.) 165.

¹²⁵ *McGreary v. Chandler*, 58 Me. 537.

¹²⁶ *Walker v. Wait*, 50 Vt. 668.

¹²⁷ *Ruffin v. Mebane*, 41 N. C. 507. And, although the agent be not authorized to give the note in question, the principal will be liable for goods purchased for him and by his authority, for which the note was given. *Id.* So, too, *Emerson v. Manufacturing Co.*, 12 Mass. 237.

words, "Marine Bank, by J. S. H., President."¹²⁸ So, a note signed, "Steamboat Ben Lee and Owners, by W. R., Capt.," is binding upon the owners.¹²⁹ So, a note signed, "For the Providence Hat Manufacturing Company, F. R."; ¹³⁰ or, "For the M. Iron Works. A. B., President. C. D., Secretary."¹³¹ So, a note beginning, "We promise," etc., and signed, "A. & Co., A. B., President."¹³² So, the acceptance of a draft drawn by the Empire Mills on E. C. H. in the words, "Accepted, Empire Mills, by E. C. H., Treasurer," is the company's acceptance, and not that of the individual.¹³³ So, a note beginning, "We promise," etc., and concluding, "Witness our hands and seals. A. B., for C. D. & Co.,"—is the note of C. D. & Co.¹³⁴ And the corporate character is still more plain in a note reading, "We, the President and Directors of the C. S. M. Co., promise," etc., signed, "A. B., President," and sealed with the corporation seal.¹³⁵

The fact that a bill or note is given in a form proper to bind the principal, and not the agent who executes it, cannot, of course, preclude the principal from any defense that he may have by reason of

¹²⁸ Aiken v. Bank, 16 Wis. 679.

¹²⁹ Sanders v. Anderson, 21 Mo. 402. So, too, an acceptance by "A. B., Capt.," of a bill drawn on "the owners of the steamboat Messenger," May v. Hewitt, 33 Ala. 161.

¹³⁰ Emerson v. Manufacturing Co., 12 Mass. 237.

¹³¹ Roney's Adm'r v. Winter, 37 Ala. 277.

¹³² Atkins v. Brown, 59 Me. 90; Castle v. Foundry Co., 72 Me. 167, 15 Am. Law Rev. 358; Draper v. Heating Co., 5 Allen (Mass.) 338; Armstrong v. Canal Co. (Utah) 48 Pac. 690; Liebscher v. Kraus, 74 Wis. 387, 43 N. W. 166. But see, contra, Mathews v. Mattress Co., 87 Iowa, 246, 54 N. W. 225. So, a note reading, "We, the trustees of the F. W. Bapt. Soc., promise," etc., and signed with the corporate name, and the individual names of the trustees, is properly executed as the note of the corporation. Gillet v. Bank, 7 Ill. App. 499. So, "We promise * * *. P. M. Co. A. B., Supt.," without corporate seal, but for use of the corporation, and so known to payee. Bean v. Mining Co., 66 Cal. 451, 6 Pac. 86. As to joint liability of corporation and agent on such note, see Albany Furniture Co. v. Merchants' Nat. Bank, 17 Ind. App. 531, 47 N. E. 227; Armstrong v. Canal Co. (Utah) 48 Pac. 690.

¹³³ Walker v. Bank, 9 N. Y. 582.

¹³⁴ Cook v. Sanford, 3 Dana (Ky.) 237.

¹³⁵ Pitman v. Kintner, 5 Blackf. (Ind.) 250. As to the effect of a corporate seal in defining the character of such a paper, see section 138, *infra*. But see Tama Water-Power Co. v. Ramsdell, 90 Iowa, 747, 52 N. W. 209, 57 N. W. 631, where the contrary was held, for want of a special averment as to the corporate seal.

the *want of authority in the agent* or the absence of any consideration to himself.¹³⁶ If, however, the instrument is plainly executed as the contract of the principal, and not of the agent, and it appears that the agent had no authority to execute it, it often becomes a question of importance whether the *unauthorized agent* has made himself liable *as* maker, drawer, acceptor, or indorser of the paper in controversy. That the agent in such case is liable for false warranty, deceit, or in other form is admitted.¹³⁷ And the rule seems to be established by the American cases that, as to contracts other than negotiable instruments, an agent, acting in the principal's name, without his authority, makes himself individually liable *on the contract*.¹³⁸ Whether this rule is applicable to commercial paper is a question upon which authorities are divided.¹³⁹ It has been held that an agent accepting a bill without authority in his principal's name renders himself liable for the tort, but not on the bill as an acceptor.¹⁴⁰ And this seems to be the rule generally followed by the English cases and by the better and more recent American authorities.¹⁴¹ There are, however, authorities of some weight to the contrary.¹⁴²

¹³⁶ Hall v. Turnpike Co., 27 Cal. 255.

¹³⁷ West London Com. Bank v. Kitson, 13 Q. B. Div. 360; McHenry v. Duffield, 7 Blackf. (Ind.) 41. And a bank president, who has made himself liable personally by an indorsement for the bank in excess of the amount of debt authorized by its charter, will not be discharged from the tort by the release of an accommodation acceptor, who was liable on the bill. Brannin v. Loving, 20 Cent. Law J. (Ky.) 57.

¹³⁸ Meech v. Smith, 7 Wend. (N. Y.) 315; Bay v. Cook, 22 N. J. Law, 343; Feeter v. Heath, 11 Wend. (N. Y.) 479. And see section 378, *infra*. But see, *contra*, as to simple contracts, Jenkins v. Hutchinson, 13 Q. B. 744; Lewis v. Nicholson, 18 Q. B. 503; Woodes v. Dennett, 9 N. H. 55; and *infra* as to sealed contracts.

¹³⁹ Story, Prom. Notes, § 71.

¹⁴⁰ Byles, Bills, 39; Chit. Bills, 47; 1 Daniel, Neg. Inst. 286; Polhill v. Walter, 3 Barn. & Adol. 114. But, if he had signed the drawer's name without authority, quære whether he would not have been personally liable on the bill as drawer. Wilson v. Barthrop, 2 Mees. & W. 863. "At all events, in order to make him so liable it is incumbent on the plaintiff to prove the want of authority, and that the defendant did not act *bona fide*." Chit. Bills, 48.

¹⁴¹ 1 Daniel, Neg. Inst. 286; Bartlett v. Tucker, 104 Mass. 336; Ballou v. Talbot, 16 Mass. 461; Jefts v. York, 4 Cush. (Mass.) 371, 10 Cush. (Mass.)

¹⁴² See note 142 on following page.

Principal Named Only in Agent's Official Title—In Instrument.

§ 136. Merely naming the principal, either in the body of the instrument or in the signature, does not, of itself, make the contract even apparently that of the principal. This occurs most frequently in bills of exchange and other papers executed by corporation officers using their full official title, which includes the name of their principal, the corporation. In general, such titles, however fully the principal be named in them, are to be considered as a mere descriptio personæ, and the agent executing the paper remains individually liable upon it, and the corporation is not bound.

Thus, first, *in the instrument*: A promissory note in form, "We, the trustees of the Methodist Episcopal Church of A., promise," etc.,

392; Hancock v. Yunker, 83 Ill. 208; Lander v. Castro, 43 Cal. 497; Hall v. Crandall, 29 Cal. 567; McHenry v. Duffield, 7 Blackf. (Ind.) 41; Harkins v. Edwards, 1 Iowa, 426; Sheffield v. Ladue, 16 Minn. 388 (Gil. 346); Delius v. Cawthorn, 13 N. C. 90; Moor v. Wilson, 26 N. H. 332. So, too, an agent signing a sealed instrument in the name of his principal, without authority, is not liable on it. Abbey v. Chase, 6 Cush. (Mass.) 54; Hopkins v. Mehaffy, 11 Serg. & R. (Pa.) 128 (Gibson, J.), disapproving in this respect Chit. Pl. 24, and Tippetts v. Walker, 4 Mass. 595. In this latter case, however, the agents had "expressly bound themselves." Neither will an agent, whose authority has expired by the death of his principal, be bound personally by a deed executed in his principal's name. Harper v. Little, 2 Me. 14; Stetson v. Patten, Id. 358. See, further, as to the liability of an agent contracting without authority in his principal's name, the remarks of Ellsworth, J., in Ogden v. Raymond, 22 Conn. 385.

142 1 Pars. Notes & B. 105; Dusenbury v. Ellis, 3 Johns. Cas. (N. Y.) 70; Bank v. Flanders, 4 N. H. 239; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494; Weare v. Gove, 44 N. H. 196; Roberts v. Button, 14 Vt. 195. This was also held in the case of a note running, "We promise," etc., and signed, "G. Stephens," and under that the initials "W. G. S." Here it was claimed that "W. G. S." signed merely as agent for G. S. & Co., of which firm he was not a member, but was the authorized agent. But the note being signed with the individual name of G. S., for whom he was not authorized to act, W. G. S. was held personally liable. Palmer v. Stephens, 1 Denio (N. Y.) 472. So, an unauthorized agent, who signed with his individual name a note reading, "The steamer Tecumseh and owners promise," etc. Ormsby v. Kendall, 2 Ark. 338. So, where the agent, a college president, had personally assumed the debt for which the corporate note was given. Forbes v. Whittemore (Ark.) 35

binds the individual signers only.¹⁴³ So, too, a note in form, "I, J. F., president of the Mechanics' Insurance Company, promise," etc.;¹⁴⁴ or, "We, the trustees of the Methodist Episcopal Society for building a parsonage house, promise," etc., although in this case a corporate consideration and purpose appeared to be plainly designated.¹⁴⁵ Likewise, on a note in form, "We, the trustees of the Methodist Episcopal Church, promise," etc., signed, "A., B., C., trustees of the Meth. Episc. Ch.," the persons signing were held to be individually and alone liable;¹⁴⁶ and so, a fortiori, on a note in form, "We, the trustees of the Presbyterian Church, promise," etc., signed merely, "A., B., C., trustees."¹⁴⁷ In the other cases above mentioned, the signature consisted simply of the name, with no official title added.¹⁴⁸ The individual signers were held personally in like man-

S. W. 223. So one who made a note, without authority, in the simple form, "I promise," etc., and signed it, "A. B., Attorney for C. D.," was held on it personally in *Byars v. Doores' Adm'r*, 20 Mo. 284. So, where a note read, "We, the selectmen of R., promise," etc., and was signed, "A., B., Selectmen." *Underhill v. Gibson*, 2 N. H. 352. And so, too, of a joint and several note signed by road commissioners in their "official capacity." *Savage v. Rix*, 9 N. H. 263. So, too, an agent without authority to execute a note for a firm, but signing it and holding himself out as a member of the firm, is liable on it. *Dodd v. Bishop*, 30 La. Ann. 1178. And it is said that an agent executing a note without authority is liable on an implied warranty of authority. *White v. Madison*, 26 N. Y. 124. And, if liable on the contract, it seems that he is so only where he "had no authority *in fact* to use the name of his principal." *Selden, J.*, in *Walker v. Bank*, 9 N. Y. 585.

¹⁴³ *Packard v. Nye*, 2 Metc. (Mass.) 47; *Hypes v. Griffin*, 89 Ill. 134; *Fogg v. Virgin*, 19 Me. 352. And this is true, a fortiori, of a joint and several bond in like form signed with the individual names, with common seals, and no official addition to their signatures. *Drayton v. Warne*, 43 N. J. Law, 659. But a note, "We, the subscribers for the Carmel Cheese Manufacturing Co., promise," etc., signed with the individual names of the directors, and given for a corporation purpose by its authority, was held to be the note of the corporation in *Simpson v. Garland*, 72 Me. 40, 24 Alb. Law J. 353.

¹⁴⁴ *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 94.

¹⁴⁵ *Chick v. Trevett*, 20 Me. 462.

¹⁴⁶ *Mears v. Graham*, 8 Blackf. (Ind.) 144. But see, contra, *New Market Sav. Bank v. Gillet*, 100 Ill. 254.

¹⁴⁷ *Powers v. Briggs*, 79 Ill. 493; *Pack v. White*, 78 Ky. 243.

¹⁴⁸ *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 94; *Packard v. Nye*, 2 Metc. (Mass.) 47; *Fogg v. Virgin*, 19 Me. 352; *Chick v. Trevett*, 20 Me. 462; *Hypes v. Griffin*, 89 Ill. 134.

ner on a note in form, "We, or either of us, directors of the T. Company, promise," etc., signed, "A. B., President, C. D., E. F.," the form of the promise seeming to indicate this construction.¹⁴⁹ And a similar construction has been given to a note in form, "We, the directors of the A. B. Company, promise," etc., signed, "C., D., E.," and sealed with the corporation seal.¹⁵⁰ The same construction was followed in a note in form, "We, the selectmen of R., promise," etc., signed "A., B., Selectmen," although the conclusion in this case seems to have been derived from the fact that the public officers signing the note acted without sufficient authority in so doing.¹⁵¹ In the case of a note similar to the foregoing, in form, "We, the trustees of school district No. 100, promise," etc., signed, "A., B., Trustees," it has been held that the individual signers were *prima facie* liable, but might discharge themselves by proving that they acted merely as agents.¹⁵² As to the general effect of parol evidence in such cases, the reader is referred to a subsequent part of this chapter.

On the other hand, it was held, in an early case, which cannot now be considered of any authority, that a note in form, "I, A. B., treasurer of the D. T. Company, promise," etc., signed, "A. B., treasurer of the D. T. Co.," bound the company, and not the agent who signed it.¹⁵³ And an exception to the rule laid down above seems to have been made in favor of the term "president and directors," as being at least a quasi corporate name. Thus, a note in form, "The president

¹⁴⁹ *Whitney v. Sudduth*, 4 Metc. (Ky.) 296. So, "We, the directors of the T. Co., promise * * *. A. B., C. D.," *McKensey v. Edwards*, 88 Ky. 272, 10 S. W. 815; or, "We, the president and directors of the T. Co. * * *. A. B., Pres. C. D., E. F.," *Yowell v. Dodd*, 3 Bush (Ky.) 581.

¹⁵⁰ *Dutton v. Marsh*, L. R. 6 Q. B. 361.

¹⁵¹ *Underhill v. Gibson*, 2 N. H. 352.

¹⁵² *Bingham v. Stewart*, 13 Minn. 106 (Gil. 96).

¹⁵³ *Mann v. Chandler*, 9 Mass. 335. Speaking of this case, Judge Gray said in *Barlow v. Society*, 8 Allen (Mass.) 461: "That case, although it has never been in terms overruled, has never been followed in this commonwealth, can hardly be reconciled with the later decisions, and must be maintained, if at all, upon the ground that the treasurer of a corporation is, by virtue of his office, the hand by which the corporation conducts all its pecuniary affairs, signs all its commercial paper, and pays all its debts. * * * All the decisions of this court upon unscaled instruments, since the case of *Mann v. Chandler*, have required something more than a mere description of the general relation between the agent and the principal in order to make them the contracts of the latter."

and directors of the A. B. Company promise," etc., has been held to be a corporation note.¹⁵⁴ Other cases have held that in a note of this form signed, "A., President. B., C., Directors," parol evidence is admissible to show a corporation note intended.¹⁵⁵ So, too, a note in form, "We, the inhabitants of school district No. 12, promise," etc., signed, "A. B., Treasurer," is the note of the school district, and not of A. B.¹⁵⁶ So, too, the following notes of school or other municipal officers: "We, the undersigned directors of school district No. 4, promise," etc., signed with their names simply;¹⁵⁷ "We, the undersigned committee for the First school district, promise," etc., signed, "A., B., C., Committee";¹⁵⁸ "I, A. B., director of district No. 2, promise," etc., signed, "A. B., Director."¹⁵⁹ So, too, a contract under seal by "A., B., C., a committee appointed by the corporation of Albany for the purpose," is a contract of the municipal corporation, and not of the individual members of the committee.¹⁶⁰ So, a promissory note in the name of "the pastor and deacons of the First Baptist Church, in behalf of said church," signed, "S. D. G., Agent for the First Bapt. Ch.," binds the church, and not the agent personally.¹⁶¹

Principal Named Only in Agent's Official Title—In Signature.

§ 137. Secondly, *in the signature* the principal's name may occur as a mere *descriptio personæ*, completing the official title of the agent who signs the instrument. In such cases the note or bill is

¹⁵⁴ 1 Daniel, Neg. Inst. 376; 1 Pars. Bills & N. 169; Story, Prom. Notes, § 69; Mott v. Hicks, 1 Cow. (N. Y.) 513. Especially so if executed under the corporate seal. Pitman v. Kintner, 5 Blackf. (Ind.) 250.

¹⁵⁵ Yowell v. Dodd, 3 Bush (Ky.) 581; Haile v. Peirce, 32 Md. 327.

¹⁵⁶ Whitney v. Inhabitants of Stow, 111 Mass. 368. This note may be properly regarded as one given in the principal's name.

¹⁵⁷ Baker v. Chambles, 4 G. Greene (Iowa) 428. See, too, Sanborn v. Neal, 4 Minn. 126 (Gil. 83), where the note read, "We, as trustees of school district No. 10, promise," etc. And as to the effect of the word "as," and others like it, see section 144, *infra*.

¹⁵⁸ Andrews v. Estes, 11 Me. 267.

¹⁵⁹ McGee v. Larramore, 50 Mo. 425.

¹⁶⁰ Randall v. Van Vechten, 19 Johns. (N. Y.) 60.

¹⁶¹ Jefts v. York, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392.

that of the agent only, although authorities are somewhat at variance in the matter.¹⁶² In like manner a bill of exchange drawn on the "Piscataqua F. & M. Ins. Co.," signed, "D. F. & Co., Agts. Piscataqua F. & M. Ins. Co.," binds the individuals only.¹⁶³ So, too, a promissory note signed, "A., B., Trustees of the Baptist Society,"¹⁶⁴

¹⁶² "The addition of official character to the signature at the foot of the note will not of itself be sufficient to indicate an intention to bind the corporation, but will be regarded merely as an earmark, or *descriptio personæ*."

1 Daniel, Neg. Inst. § 403. See, also, for criticism on Prof. Parsons' view, *Id.* § 404. This is the rule whether the officer sign his name as *president*, *Burbank v. Posey's Adm'r*, 7 Bush (Ky.) 372; *Chamberlain v. Wool-Growing Co.*, 54 Cal. 103; *Moss v. Livingston*, 4 N. Y. 208; *Scott v. Baker*, 3 W. Va. 285; *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 94; *McNeil v. Lithographing Co.*, 144 Ill. 238, 33 N. E. 31; or, in an indorsement, *Terhune v. Parrott*, 59 N. J. Law, 16, 35 Atl. 4; or, in a note, "I promise * * *. Witness my hand and seal. A. B. [Seal], for C. C., Pres. M. & P. Co.," *Bryson v. Lucas*, 84 N. C. 680; *treasurer*, *Bruce v. Lord*, 1 Hilt. (N. Y.) 247; *Sheridan v. Carpenter*, 61 Me. 83; *Sturdivant v. Hull*, 59 Me. 172; *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11; *Sumwalt v. Ridgely*, 20 Md. 107; *Smith v. Alexander*, 31 Mo. 193; *Mellen v. Moore*, 68 Me. 390; *secretary*, *Drake v. Flewellen*, 33 Ala. 106; *president and directors*, *Rendell v. Harriman*, 75 Me. 497; *president and secretary*, *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997; *president and treasurer*, "I promise," etc., *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *agent*, *Haight v. Naylor*, 5 Daly (N. Y.) 219; even where the draft was by the company on "A. B., Agent," and accepted, "A. B., Agent of the K. & O. Co.," *Robinson v. Bank*, 44 Ohio St. 441, 8 N. E. 583; *trustee*, *Williams v. Bank*, 83 Ind. 237; *McClellan v. Robe*, 93 Ind. 298; contra, *School Town of Monticello v. Kendall*, 72 Ind. 91; or by some other title. In all the Indiana cases above cited, the consideration went to the corporation. See, too, section 133, note, *supra*.

¹⁶³ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Gray, J.*, saying (page 104): "In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds, to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability."

¹⁶⁴ *Brockway v. Allen*, 17 Wend. (N. Y.) 40, although really made for the benefit of the society, the holder having, however, no notice of that fact, *Hays v. Crutcher*, 54 Ind. 260; *Fiske v. Eldridge*, 12 Gray (Mass.) 474; *Fowler v. Atkinson*, 6 Minn. 578 (Gil. 412); *Conner v. Clark*, 12 Cal. 168; *Hayes v.*

or a bond signed, "A., B., Trustees of the First Universalist Church,"¹⁶⁵ is the note or bond of the individuals only. Of the same force is a note signed in that manner, and also naming the principal in the body of the instrument in such words as, "We, the trustees of the Methodist Episcopal Church, promise," etc.¹⁶⁶ And in England the same construction has been applied to a churchwardens' note, made for the parish and by authority of a vote of the vestry, and signed, "A., B., C., Churchwardens for the Parish of Chingford. D., Overseer."¹⁶⁷ So, too, a note signed, "A., B., C., Directors of the D. E. Company, Limited";¹⁶⁸ or a steamboat contract signed, "T. & B., Agents of Steamer Flora."¹⁶⁹

The contrary doctrine is laid down by Judge Parsons in his learned work on Notes and Bills, but seems to be less strongly supported by authority.¹⁷⁰ In some states where the rule has been laid down in

Matthews, 63 Ind. 412; Hayes v. Brubaker, 65 Ind. 27, although actually made for the church, and without consideration of any sort to the trustees.

¹⁶⁵ Taft v. Brewster, 9 Johns. (N. Y.) 334; Hills v. Bannister, 8 Cow. (N. Y.) 31.

¹⁶⁶ Mears v. Graham, 8 Blackf. (Ind.) 144. So, too, a bond by one named in the body of the instrument and the signature as "Trustee of Columbia Township." Hobbs v. Cowden, 20 Ind. 310. But see, contra, the case of a note signed by a *treasurer* in Mann v. Chandler, 9 Mass. 335, and remarks upon it in note to section 136, *supra*.

¹⁶⁷ Rew v. Pettet, 1 Adol. & E. 196, Patterson, J., saying: "The makers of the notes could not bind themselves as parish officers. They contract, therefore, as individuals. Hence the addition of their titles to their signatures cannot destroy their individual liability." So, a note signed, "A., B., C., *Vestrymen* of Grace Church," has been held to bind only the individual signers, although given for a corporation debt. Tilden v. Barnard, 43 Mich. 376. But see, contra, as to a note signed in such way, but reading, "We promise for ourselves and our successors." Creswell v. Holden, 3 MacArthur (D. C.) 579.

¹⁶⁸ Courtauld v. Saunders, 16 Law T. (N. S.) 562.

¹⁶⁹ Pratt v. Beaupre, 13 Minn. 187 (Gil. 177). In this case the individuals signing were held to be *prima facie* liable, but were allowed to show the contrary by parol.

¹⁷⁰ "If a corporation, certainly authorized to make, sign, accept, or indorse negotiable paper, has an officer authorized to use its name in this way, and this officer writes his own name as drawer of a bill of exchange, with the express addition of his office, it seems that he will be held to do this officially, and not personally, and to bind the corporation, and not himself." 1 Pars. Notes & B. 168, citing as authority Witte v. Fishing Co., 2 Conn. 260; Safford v. Wyckoff, 1 Hill (N. Y.) 11, 4 Hill (N. Y.) 442; and Kean v. Davis, 21 N. J.

this way, the later cases, already cited, have gone over to the majority. The following cases have held that the addition to the signature of the agent's name of an official title disclosing the name of the principal rendered the note or bill the contract of the principal.¹⁷¹ So, too, in Connecticut, a promissory note signed, "A., B., Vestrymen of the Episcopal Society," made for the corporation;¹⁷² and, perhaps, with more reason, a note made for the benefit of a corporation by its authorized agent, in form, "I promise," etc., and signed, "A. M., Agent *for* the M. Mfg. Co." ¹⁷³ So, an acceptance by "A. B., Agent of the C. Company," of a bill drawn on him in that form, was held, in Connecticut, to be binding on the corporation.¹⁷⁴ And a similar conclusion was reached in the case of a note signed, "A. B., Agent of the F. B. Co.," by reason of the following language in the note: "I will give," etc., with a condition, "Should *we* find," etc., "*we* will allow," etc.¹⁷⁵ The reader is referred to the next and succeeding paragraphs for the effect of a corporate seal, stamped paper, and other modifications on bills and notes signed by an agent with or without the principal's name.

Law, 683. In these cases the bill contained a direction to charge the amount to the principal's account. As to other cases containing like direction, see section 140, *infra*.

¹⁷¹*Secretary*: Gaff v. Theis, 33 Ind. 307. *President*: Kennedy v. Knight, 21 Wis. 345 (at least, *prima facie*); Farmers' & Mechanics' Bank of Savings v. Colby, 64 Cal. 352, 28 Pac. 118. So, too, Bank of University v. Hamilton, 78 Ga. 312, under Code Ga. § 2211, which provides that, "where the agency is known and the credit is not expressly given to the agent, he is not personally responsible on the contract." *Agent for*, etc.: Hovey v. Magill, 2 Conn. 680; Rawlings v. Robson, 70 Ga. 596. *Superintendent*: Schaefer v. Bidwell, 9 Nev. 209. *Treasurer*: Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411, on *parol* evidence as to consideration and intention. *Chief engineer*: Lazarus v. Shearer, 2 Ala. 718, on *parol* evidence. *Manager*: Under power in a will, and reciting consideration to the company. Froelich v. Trading Co., 120 N. C. 39, 26 S. E. 647.

¹⁷²Johnson v. Smith, 21 Conn. 627. But see Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, disapproving this case, and, to the same effect, Tilden v. Barnard, 43 Mich. 376.

¹⁷³Hovey v. Magill, 2 Conn. 680.

¹⁷⁴Shelton v. Darling, 2 Conn. 435.

¹⁷⁵Rogers v. March, 33 Me. 106. In this case the action was against the agent, and great stress was laid on the use of the pronouns, as indicating a promise by the company.

Principal Indicated by Corporation Seal or Paper.

§ 138. Sometimes the intention to bind the principal is made evident by the use of its *corporate seal*. Thus, a note signed, "A., B., C., Trustees of St. John's Church," given for a corporation debt and under the corporate seal, is clearly binding upon the corporation, and not upon the trustees personally.¹⁷⁶ So, too, as we have seen, a note under the corporate seal, in the form, "We, the president and directors of the C. S. M. Company, promise," etc., signed, "A. B., President."¹⁷⁷ So, a note in form, "We promise," etc., signed, "W. B. S., Secretary," and sealed with the corporate seal.¹⁷⁸ But in a recent case the court of queen's bench disregarded the corporate seal on a note made in form, "We, the directors of the Isle of Man Slate Company, Limited, promise," etc., and signed by the individual names of the directors, and they were held to be personally liable.¹⁷⁹

Another indication of corporate rather than individual action is sometimes found in the fact that the bill or note in question is on paper stamped or otherwise *marked with the company's name or dated at the company's office*. Thus, an order on the cashier of the United States Bank, dated "Mechanics' Bank of Alexandria," and signed by W. P., who was the cashier of the Mechanics' Bank, with

¹⁷⁶ Hood v. Hallenbeck, 7 Hun (N. Y.) 362. In the words used by Judge Bockes in this case: "The note prima facie created a personal obligation against the makers; but being signed with descriptive words attached to the names, and bearing also the corporate seal, the case was open to proof of the facts under which it was given, with a view to determine whether it was intended by the partners that they should assume personal liability."

¹⁷⁷ Pitman v. Kintner, 5 Blackf. (Ind.) 250. So, too, a note in form, "We, the two directors of the A. L. Ass. Society, by and on behalf of the said society, promise," etc., attested by the secretary, and sealed with the corporate seal, binds the corporation, and not the directors personally. Aggs v. Nicholson, 1 Hurl. & N. 165; 25 Law J. Exch. 348. As to this case, see, also, 25 & 26 Vict. c. 89, § 47.

¹⁷⁸ Means v. Swarmstedt, 32 Ind. 87; Miller v. Roach, 150 Mass. 140, 22 N. E. 634. So, a fortiori, where it was also signed, "A. B., Pres. Chic. R. R. Co. C. D., Secy." Scanlan v. Keith, 102 Ill. 634; Guthrie v. Imbrie, 12 Or. 182, 6 Pac. 664.

¹⁷⁹ Dutton v. Marsh, L. R. 6 Q. B. 361. "It does not purport, in form, to be a promissory note made on behalf of or on account of the company." Cockburn, C. J.

his individual name alone, was declared to be a corporation order "on its face," and parol evidence was admitted to charge the Mechanics' Bank with the order.¹⁸⁰ So, too, a check bearing in the margin the printed words "Ætna Mills," and signed, "J. D. F., Treasurer," was held to be the check of the corporation.¹⁸¹ So, too, a promissory note dated, "Office of the Dubuque Lumber Company," and signed by the president of the company, "M. H. Moore, P. D. L. Co.," was held to be the company's note, although it ran, "I promise," etc.¹⁸² So, a draft by the president of a corporation on its treasurer, dated at the company's office, and signed, "A. B., President," the intention to bind the corporation being shown by parol and from "indications on the bill itself."¹⁸³ So, an order on an insurance company by its agents, dated at the "Office of the New England agency of the" company, and signed simply with the firm name

¹⁸⁰ *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326. So, too, a receipt for money deposited in a bank for the purchase of bonds, signed by the cashier only, and charged by the bank to his account, but dated at the banking house, renders the bank liable, on parol evidence of the facts. *Caldwell v. Bank*, 64 Barb. (N. Y.) 333. So, too, and notwithstanding a similar entry on the books of the corporation, a like receipt signed by the president with his individual name only, but dated likewise at the bank, with a printed letter head designating also the names of the principal bank officers. *Van Leuvan v. Bank*, 6 Lans. (N. Y.) 373, affirmed 54 N. Y. 671. Indeed, it was held in this case, in the supreme court, that the paper was prima facie a corporation contract. 6 Lans. (N. Y.) 378. So, too, *Continental Nat. Bank v. Heilman*, 81 Fed. 36.

¹⁸¹ *Carpenter v. Farnsworth*, 106 Mass. 561. But, in the hands of a bona fide holder, the individuals were held on a note, "We promise * * *. A. B., Pres. C. D., Treasr.," with the corporation name printed on its margin. *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908; *Merchants' Nat. Bank v. Clark*, 64 Hun, 175, 19 N. Y. Supp. 136; *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038, affirming 84 Hun, 376, 32 N. Y. Supp. 382; *First Nat. Bank v. Stuetzer*, 80 Hun, 435, 30 N. Y. Supp. 83.

¹⁸² *Lacy v. Lumber Co.*, 43 Iowa, 510; the circumstances and intention to bind the company being shown by parol. In like manner, a certificate "that there is due from this township," signed, "A. B., Trustee Johnson Township," and dated, "Treasurer's Office Johnson Township," is the note of the corporation, *Johnson School Tp. v. Citizens' Bank of Greenfield*, 81 Ind. 515. So, a bill of exchange dated, "Office of Belleville Nail Co.," concluding, "Charge same to account of Belleville Nail Co.," and signed, "A. B., Prest. C. D., Sec'y." *Hitchcock v. Buchanan*, 105 U. S. 416.

¹⁸³ *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

of the agents.¹⁸⁴ So, a draft by one agent of a company on another, both drawer and drawee being designated by the official addition of "Agent," and the draft being dated at the company's office, and containing the words, "and charge to the account of this company," is a corporation draft, on which the drawer is not personally liable.¹⁸⁵ As to the effect of such words referring to the person to be charged, the reader will find a fuller discussion in a subsequent part of this chapter. Again, a bill of exchange dated at the office of a corporation, drawn by its president on its secretary, and concluding with the words, "charge to motive power account," is the bill of the corporation, and not of the individual signing it.¹⁸⁶ So, too, a bill drawn on the secretary of a corporation, and dated at its office, and concluding with the words, "charge the same to account of B. J., Superintendent."¹⁸⁷ So, too, a bill of exchange dated "Pompton Iron Works," and concluding with the words, "which place to account of the Pompton Iron Works. W. B., Agent."¹⁸⁸

But this circumstance has not been considered of the same weight in the English courts. Thus, in England, the individual signers were held personally liable on a promissory note dated "Midland Co. Building Society," and reading, "We promise," etc. "A., B., Trustees. C., Secretary."¹⁸⁹ So, too, upon a check signed by railway directors with their individual names and stamped with a company stamp. The character of the stamp, however, in this case, would

¹⁸⁴ *Chipman v. Foster*, 119 Mass. 189. In this case, however, the note contained the words, "being in full of all claims and demands against said company for loss and damage under policy No. 824."

¹⁸⁵ *Sayre v. Nichols*, 7 Cal. 535.

¹⁸⁶ *Olcott v. Railroad Co.*, 40 Barb. (N. Y.) 179, affirmed 27 N. Y. 546.

¹⁸⁷ *Gillig v. Road Co.*, 2 Nev. 214.

¹⁸⁸ *Fuller v. Hooper*, 3 Gray (Mass.) 334. Of this case, Metcalf, J., says in *Bank of British North America v. Hooper*, 5 Gray (Mass.) 573: "There was in the margin of the draft, which was apparently a business draft prepared to be used for the Pompton Iron Works, 'Pompton Iron Works.' An agency was thus fully disclosed on the face of the bill, and the only further inquiry was whether enough appeared to connect that agency with Horace Gray, or the Pompton Iron Works. The court were of opinion that it was shown that the signature of Burtt was the signature of an agent, and that the face of the bill indicated who the principal was."

¹⁸⁹ *Price v. Taylor*, 5 Hurl. & N. 540; 6 Jur. (N. S.) 402; 29 Law J. Exch. 331.

probably reconcile it with the American cases above referred to.¹⁹⁰ And a similar construction has been made in one or two American cases. Thus, a note dated, "Commercial Bank of R.," and reading, "We promise," etc. "A. B., President. C. D., Cashier,"—was held, in Mississippi, to be *prima facie* an individual liability.¹⁹¹ And the individual signers were personally held on a note or obligation beginning with the title of a corporation lawsuit, of which it was the settlement,—*"The Butchers' Benevolent Association vs. The Crescent City Company. We, the undersigned, bind ourselves to pay in solido."* etc.,—and signed with the individual names only. But in this case the form of the promise, "to pay in solido," undoubtedly had its influence upon the construction.¹⁹²

Principal Indicated by Words: "In Behalf of"—"On Account of"—"For the Use of"—"By Order of."

§ 139. In general, if the principal be named in the agent's bill or note, and the promise be expressly made *on his behalf*, it will be held to be his contract, whatever be the form in which the agent describes and signs himself. This is clearly the case in a note in the following form: "The pastor and deacons of the First Baptist Church, in behalf of said church, promise," etc. "S. D. G., Agent for the First Bapt. Ch."¹⁹³ So, too, a note in this form: "For and on behalf of the D. M. Co., I promise," etc. "W. R., Supt.,"—espe-

¹⁹⁰ *Serrell v. Railway Co.*, 9 C. B. 811; *Maule, J.*, saying (page 826): "It does not purport to be drawn by the company in its corporate character. The persons by whom it is drawn are in fact directors of the company, but they do not describe themselves as such. There is no mention whatever of the company, except on the stamp. * * * It is not a substitute for signature, like the cross of a marksman. It is not usual or customary to sign a document in this circular form. It looks rather (if one were obliged to construe it) as if this were a document which had passed through the office of the company on such a day, and received the stamp as a mode of identifying or earmarking it, as is usual in some offices."

¹⁹¹ *Fitch v. Lawton*, 6 How. 371.

¹⁹² *Cooley v. Esteban*, 26 La. Ann. 515.

¹⁹³ *Jefts v. York*, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392, although in this case the agent's authority had been exceeded. So, "We, the subscribers, for the C. M. Co., promise," etc. "A. B., C. D." *Simpson v. Garland*, 76 Me. 203.

cially where the consideration had gone to the company, and it had made payments on the note after the agent's death. By these circumstances, an estoppel was held to be raised against the denial of the note by the corporation.¹⁹⁴ And a note in form, "We, the two directors of the A. L. Ass. Society, by and on behalf of the said society, promise," etc., signed with the directors' individual names, attested by the secretary, and sealed with the corporate seal, was held to be a note of the corporation.¹⁹⁵ So, too, notwithstanding the form of the promise, a note in form, "We, or either of us, promise in behalf of school district No. 6. * * * A. B., President. C. D., Secretary. E. F., Treasurer."¹⁹⁶ So, too, a note in form, "We, the trustees of the Methodist Episcopal Church, in behalf of the whole board of trustees of said church, promise, * * * for value received by the said association."¹⁹⁷ So, a note given expressly "for work done on the N. W. Seminary," and signed, "A., B., C., Building Committee, in behalf of the Trustees of the N. W. Sem."¹⁹⁸ So, a contract by C. L., "as agent for and on the part and behalf of S. R.," signed simply, "C. L.," but afterwards ratified, in writing, by S. R., will not involve C. L. in any personal liability.¹⁹⁹

So, a note in form, "We jointly promise," etc., "*on account of* the L. & B. Co. A., B., C., Directors," and attested by the corporation secretary, is a corporation note.²⁰⁰ And, in like manner, a memorandum of sale for a bill of exchange, "Sold you on account of T.," signed, "E. F., Broker," will bind T., and not the broker, personally.²⁰¹ So, a note "*for the use of* the N. E. P. Union Store," signed, "S. S., Treasurer," binds the partnership doing business in the name of the store.²⁰² And the same construction has been applied to a note running: "We, the worshipful master and wardens and trustees of the Mt. Vernon Lodge, for its use, promise," etc.²⁰³ Thus, too,

¹⁹⁴ Jones v. Clark, 42 Cal. 180.

¹⁹⁵ Aggs v. Nicholson, 1 Hurl. & N. 165, 25 Law J. Exch. 348. See, as to this case, 25 & 26 Vict. c. 89, § 47.

¹⁹⁶ Harvey v. Irvine, 11 Iowa, 82.

¹⁹⁷ Haskell v. Cornish, 13 Cal. 45.

¹⁹⁸ McHenry v. Duffield, 7 Blackf. (Ind.) 41.

¹⁹⁹ Spittle v. Lavender, 2 Brod. & B. 452.

²⁰⁰ Lindus v. Melrose, 3 Hurl. & N. 177.

²⁰¹ Fairlie v. Fenton, L. R. 5 Exch. 173.

²⁰² Dow v. Moore, 47 N. H. 419.

²⁰³ Pearse v. Welborn, 42 Ind. 331.

a contract for the hire of slaves "for the use of A. B.," signed by C. D. with his own name simply, was held binding only on A. B.²⁰⁴ And the words "*by order of*" or "*by authority of*" have the same effect, in general, and render the principal liable, and not the agent, using them. This is so of a guaranty indorsed on a note by an agent "by authority of" his principal.²⁰⁵ So, where a bill of exchange was drawn on the R. S. G. Company, and "accepted by order of the R. S. G. Company, W. E., Secretary," the acceptance was held not to be binding on the individual acceptors.²⁰⁶

Some cases have, however, held a contrary doctrine as to the force of such expressions, or at least reached a different conclusion in cases where such words occur. Thus, a note in form, "We, in behalf of the First Methodist Episcopal Society, promise," etc., signed with the individual names only, was held to create at least prima facie an individual liability.²⁰⁷ So, a contract made by a "committee for the Jackson Lodge, * * * on behalf of said lodge," and signed, "A., B., C., Committee";²⁰⁸ or an acknowledgment of debt "on behalf of" a building committee, signed, "A. B., Chm. Com."²⁰⁹ So, a promissory note running, "We promise," etc., "on behalf of the Cambridge City Greys," and signed, "A., B., C., Secretary";²¹⁰ or one in form, "The president, by order of the H. & B. Co., promises," etc., signed, "A. B., President, C. D."²¹¹ And it has even been held that a note in form, "We, as trustees of the Summerfield Methodist Episcopal Church, for and on behalf of said church, promise," etc., and signed, "A., B., C., trustees of the S. M. E. Ch.," bound the individual signers, and not the corporation.²¹² In another case, where the same result was reached, it was due to the form of the promise as a joint and several one. This was a note in form,

²⁰⁴ Key's Ex'r v. Parnham, 6 Har. & J. (Md.) 418.

²⁰⁵ New England Ins. Co. v. De Wolf, 8 Pick. (Mass.) 56, 1 Am. Lead. Cas. 600.

²⁰⁶ Eastwood v. Bain, 3 Hurl. & N. 738, 28 Law J. Exch. 74.

²⁰⁷ Pomeroy v. Slade, 16 Vt. 220.

²⁰⁸ Steele v. McElroy, 1 Sneed (Tenn.) 341.

²⁰⁹ McCalla v. Rigg, 3 A. K. Marsh. (Ky.) 259.

²¹⁰ Kendall v. Morton, 21 Ind. 205.

²¹¹ Caphart v. Dodd, 3 Bush (Ky.) 584.

²¹² Dennison v. Austin, 15 Wis. 334. The reason for this conclusion, however, seems to lie in the fact that the note had not been executed in a legal manner by the trustees "lawfully convened."

"We jointly and severally promise," etc., "for and on behalf of the Wesleyan Newspaper Association," and signed, "A. B., C. D., Directors." ²¹³

In other cases similar results were reached in construing *acceptances* of bills drawn on an individual and accepted by him for a company. This was the case where a bill was drawn on "H. C., general agent of L'Unione Compagna," and "accepted on behalf of the company. H. C.,"—the acceptor being held personally liable, although the consideration for the acceptance went to the company.²¹⁴ So, too, an acceptance on a bill drawn on W. C. for supplies to the company, "Accepted for the companies. W. C., Purser."²¹⁵

Principal Indicated by Charging to His Account.

§ 140. A mere direction in a bill of exchange to charge it to the account of another is not alone sufficient to make the other liable as drawer of the bill. Thus, on a draft concluding, "Charge the same to account of proprietors Pembroke Iron Works," and signed, "J. B.," simply, the signer is personally responsible.²¹⁶ This is true also of a bill signed in the same manner, and concluding, "Place to the account of the Durham Bank," although the signer was known by the holder to be an agent only.²¹⁷ In like manner, a bill con-

²¹³ *Healey v. Story*, 3 Exch. 3. In this case "severally" was held equivalent to "*personally*."

²¹⁴ *Herald v. Connah*, 34 Law T. (N. S.) 885.

²¹⁵ *Mare v. Charles*, 5 El. & Bl. 978.

²¹⁶ *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567; *Dewey, J.*, saying (page 572): "There is no single circumstance on the face of the paper which in any way connects Horace Gray or the Pembroke Iron Works with the draft, unless it be the direction to the drawees to 'charge the same to the account of Pembroke Iron Works.' It has been urged that this direction indicates that the Pembroke Iron Works are the real drawers. But no such inference can properly be drawn from that circumstance. Bills are often drawn by parties on funds of others, distinct from the drawer, but with whom arrangements have been made to discharge such drafts." See, too, *Safford v. Wyckoff*, 1 Hill (N. Y.) 11. So, too, a bill concluding with the words, "Charge the same to account of disbursements of Barque Dublin," signed by the master of the vessel with his own name, simply. *Bass v. O'Brien*, 12 Gray (Mass.) 477.

²¹⁷ *Goupy v. Harden*, 7 Taunt. 160, 2 Marsh. 454.

cluding with the words, "Charge to the account of A., B., agents of the P. Ins. Co.," renders A., B., individually liable.²¹⁸ This is also the case *prima facie* of a bill concluding with the words, "Charge as ordered. J. K., President E. & S. R. R. Co.,"²¹⁹ or, "Which please place to account of the D. F. Co. A. B., President."²²⁰ But in such cases parol evidence is admissible to charge the corporation.²²¹ So, where a bill was drawn by the president of a corporation on its treasurer, concluding with a request to charge it to the account of the corporation, and accepted, "F. D. H., Treasurer," parol evidence is admissible to charge the corporation and relieve the treasurer from personal liability.²²²

Where, on the other hand, the principal is already indicated by a date at the company's office, the addition of a request to place the amount of a draft to its account,²²³ or to charge it to its account,²²⁴ renders the intention to charge the principal plainer, whether the agent sign simply as "Agent,"²²⁵ or in his full official name, e. g. "J. R. W., President T. N. Co."²²⁶ Indeed, with such date, a draft on "J. E. G., Secretary," concluding, "Charge the same to account of B. J., Superintendent," has been held to be a corporation draft.²²⁷

²¹⁸ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Gray, J.*, saying (page 107): "The address of the bill to the corporation, and the request to them to charge the amount to the account of the drawers, have certainly no tendency to show that the drawers are the same as the corporation, the drawees."

²¹⁹ *Kean v. Davis*, 21 N. J. Law, 683, reversing 20 N. J. Law, 425. In this case the bill was held to be *prima facie* an individual bill, but parol evidence was admitted to show that the corporation was intended as maker.

²²⁰ *Witte v. Fishing Co.*, 2 Conn. 260.

²²¹ *Witte v. Fishing Co.*, *supra*; *Kean v. Davis*, *supra*.

²²² *Hager v. Rice*, 4 Colo. 90. So, a request to charge to the ranch, in a draft signed, "A. B., Superintendent." *Texas Land & Cattle Co. v. Carroll*, 63 Tex. 48.

²²³ *Fuller v. Hooper*, 3 Gray (Mass.) 334.

²²⁴ *Olcott v. Railroad Co.*, 27 N. Y. 546, affirming 40 Barb. (N. Y.) 179; *Sayre v. Nichols*, 7 Cal. 535; *Hitchcock v. Buchanan*, 105 U. S. 416.

²²⁵ *Fuller v. Hooper*, 3 Gray (Mass.) 334; *Sayre v. Nichols*, 7 Cal. 535.

²²⁶ *Olcott v. Railroad Co.*, 27 N. Y. 546, affirming 40 Barb. (N. Y.) 179.

²²⁷ *Gillig v. Road Co.*, 2 Nev. 214.

Principal Indicated by Recital of Consideration Moving to Him.

§ 141. It has been held in some cases that a draft or note by an authorized agent for the benefit of his principal is sufficient in itself to bind the principal. But the cases so holding have had some other indication, at least, of such intent on the face of the paper, although this may be merely the full official title of the agent after his signature;²²⁸ or his official character as a public officer.²²⁹ In other cases the agent's name has been held to be a name adopted by the principal for purposes of business.²³⁰ Or the principal may be estopped by conduct which has led the payee into mistake as to the real character of the paper.²³¹ These cases, therefore, leave unaltered the general rule that the fact of benefit to the principal is not of itself sufficient to control the character of commercial paper, and make it the contract of the principal, when it is in form that of the agent only.²³²

When, however, the nature of the consideration is expressed in the paper, this circumstance has a natural weight in determining the intention of the parties. Thus, the principal, and not the agent, is liable on a note expressed to be "for work done on the N. W. Seminary," and signed, "A., B., C., Building Committee, on Behalf of the Treasurer of the N. W. Sem."²³³ So, a note in form, "We, the trustees of the M. E. Church, in behalf of the whole board of trustees of said church, promise," etc., "for value received by said associa-

²²⁸ *Johnson v. Smith*, 21 Conn. 627; *Thompson v. Tioga R. R. Co.*, 36 Barb. (N. Y.) 79. But, when the agent had no authority to give the note, the words "for value received as treasurer of the town of W.," will not render the town liable, although the note is signed, "A. B., Treasurer." *Ross v. Brown*, 74 Me. 352. In this case the treasurer was held on the note as an individual.

²²⁹ *Great Falls Bank v. Farmington*, 41 N. H. 32, where a note was given by selectmen for liquor purchased for the town.

²³⁰ *Conro v. Iron Co.*, 12 Barb. (N. Y.) 27; *Melledge v. Iron Co.*, 5 Cush. (Mass.) 158. See, too, *Lockwood v. Coley*, 22 Fed. 192.

²³¹ *Melledge v. Iron Co.*, *supra*.

²³² And even a note "for work done on the Hazel Valley school house," signed, "A., B., C., Committee," has been held to render the individual signers liable. *Anderson v. Pearce*, 36 Ark. 293.

²³³ *McHenry v. Duffield*, 7 Blackf. (Ind.) 41.

tion.”²³⁴ So, an order on a company by its agents in their individual name, dated at the company’s office, and containing the words, “being in full of all claims and demands against said company for loss and damage * * * under policy No. 824.”²³⁵ So, a note in form, “We promise,” etc., “for and on account of his wages as teacher,” and signed, “A., B., Trustees”;²³⁶ or, “I promise to pay,” etc., “for building a school house in said district. A. B., Local Director.”²³⁷ So, an order on a public school commissioner “for tuition,” signed, “A., B., Trustees.”²³⁸ And where a duebill was given “in full of labor performed for R. R. Co.,” parol evidence was admitted to show whether the intention was to make the company or the agent liable.²³⁹

This recital of consideration is, however, not conclusive evidence of an intent to bind the principal, as will be seen from the fact that some recent cases have arrived at a different conclusion. Thus, the maker has been held personally liable on a note in form, “For value received in policy No. 100, issued by the H. M. Co., I promise,” etc., “C. N., President of the D. A. R. R.,” notwithstanding that the consideration had been received by the railroad company.²⁴⁰ So, in a note running, “We, the trustees of O. Academy, promise,” etc., “for teaching school at,” etc., “A., B., C.”;²⁴¹ or in a note in form, “The trustees of the N. N. School District, promise,” etc., “for services of teacher,” etc., and signed, “A., B., Trustees”;²⁴² or, “We, the trustees of the M. E. Society, for building a parsonage house, promise,” etc.²⁴³ This is true also of a receipt for money loaned “to be used

²³⁴ *Haskell v. Cornish*, 13 Cal. 45.

²³⁵ *Chipman v. Foster*, 119 Mass. 189.

²³⁶ *Horton v. Garrison*, 23 Barb. (N. Y.) 176.

²³⁷ *McClellan v. Reynolds*, 49 Mo. 312.

²³⁸ *Tutt v. Hobbs*, 17 Mo. 486; the case holding that there was no difference in the application of this rule to government officers or private agents.

²³⁹ *Richmond, F. & P. R. Co. v. Snead*, 19 Grat. (Va.) 354. But see *Carson v. Lucas*, 13 B. Mon. (Ky.) 213.

²⁴⁰ *Haverhill Mut. Ins. Co. v. Newhall*, 1 Allen (Mass.) 130.

²⁴¹ *Cleaveland v. Stewart*, 3 Ga. 283.

²⁴² *Wiley v. Shank*, 4 Blackf. (Ind.) 420.

²⁴³ *Chick v. Trevett*, 20 Me. 462. “The use of the term ‘trustees’ indicates,” in the language of *Weston, C. J.*, in this case, “rather that the legal interest is in them, than that they act as mere agents.”

to buy rifles, * * * the same to be returned as soon as the county bounty is paid," signed, "C. D., Capt. 49th Regiment Mo. Vols." ²⁴⁴

Principal or Agent—Intention Shown by Form of Promise:
"I Promise."

§ 142. As we have already seen in another part of this work, no great stress can be laid on the use of a singular pronoun in a note signed by several persons, or vice versa.²⁴⁵ In the absence, however, of all other indications, the form of a promise, e. g. "I promise," or "We promise," may throw some light on the intent of the maker to bind himself or otherwise. Thus, one who signs a note in such words as, "I, J. F., president of the Mech. Ins. Co., promise," etc., binds himself thereby.²⁴⁶ So, too, even where the note read, "I, A. B., as trustee of the Louisiana Company, promise," etc., and was signed, "A. B., Trustee La. Co.," the individual signer was held.²⁴⁷ And where a note is in the words, "I promise," etc., and signed, "Samuel W. Snow. Snow, Foote & Co.," under one another, it may be inferred to be an individual obligation, but the whole question is one for the jury as a question of fact.²⁴⁸ It has also been held that a note reading, "I promise," etc., and signed, "C. N., President of the D. A. R. R.," renders the individual liable, although it purports to be for value received by the company.²⁴⁹ So, a note reading, "I promise," etc., and signed by several "as trustees of the First Univ. Church." ²⁵⁰

But there are many cases where a note reading, "I promise," etc., and signed by an agent, has been held to be binding on the corporation rather than the agent. This was early held in a note reading: "I, G. C., treasurer of the D. T. Co., promise," etc. "G. C., Treas-

²⁴⁴ *Blakely v. Bennecke*, 59 Mo. 193.

²⁴⁵ See chapter 4.

²⁴⁶ *Barker v. Mechanics' Ins. Co.*, 3 Wend. (N. Y.) 94.

²⁴⁷ *Rupert v. Madden*, 1 Chand. (Wis.) 146.

²⁴⁸ *Sherwood v. Snow*, 46 Iowa, 481. As to notes beginning, "I promise," etc., and signed by several, see § 149, *infra*.

²⁴⁹ *Haverhill Mut. Ins. Co. v. Newhall*, 1 Allen (Mass.) 130.

²⁵⁰ *Burlingame v. Brewster*, 79 Ill. 515.

urer.”²⁵¹ So, too, in the following notes: “I, C. W. L., Director of School District No. 2, promise,” etc. “C. W. L., Director;”²⁵² “I promise,” etc., “for building a school house in said district. A. B., Local Director;”²⁵³ “I promise,” etc. “A. M., Agent for the M. Mfg. Co.,”²⁵⁴ “For and on behalf of the D. M. Co., I promise,” etc. “W. R., Supt.,”²⁵⁵ “I promise,” etc. “M. H. Moore, P. D. L. Co.,” Moore being the president of the D. L. Co.;²⁵⁶ “I promise, as president of the T. O. Co.,” etc. “A. B., Pres. T. O. Co.,”²⁵⁷ “I will give,” etc., with condition “should we do,” etc., “*we* will allow * * *. A. B., Agent of the F. B. Co.”²⁵⁸

“We or Either of Us”—“Jointly and Severally.”

§ 143. On the other hand, “*we promise*” seems the natural form of words for a corporation’s promise, if the name itself is not used in the body of the note. Many instances have been already given of notes in this form, some construed as corporate obligations and others not. Nor are these decisions always easily reconcilable. Thus, a note in this form, “We promise,” etc., signed, “W. B. S., Secretary,” and sealed with the corporate seal, has been held in Indiana to be a note of the corporation;²⁵⁹ while in England a note reading, “We, the directors of the A. B. Company, promise,” etc., signed with the individual names of the directors simply, was held to be their personal obligation, although sealed with the corporate

²⁵¹ Mann v. Chandler, 9 Mass. 335. But this case has been overruled. Barlow v. Society, 8 Allen (Mass.) 461. And see § 136, supra.

²⁵² McGee v. Larramore, 50 Mo. 425.

²⁵³ McClellan v. Reynolds, 49 Mo. 312.

²⁵⁴ Hovey v. Magill, 2 Conn. 680.

²⁵⁵ Jones v. Clark, 42 Cal. 180. In this case it was shown that the consideration went to the company, and that the company paid interest after W. R.’s death, and was estopped from denying the note to be theirs.

²⁵⁶ Lacy v. Lumber Co., 43 Iowa, 510. This note was dated at the company’s office, and was shown by parol to have been executed for the company.

²⁵⁷ Randall v. Snyder, 1 Lans. (N. Y.) 163, although the note was ultra vires.

²⁵⁸ Rogers v. March, 33 Me. 106.

²⁵⁹ Means v. Swormstedt, 32 Ind. 87. So, in Texas, without a seal, a note, “We promise * * *. A. B., Agent. C. D. E. F.,” that being their customary form, and the last two signing as sureties. McIlhenny Co. v. Blum, 68 Tex. 197, 4 S. W. 367.

seal.²⁶⁰ But in England it was held that a note in the form, "We *jointly* promise," etc., "on account of the L. & B. Company," signed, "A., B., C., Directors," and attested by the secretary, was a note of the corporation;²⁶¹ and in Louisiana an equally joint promise reading, "The Butchers' Benevolent Association vs. Crescent City Co. We, the undersigned, bind ourselves to pay *in solido*," etc.,—signed with the individual names simply, was held to be an individual note.²⁶²

And it seems that the expression "*we or either of us*" forms no more certain guide as to the party to be bound. Thus, in a promissory note in the form, "We or either of us, directors of the T. Company, promise," etc., signed, "A. B., Pres. C. D., E. F.,"—the individual signers were held personally liable.²⁶³ So, too, even in a note reading: "We or either of us *as* directors of the H. M. & G. road, promise," etc.²⁶⁴ But the school district was held on a note reading: "We or either of us promise, * * * in behalf of the school district No. 6. A. B., Pres. C. D., Secy. E. F., Treasurer."²⁶⁵

A *joint and several* promise is, however, generally a personal one, and the individuals are bound by it, and not the corporation. This has been the construction in England of the following note: "We jointly and severally promise, * * * for and on behalf of the Wesleyan Newspaper Association. A., B., C., Directors;"²⁶⁶ and, in the United States, of a note: "We, as trustees of the town of H., jointly and severally promise * * *. A., B., C., Trustees."²⁶⁷

²⁶⁰ Dutton v. Marsh, L. R. 6 Q. B. 361. So, too, a note, "We promise * * *, P. Co., by A. B., Pres. C. D. E. F.," as to the two last named, who were directors. Taylor v. Reger (Ind. Sup.) 48 N. E. 262.

²⁶¹ Lindus v. Melrose, 3 Hurl. & N. 177. So, too, a note running, "We promise for ourselves and our successors," etc., signed, "A., B., C., Vestrymen of St. John's Parish," and given for land bought for the parish, has been held to be binding on the corporation only. Creswell v. Holden, 3 MacArthur (D. C.) 579.

²⁶² Cooley v. Esteban, 26 La. Ann. 515.

²⁶³ Whitney v. Sudduth, 4 Metc. (Ky.) 296.

²⁶⁴ Titus v. Kyle, 10 Ohio St. 444.

²⁶⁵ Harvey v. Irvine, 11 Iowa, 82.

²⁶⁶ Healey v. Story, 3 Exch. 3. Here the word "severally" was held equivalent to "*personally*."

²⁶⁷ Trask v. Roberts, 1 B. Mon. (Ky.) 201. And see Savage v. Rix, 9 N.

Principal Indicated by Agent's Promise "as" Such.

§ 144. If, indeed, a promise is made by an agent, trustee, or other officer, *as agent*, etc., the intention to bind the principal only is apparently clear. There is not wanting, however, the usual array of cases to the contrary. So far as these opposing cases turn only upon that expression, they cannot be regarded as authorities of any value. An intention to bind the corporation as an expressed principal, and not the agent himself, has been held to be manifest in the following notes: "The trustees of the Third Church, as such trustees, promise," etc., signed by each "as trustee of the Third Church;"²⁶⁸ "We, as trustees of the A. & W. R. R. Company, promise," etc., signed, "A., B., C., Trustees of the A. & W. R. R. Co.;"²⁶⁹ "I promise, as president of the T. O. Company," etc., signed, "A. B., President of the T. O. Company;"²⁷⁰ "We, as trustees of the Methodist Episcopal Church, promise," etc., signed, "A., B., Trustees;"²⁷¹ "We, as trustees of school district No. 10, promise," etc., signed with their individual names only;²⁷² "We, the trustees of the Evangelical Ger-

H. 263, where road commissioners were held individually liable on a joint and several note, though made expressly "in official capacity," and signed "A. B., C. D., Road Commissioners." This case seems, however, to have turned on the commissioners' want of authority to execute the note. But see, *contra*, *Rice v. Gove*, 22 Pick. (Mass.) 158, where the note read, "We jointly and severally promise," etc., but was signed, "R. & J., for G.," and G. was held as the maker.

²⁶⁸ *Little v. Bailey*, 87 Ill. 239.

²⁶⁹ *Blanchard v. Kaull*, 44 Cal. 440. Although there be no such corporation as that named, or no authority to execute a note for it.

²⁷⁰ *Randall v. Snyder*, 1 Lans. (N. Y.) 163. Although the note in question was *ultra vires*.

²⁷¹ *Leach v. Blow*, 8 Smedes & M. (Miss.) 221. And this note was not admissible in evidence, it was held, in an action against the individual trustees.

²⁷² *Sanborn v. Neal*, 4 Minn. 126 (Gil. 83); *Emmett, C. J.*, saying: "As the primary object in all cases is to ascertain what the parties really intended to declare by the language used, it should make no material difference whether this intention appears in the signature, or the body of the instrument." It was held in this case that the trustees were exempt, as known public officers. But a different result was reached in the same court where the note read, "We promise," etc. "A., B., C., Trustees of School District No. 5." *Fowler v. Atkinson*, 6 Minn. 578 (Gil. 412). This is also *prima facie* the case where the note is drawn, "We, the trustees of school district No. 10, promise," etc. "A. B.,

man Church, for ourselves as such trustees and our successors in office, promise and bind ourselves for said congregation and such successors in office," etc., signed, "A., B., C., Trustees;"²⁷³ "I, as treasurer of the Congregational Society, or my successors in office, promise," etc., signed, "A. B., Treasurer."²⁷⁴ So, too, a contract by "C. L., as agent for and on the part and behalf of S. R.," signed by C. L., and afterwards ratified in writing by S. R., is not binding upon C. L. personally.²⁷⁵

Other cases, turning in some instances, as will be seen, on other circumstance or expression, hold such a contract or note to be that of the agent only. Thus, a draft signed by several "as commissioners," has been held to be binding upon them personally;²⁷⁶ or a sealed covenant, signed and sealed by A. B., "as Agent";²⁷⁷ or a contract of sale made for a principal residing abroad, and signed "as Agents for J. S. & Co., W. & S."²⁷⁸ So, a promissory note read-

Trustees," leaving on the plaintiff the onus probandi. *Bingham v. Stewart*, 13 Minn. 106 (Gil. 96).

²⁷³ *Klostermann v. Loos*, 58 Mo. 290; parol evidence being admissible to show such intention, if necessary.

²⁷⁴ *Barlow v. Society*, 8 Allen (Mass.) 460. "Even the insertion in a promissory note of the word 'as' between the name of the signer and the description of his relation to another person, has been held not sufficient to exempt him from personal liability where the note showed upon its face that no other person was legally bound, as in the case of a promissory note made by a guardian 'as guardian,' " Gray, J., page 464. But of the note in question in the suit he says (page 465): "The note not only names the principal, describes the relation between the principal and the agent, and declares the note to be made in execution of the agency, but it cannot take effect according to its terms except as the note of the principal."

²⁷⁵ *Spittle v. Lavender*, 2 Brod. & B. 452.

²⁷⁶ *Byles, Bills*, 76; *Eaton v. Bell*, 5 Barn. & Ald. 34; *Nicholls v. Diamond*, 9 Exch. 154; *Bottomley v. Fisher*, 1 Hurl. & C. 211.

²⁷⁷ *Stone v. Wood*, 7 Cow. (N. Y.) 453.

²⁷⁸ *Paice v. Walker*, L. R. 5 Exch. 173. But in *Gadd v. Houghton*, 1 Exch. Div. 357, where a different conclusion was reached as to a contract for sale of oranges, "on account of J. M. & Co., Valencia," signed, "J. C. H. & Co.," Lord Justice James said (page 359): "The case is not, in my opinion, in any way governed by *Paice v. Walker*; for, whatever the decision was in that case upon the words 'as agents,' the words in the present case, 'on account of,' are not at all ambiguous, and it would be impossible to make them words of description. The ratio decidendi in *Paice v. Walker* was that, having regard to the contract and all the circumstances of the case, the words 'as

ing, "We, or either of us, as directors of the H. M. & G. road, promise," etc.;²⁷⁹ or, "We, as trustees of the town of H., jointly and severally promise," etc., signed, "A., B., C., Trustees";²⁸⁰ or, "I, A. B., as trustee of the Louisiana Company, promise," etc., signed, "A. B., Trustee La. Co.";²⁸¹ or, "We, as committeemen for the erection of a school house in district No. 3, promise," etc., signed with the individual names only.²⁸² So, too, "We, as trustees of the Summerfield Methodist Episcopal Church, for and in behalf of said church, promise," etc., signed, "A., B., Trustees of the S. M. E. Ch.," but not executed in a legal manner by the trustees "lawfully convened."²⁸³

Principal Indicated as Acceptor or Indorser by Drawee's or Payee's Name.

§ 145. The principles already laid down as to the individual liability of an agent drawing a bill or note in his own name are in general applicable to acceptances and indorsements by an agent. In an acceptance or indorsement, however, there is an additional means for ascertaining who is to be bound in the way in which the bill or note is drawn. Thus, if the bill or draft is drawn upon the principal by name, and accepted by the agent in his own name, it will

agents' must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain 'on account of' another person. Those are the very words used in the present case. When a man says that he is making a contract 'on account of' some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to *Paice v. Walker*, I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea. If that case were now before us, I should hold that the words 'as agents' in that case had the same effect as the words 'on account of' in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think the words 'as agents' were words of description."

²⁷⁹ *Titus v. Kyle*, 10 Ohio St. 444.

²⁸⁰ *Trask v. Roberts*, 1 B. Mon. (Ky.) 201.

²⁸¹ *Rupert v. Madden*, 1 Chand. (Wis.) 146.

²⁸² *Bayliss v. Pearson*, 15 Iowa, 279.

²⁸³ *Dennison v. Austin*, 15 Wis. 366.

be deemed to be the acceptance of the principal, and not of the agent.²⁸⁴ And this is still plainer in the case of a bill drawn upon a company, and "Accepted by order of the R. S. G. Company. W. E., Secretary";²⁸⁵ or drawn on the company by a wrong name, and "Accepted. A. B., Manager";²⁸⁶ or drawn on a company, and "Accepted. A., B., Directors," etc.,—such acceptance being, moreover, attested by the secretary.²⁸⁷ But where a bill is drawn on the agent "and owners" of a vessel, and accepted by the agent only in his individual name, he alone is liable on the acceptance.²⁸⁸

Again, if a note be made to a corporation and indorsed, "A. B., Atty.," or "A. B., President," it is an indorsement by the corporation.²⁸⁹ And this, as we have seen, is a matter of everyday occurrence in the indorsement by cashiers of paper made payable to their banks. But where a note was made payable to the Fire Brick Company, and indorsed, "Fire Brick Co. A. B., Treasurer. C. D.,"—the latter is personally liable, and cannot be discharged by parol evidence that he indorsed the note as president of the company.²⁹⁰ A mere misnomer of the corporation in the indorsement leaves it still the company's indorsement, e. g. where a note to the Southern College of Kentucky was indorsed, "Trustees of Southern College, by A. W. G." ²⁹¹

So, in general, the corporation or other principal will be liable as acceptor of a bill drawn upon its agent, and accepted by him, *as such*

²⁸⁴ *Lindus v. Bradwell*, 5 C. B. 583. See, also, *Gurney v. Evans*, 27 Law J. Exch. 166; *Id.*, 3 Hurl. & N. 122; *Edmunds v. Bushell*, 35 Law J. Q. B. 20.

²⁸⁵ *Eastwood v. Bain*, 3 Hurl. & N. 738, 28 Law J. Exch. 74.

²⁸⁶ *Hascall v. Life Ass'n*, 5 Hun (N. Y.) 151.

²⁸⁷ *Okell v. Charles*, 34 Law T. (N. S.) 822. So, an order addressed to a corporation, and "Accepted. A. B., Treasurer," is accepted by the corporation. *Rogers v. Stone Co.*, 134 Mass. 31.

²⁸⁸ *Taber v. Cannon*, 8 Metc. (Mass.) 456. But an acceptance, "Str. Dorrance per G. M., Agent," of a bill drawn on "steamer Dorrance and owners," binds the owners, and not the agent. *Alabama Coal-Min. Co. v. Brainard*, 35 Ala. 476.

²⁸⁹ *Merchants' Bank v. McColl*, 6 Bosw. (N. Y.) 473; *Elwell v. Dodge*, 33 Barb. (N. Y.) 336; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Marine Bank v. Clements*, 31 N. Y. 33; *Russell v. Folsom*, 72 Me. 436. This is at least *prima facie* the company's act. *Goodrich v. Reynolds*, 31 Ill. 490. -

²⁹⁰ *Condon v. Pearce*, 43 Md. 83.

²⁹¹ *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84.

agent. This is true in the case of a bill or draft on "A. B., Treasurer of the T. H. R. R. Co.," "Accepted. A. B., Treasurer,"²⁹² even though the bill was drawn in fraud of the company and without its knowledge.²⁹³

Where, however, a bill drawn on "H. B., cashier of the Y. B. Co.," is accepted by H. B. in his individual name, he only is liable on the acceptance.²⁹⁴ And this has been held, also, in case of an acceptance by "A. B., Agent," of a bill drawn on "A. B., Agent," by "C. D., Agent," although the bill was dated at the company's office, and concluded, "Charge to the account of this company";²⁹⁵ and also of a bill drawn on "H. C., general agent of L'Unione Campagna," and "Accepted on behalf of the company. H. C.," although the consideration went to the company.²⁹⁶

In like manner, where a bill is drawn on any one in his individual name and accepted by him with the addition of an official name, as "A. B., Treasurer of the L. & M. Co.," the drawee is *prima facie* personally liable on his acceptance.²⁹⁷ Parol evidence is admissible in such cases, however, to show an intention to bind the company, and that the consideration went to the company.²⁹⁸ But a bill of

²⁹² *Tousey v. Taw*, 19 Ind. 212. In the similar case of *Amison v. Ewing*, 2 Cold. (Tenn.) 367, an action against the acceptor individually was defeated on the ground that the treasurer of the railroad company "acted in the character of a *public agent*"!

²⁹³ *Shelton v. Darling*, 2 Conn. 435.

²⁹⁴ *Thomas v. Bishop*, 2 Strange, 955; *Rew v. Pettet*, 1 Adol. & E. 196. 3 Nev. & M. 456; *Lallerstedt v. Griffin*, 29 Ga. 708. And it is negligence on the part of an agent to receive such acceptance. *Exchange Nat. Bank v. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, reversing 4 Fed. 20.

²⁹⁵ *Slawson v. Loring*, 5 Allen (Mass.) 340. But on an exactly similar bill the corporation (*Adams Express Company*), and not the agent, was held to be liable as maker in *Sayre v. Nichols*, 7 Cal. 535.

²⁹⁶ *Herald v. Connah*, 34 Law T. (N. S.) 885; *Bramwell, B.*, saying: "Bearing in mind that * * * the bill is addressed personally to the defendant, it must be taken that it was accepted so as to make it a good acceptance."

²⁹⁷ *Bruce v. Lord*, 1 Hilt. (N. Y.) 247; *Lafin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411. So, a similar acceptance, corresponding, however, to the form of the drawee's name on the bill. *Moss v. Livingston*, 4 N. Y. 208; *Haight v. Naylor*, 5 Daly (N. Y.) 219. But, *contra*, *Shelton v. Darling*, 2 Conn. 435. And see *Walker v. Bank*, 9 N. Y. 582, where the acceptance was in the corporation name, "by A. B., Treasurer."

²⁹⁸ *Lafin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411; *Bruce v. Lord*, 1

exchange drawn on a purser individually for supplies to his company, and "Accepted for the company. W. C., Purser," has been held, in England, to bind him individually.²⁹⁹ And so even an acceptance by "A. B., Purser, Per Procuration W. D. M. Company."³⁰⁰ On the other hand, in the United States, a bill drawn on A. B., "Accepted, payable on return of March estimates. A. B., Treasurer," has been held to bind the company.³⁰¹ And a bill of exchange drawn by C. D. on A. B. and "Accepted. A. B., Agent of C. D.," is equivalent, it has been held, to a note of C. D., and is not binding upon the acceptor personally, the intention to bind the principal being shown by parol.³⁰²

Signature by Agent—Foreign Statutes.

§ 146. It is not necessary that an agent should adopt any particular manner of signature to effect his intention of binding his principal only. Whatever shows this intention clearly is sufficient, in the absence of specific statutory requirements. The proper and usual way, however, is for the agent to sign his principal's name, adding his own name and official title or designation as agent, e. g. "A. B., by C. D., Agent." He may, however, if authorized to sign for his principal, sign the principal's name only.³⁰³ But this course renders the proof of execution more difficult, and is to be avoided. In the same way, one of two joint makers of a note may sign both names, if authorized, without any words indicating his agency, and charge his co-maker by parol proof of his authority and act.³⁰⁴ And an agent may bind his principal by signing his own name first, e. g.

Hilt. (N. Y.) 247. And an acceptance, "for the Opinion newspaper. W. L. S.," of an order drawn on W. L. S., individually binds the partners owning the paper, although the partnership name was not used. *Markham v. Hazen*, 48 Ga. 570.

²⁹⁹ *Mare v. Charles*, 5 El. & Bl. 978.

³⁰⁰ *Nicholls v. Diamond*, 9 Exch. 154.

³⁰¹ *Amison v. Ewing*, 2 Cold. (Tenn.) 367. As to this case, see section 145, *supra*.

³⁰² *Hardy v. Pilcher*, 57 Miss. 18.

³⁰³ *First Nat. Bank of Canandaigua v. Whitney*, 4 Lans. (N. Y.) 34. Perhaps it is better to avoid the doubt altogether by putting the principal's name, as promisor, into the body of the note. *Hamilton v. Railroad Co.*, 9 Ind. 359.

³⁰⁴ *Morse v. Green*, 13 N. H. 32.

"A. B., Agent for C. D." ³⁰⁵ Where, however, a signature in this form failed to designate the principal by name, but referred only to a newspaper, of which he was proprietor, e. g. "D. H., Agent for The Churchman," the agent was held to be personally liable.³⁰⁶ The word "Agent" is not a necessary part of an agent's signature. Thus, he may sign, "A. B., by C. D." And in like manner it is sufficient to bind his principal if he sign, "C. D., for A. B." ³⁰⁷ So, too, even a note reading, "We jointly and severally promised," etc., and signed, "R. & J., for G.," is sufficient to bind G. only.³⁰⁸ And a joint note signed, "W. S., for Himself and G. L.," binds both, if there is proof of authority to sign for G. L.³⁰⁹

A special provision is now made by statute, in England, for the execution of notes and bills on behalf of a company.³¹⁰ And the laws of Spain, and of most of the Spanish-American states, require

³⁰⁵ Ballou v. Talbot, 16 Mass. 461; Olcott v. Little, 9 N. H. 259; Webb v. Burke, 5 B. Mon. (Ky.) 51; Tiller v. Spradley, 39 Ga. 35. But see, contra, in case of a sealed note, Dawson v. Cotton, 26 Ala. 591. So, too, a sealed covenant signed, "A. B., for the Directors." White v. Skinner, 13 Johns. (N. Y.) 307. A sealed bond, however, signed in this manner, given expressly for the performance by the principal of a certain act, binds the principal only, if the agent has proper authority. Deming v. Bullitt, 1 Blackf. (Ind.) 241.

³⁰⁶ The note not being shown to have been given in the principal's business. De Witt v. Walton, 9 N. Y. 571. But see, as to this case, Green v. Skeel, 2 Hun (N. Y.) 485. And in Shattuck v. Eastman, 12 Allen (Mass.) 369, a contract signed, "Robert Eastman, Agent for Ward G. Lowell, Mass.," it was held, might be binding on the agent personally.

³⁰⁷ Scott v. Johnson, 5 Bosw. (N. Y.) 213; Long v. Colburn, 11 Mass. 97; Robertson v. Pope, 1 Rich. (S. C.) 501, overruling Fash v. Ross, 2 Hill (S. C.) 294; Hovey v. Magill, 2 Conn. 680; King v. Handy, 2 Ill. App. 212; Wheelock v. Winslow, 15 Iowa, 464; Roney's Adm'r v. Winter, 37 Ala. 277. But see, contra, Musgrove v. McIlroy, 5 J. J. Marsh. (Ky.) 646; Offutt v. Ayres, 7 T. B. Mon. (Ky.) 356, Bibb, C. J., dissenting; Taylor v. McLean, 1 McMul. (S. C.) 352 (overruled by Robertson v. Pope, supra); Moore v. Cooper, 1 Speers (S. C.) 87 (overruled by Robertson v. Pope, supra); Early v. Wilkinson, 9 Grat. (Va.) 68, where the principal's name was in brackets, and the agent's authority was not shown; MacBean v. Morrison, 1 A. K. Marsh. (Ky.) 545.

³⁰⁸ Rice v. Gove, 22 Pick. (Mass.) 158.

³⁰⁹ Olcott v. Little, 9 N. H. 259.

³¹⁰ By the companies' act of 25 & 26 Vict. c. 89 (repealing the joint-stock companies' act of 19 & 20 Vict. c. 47) § 47, "a promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under that act, if made, accepted or indorsed *in the name of*

every bill of exchange or note made, accepted, or indorsed by an agent, to be made, accepted, or indorsed under a special power of attorney, and to state that fact.³¹¹ The Hungarian exchange law in like manner makes the agent signing a bill or note individually liable, unless he expresses the fact that he signs only as attorney for another.³¹²

Parol Evidence—Disclosing Principal—Discharging Agent.

§ 147. Parol evidence is generally admitted in simple contracts *to disclose the principal* for whom the contract is made, either for the purpose of charging him with the burden or giving him the benefit.³¹³ On the other hand, it is rejected, if offered for the purpose of discharging an agent who has signed in such manner as to render himself personally liable.³¹⁴

But in commercial paper there must be some indication of the principal on the face of the paper, or he cannot be holden as a party to it. Thus, parol evidence is inadmissible to charge one person

the company, or if made, accepted or indorsed by or on behalf or on account of the company by any person acting under the authority of the company."

³¹¹ ARGENTINE REPUBLIC (Code Com. art. 785); BOLIVIA (Code Com. art. 369); COLOMBIA (Code Com. arts. 393, 424); COSTA RICA (Code Com. arts. 382, 414); ECUADOR (same as Spain); SALVADOR (Code Com. arts. 390, 421); SPAIN (Code Com. arts. 435, 467).

³¹² HUNGARY (Exch. Law, § 27).

³¹³ Byles, Bills, 38; Bickerton v. Burrell, 5 Maule & S. 383; Rayner v. Grote, 15 Mees. & W. 359; Williams v. Bacon, 2 Gray (Mass.) 387; Dyer v. Burnham, 25 Me. 9; Eastern R. Co. v. Benedict, 5 Gray (Mass.) 562, where the order in suit was made payable to "J. S., President of the Eastern R. R. Co." And this is so of an action against a corporation for work done, although the president may have given a duebill for it in his individual name; there having been no election of the president individually as the debtor. Richmond F. & P. R. Co. v. Snead, 19 Grat. (Va.) 354.

³¹⁴ Nash v. Towne, 5 Wall. 703. In this case the agent was not allowed to prove in his own discharge that the principal for whom he acted was mentioned by him at the time of making the contract, and was known to the other contracting party to be the real party for whom the contract was made. But the rule adopted in Louisiana is opposed to this decision. Krumbhaar v. Ludeling, 3 Mart. (La.) 640. And in Louisiana the drawer of a bill at suit of the payee may be discharged by showing that he was merely the agent of the drawee and acceptor, and that the bill was given for the debt of the drawee to the payee. Wolfe v. Jewett, 10 La. 383.

on a promissory note signed by another simply with his own name.³¹⁵ But it has been said that such a word as "Agent," added to the signature of the maker of a note, is of itself notice that the signer in-

³¹⁵ Byles, Bills, 38; 1 Daniel, Neg. Inst. 286; Stackpole v. Arnold, 11 Mass. 27; Bedford Commercial Ins. Co. v. Covell, 8 Mete. (Mass.) 442; Heaton v. Myers, 4 Colo. 59; Fulton v. Loughlin, 118 Ind. 286, 20 N. E. 796; Webster v. Wray, 19 Neb. 558, 27 N. W. 644; Sparks v. Transfer Co., 104 Mo. 531, 15 S. W. 417. So, where the note was signed, "A. B., Trustee." Farrell v. Reed, 46 Neb. 258, 64 N. W. 959.

In *Mechanics' Bank of Alexandria v. Bank of Colombia*, 5 Wheat. 326, a bank was held, by parol evidence, on a check signed by its cashier with his own name simply. And a certificate of deposit in this form, fraudulently given by a bank president, and innocently accepted by the depositor, will not preclude the latter from his right of action against the bank for money had and received. *Coleman v. Bank*, 53 N. Y. 388. In this case Andrews, J., said (page 392): "The money was paid to and received by the teller of the bank, and, up to the point where the certificate was given, the dealing, as shown by the act of the parties, was between the plaintiff and the bank, and not between the plaintiff and V. [the teller]. Leaving out of view the certificate, the liability of the defendant is clear. * * * It is insisted, however, that the certificate issued to the plaintiff at the time of the deposit conclusively establishes that the transaction was with V., and upon his sole credit. The certificate is said to be a written contract, by which alone the right of the plaintiff is to be determined, and that parol proof that the deposit was made with the bank, or tending to establish a liability of the bank, was inadmissible. * * * But assuming that the certificate signed by V., when accepted by the plaintiff, became a written contract between them, parol evidence that the bank received the money as a deposit did not contradict any written agreement between the bank and the plaintiff, for they had made none. * * * Unexplained, the fact that the plaintiff accepted the certificate of V. was strong, if not conclusive, evidence that the bank was not a party to the transaction; but it was evidence only, and was subject to explanation by parol proof without violating the rule referred to. * * * The rule does not preclude a party who has entered into a written contract with an agent from maintaining an action against the principal upon parol proof that the contract was made in fact for the principal, where the agency was not disclosed by the contract, and was not known to the plaintiff when it was made, or where there was no intention to rely upon the credit of the agent to the exclusion of the principal. Such proof does not contradict the written contract." See, too, *Ford v. Williams*, 21 How. 287; *Higgins v. Senior*, 8 Mees. & W. 334; *Short v. Spackman*, 2 Barn. & Adol. 962; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Gates v. Brower*, 9 N. Y. 205; *Barry v. Ransom*, 12 N. Y. 464. And such a certificate of deposit may be rescinded, and the bank sued for money had and received. *Shields v. Bank*, 3 Hun (N. Y.) 477; *Rich v.*

tended not to be bound personally.³¹⁶ And where a note is signed in this way, and the principal is at the time made known to the payee, it seems that parol evidence is admissible to charge him on the note,³¹⁷ especially if such note has been given in the course of the principal's business.³¹⁸ This is equally true of a note signed by corporation trustees with the simple addition to their signature of the word "Trustees."³¹⁹

When the name of the corporation for which an agent acts is expressed in the signature or in the body of the instrument by the agent's official title, the instrument, as we have seen, is still prima facie the bill or note of the agent individually, but parol evidence is in such case admissible between the original parties to charge the principal.³²⁰ So, too, where a note read, "The president and directors of the D. V. Company promise," etc., and was signed, "A. B.,

Bank, Id. 481. See, too, *Caldwell v. Bank*, 64 Barb. (N. Y.) 333; *Van Leuvan v. Bank*, 6 Lans. (N. Y.) 373, affirmed 54 N. Y. 671.

And between the immediate parties, where the instrument was understood and intended to be that of the principal, he may be held upon such proof. *Roberts v. Austin*, 5 Whart. (Pa.) 313; *Milligan v. Lyle*, 24 La. Ann. 144; *Shaffer v. Hoenschield*, 2 Kan. App. 516, 43 Pac. 979. See, too, *Bushong v. Taylor*, 82 Mo. 660; *In re Pendleton Hardware & Implement Co.*, 24 Or. 330, 33 Pac. 544.

³¹⁶ *Conro v. Iron Co.*, 12 Barb. (N. Y.) 27. And in Indiana a principal is held on such agent's signature in equity, but not at law. *Kenyon v. Williams*, 19 Ind. 44.

³¹⁷ *Hicks v. Hinde*, 9 Barb. (N. Y.) 528; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Keidan v. Winegar*, 95 Mich. 430, 54 N. W. 901; *Pease v. Pease*, 35 Conn. 131; *Baldwin v. Bank*, 1 Wall. 234, where the note was made to, and indorsed by, "A. B., Cashier," without naming any bank. But see, contra, *Collins v. Insurance Co.*, 17 Ohio St. 215.

³¹⁸ *Moore v. McClure*, 8 Hun (N. Y.) 558; *Green v. Skeel*, 2 Hun (N. Y.) 485, not following *De Witt v. Walton*, 9 N. Y. 571, so far as it conflicts. So, on a check signed, "A. B., Fr." (Foreman). *Barclay v. Pursley*, 110 Pa. St. 13, 20 Atl. 411.

³¹⁹ *Hypes v. Griffin*, 89 Ill. 134.

³²⁰ *Hood v. Hallenbeck*, 7 Hun (N. Y.) 362; *Lazarus v. Shearer*, 2 Ala. 718; *Lafin & Rand Powder Co. v. Sinzheimer*, 48 Md. 411; *Wyman v. Gray*, 7 Har. & J. (Md.) 409; *McNeil v. Lithographing Co.*, 144 Ill. 238, 33 N. E. 31; *Kraniger v. Society*, 60 Minn. 94, 61 N. W. 904. Especially where the instrument read, "We assign," etc., and was signed, "J. H. S., Prest. N. M. R. R. Co.," and was sealed with the corporate seal, and attested by the company's secretary. *Musser v. Johnson*, 42 Mo. 74. So, where the corporate character of the debt is shown by recitals in a collateral mortgage. *Cabbell v. Knote*, 2 Kan. App.

President. C. D., E. F., Directors. G. H., Secretary.”³²¹ In like manner the fact of a bill or note being dated at a corporation office, coupled with any indication of agency in the maker’s signature, readily raises a presumption of its being the contract of the corporation, and parol evidence is admissible to establish that fact and hold the corporation;³²² especially where such a draft contained the further direction to “place to account of the company.”³²³ And parol evidence has been admitted, as we have seen, by the United States supreme court, to charge a banking company on a draft drawn by its cashier in his individual name, but dated at the bank, this being declared a sufficient indication “on its face” of a corporate character.³²⁴

The drawee’s name in a bill accepted by his agent is likewise an indication that an acceptance for the principal was intended, and parol evidence is admissible to charge him.³²⁵ And where a bill drawn by A. on B., in his individual name, was accepted by B., adding to his signature, as acceptor, “Agent of A.,” B. was discharged, and A. held by parol as virtually maker of a promissory note.³²⁶ So, a note signed, “R. & J., for G.,” may be shown by parol to be the note of G. only.³²⁷

68, 43 Pac. 309. But see, contra, to charge principal on a note signed, “President and Directors P. & S. Co.,” *Rendell v. Harriman*, 75 Me. 497.

³²¹ *Haile v. Pelree*, 32 Md. 327; *Yowell v. Dodd*, 3 Bush (Ky.) 581.

³²² *Lacy v. Lumber Co.*, 43 Iowa, 510, where the note was signed by the president of the company with the initials, “P. D. L. Co.” added to his signature, and bore date at the office of the D. L. Co. So, too, a draft dated at the company’s office, drawn by its president on its treasurer, and signed, “A. B., President.” *Wetumpka, etc., R. Co. v. Bingham*, 5 Ala. 657.

³²³ *Fuller v. Hooper*, 3 Gray (Mass.) 334; the draft in this case being marked with the company’s name in the margin, and signed, “W. Burtt, Agt.” And parol evidence has been admitted to bind the owners of a vessel on a bill concluding, “Charge the same to account of disbursements of barque Dublin,” and signed by the master with his individual name only. *Bass v. O’Brien*, 12 Gray (Mass.) 477.

³²⁴ *Mechanics’ Bank of Alexandria v. Bank*, 5 Wheat. 326.

³²⁵ *May v. Hewitt*, 33 Ala. 161; the bill being drawn on “The owners of the steamboat Messenger,” and “Accepted. A. B., Capt.”

³²⁶ *Hardy v. Pilcher*, 57 Miss. 18.

³²⁷ *Rice v. Gove*, 22 Pick. (Mass.) 158. And it may be shown in discharge of an agent on such a note that he never delivered it as his note. *Owings v. Grubbs’ Adm’r*, 6 J. J. Marsh. (Ky.) 31.

But courts are more reluctant to discharge the agent by parol evidence of circumstances showing another's liability as principal, where the agent appears on the paper to be the sole party liable. If he has signed the instrument with his own name, and there is no indication on its face of any agency for another, such evidence will be rejected.³²⁸ If, however, the agency and the principal for whom the agent acts are both indicated, although it be only in the official title of the agent or officer signing the instrument, while the agent is in such case *prima facie* liable, he may be discharged by parol evidence of an intention to bind the principal,³²⁹ especially if the promise be made "*as such trustees,*" etc.,³³⁰ although the mere addition of the word "Trustee," "Agent," etc., to the individual name signed, is not sufficient for this purpose.³³¹ And such evidence has been held admissible to discharge an agent accepting, with the addition of the words, "Agent of C. D.," a bill drawn on him in his own

³²⁸ Byles, Bills, 38; Story, Bills, § 76; Higgins v. Senior, 8 Mees. & W. 834; Hancock v. Fairfield, 30 Me. 299; Collins v. Insurance Co., 17 Ohio St. 215; Bartlett v. Hawley, 120 Mass. 92; Brown v. Parker, 7 Allen (Mass.) 339; Junge v. Bowman, 72 Iowa, 648, 34 N. W. 612.

³²⁹ Laffin & Rand Powder Co. v. Sinsheimer, 48 Md. 411; Bruce v. Lord, 1 Hilt. (N. Y.) 247, where the liability in question was that of an acceptor in this form of a bill drawn on him individually; Smith v. Alexander, 31 Mo. 193; Drake v. Flewellen, 33 Ala. 106; Lazarus v. Shearer, 2 Ala. 718; Bingham v. Stewart, 13 Minn. 106 (Gil. 96); Gerber v. Stuart, 1 Mont. 172; although only signed, "A. B., Pres.," or "C. D., Sec.," Brunswick-Balke-Collender Co. v. Boutell, 45 Minn. 21, 47 N. W. 261; Martin v. Smith, 65 Miss. 1. So, where the principal's name was at the head of the paper, Continental Nat. Bank v. Heilman, 81 Fed. 36. But see, contra, Sturdivant v. Hull, 59 Me. 172; Williams v. Bank, 83 Ind. 237; even where the note was signed, "B. P. Co. A. B., Pres. C. D. Sec.," McCandless v. Canning Co., 78 Iowa, 161, 42 N. W. 635; or where the note read, "I promise * * *. A. B., Pres. & Treasr. C. F. Co.," Davis v. England, 141 Mass. 587, 6 N. E. 731; or where the acceptance sued on was, "A. B., Agt. of K. & O. Co.," on a draft by the company on "A. B., Agent," Robinson v. Bank, 44 Ohio St. 441, 8 N. E. 583.

³³⁰ Klostermann v. Loos, 58 Mo. 290. Indeed, a note of this description has been held not to be admissible as evidence of a debt in an action against the individual trustees. Leach v. Blow, 8 Smedes & M. (Miss.) 221.

³³¹ Hypes v. Griffin, 89 Ill. 134; Conner v. Clark, 12 Cal. 168; Bedell v. Scarlett, 75 Ga. 56, at suit of a bona fide holder. But see, contra, Tutt v. Hobbs, 17 Mo. 486, where the trustee in question was a public officer (school trustee). This ground for decision was, however, disclaimed by the court. So, Martin v. Smith, 65 Miss. 1, 3 South. 33, as against the payee. And see § 1897, *infra*.

name by C. D.³³² And in Louisiana, where the rule is in this regard a liberal one, the drawer of a bill in his own name may exonerate himself at suit of the payee by showing that he acted only as agent of the drawee, and that the bill was given for the debt of the drawee to the payee;³³³ whereas, in Maryland, on the contrary, the president of a company, indorsing with his individual name a note which was payable to the company, and was also indorsed, "F. B. Company. A. B., Treasurer," was not allowed to exonerate himself by evidence that he acted for the company only.³³⁴

Between principal and agent a more liberal rule is adopted, and the agent may be exonerated, by parol evidence, from liability to his principal on paper actually drawn or indorsed on his account.³³⁵ At suit of other parties, however, it must always be remembered that, where the intention has been to give credit personally to the agent who signs the bill or note, neither the payee's knowledge of his acting for a principal in the matter, nor the fact that the consideration went to the principal, will avail to exonerate the agent from individual liability.³³⁶

Maker's or Drawer's Name Uncertain—Fictitious.

§ 148. There must be in a negotiable bill or note, as we have seen, no uncertainty as to the person to be bound by it as drawer or maker. It cannot be made in the alternative by either of two or more persons,³³⁷ nor in the form of a promise by one "if my

³³² Hardy v. Pilcher, 57 Miss. 18.

³³³ Wolfe v. Jewett, 10 La. 383.

³³⁴ Condon v. Pearce, 43 Md. 83. Conversely where a note is signed, "S. P. Co., A. B. Pres.," rendering the corporation liable, parol evidence will not be admitted to charge the president individually as a joint maker. Liebscher v. Kraus, 74 Wis. 387, 43 N. W. 166.

³³⁵ Lewis v. Brehme, 33 Md. 432; Castrique v. Buttigieg, 10 Moore, P. C. 94. This case discusses at length the bearing of Le Fevre v. Lloyd, 5 Taunt. 749, and Goupy v. Harden, 7 Taunt. 159, upon this question. But see Story, Ag. § 157.

³³⁶ Paterson v. Gandasequi, 15 East, 62. Of course, there is no such intention to be inferred where the principal was not known at the time the contract was made, and where the person contracting was not known to be acting for another. Raymond v. Crown & Eagle Mills, 2 Metc. (Mass.) 324.

³³⁷ Ferris v. Bond, 4 Barn. & Ald. 679. Here the note ran, "I, J. C., prom-

brother does not pay it within six weeks.”³³⁸ Neither does a person who signs a fictitious name as maker to a note or bill render himself thereby liable as maker of the instrument, unless it be used by him with intention to bind himself or has been adopted by him as his name for business or other purposes. Except in such case, the signer of such bill or note can only be held liable in a special action on the case.³³⁹ Where, however, a bill is signed with a fictitious name, and made payable to the drawer's own order, an acceptance will be construed to bind the acceptor to pay upon the order of the person who actually drew the bill.³⁴⁰ In Germany a valid acceptance or indorsement may be based on a bill of exchange in the name of a fictitious drawer.³⁴¹ In Denmark the use of fictitious names for either drawer or drawee is prohibited under a penalty.³⁴² In France and Portugal, and in all countries governed by French law, while fictitious names are not absolutely prohibited, their use destroys the commercial character of the paper, and renders it a mere evidence of indebtedness.³⁴³ This is also the case in some other foreign lands, where defense on that ground is prohibited to a party with notice at suit of a bona fide holder for value.³⁴⁴

ise,” etc., and was signed, “J. C., or else H. B.” This was held not to be a promissory note, within the statute of Anne.

³³⁸ Appleby v. Riddolph, Bull. N. P. 272; 4 Vin. Abr. 240, pl. 16.

³³⁹ Bartlett v. Tucker, 104 Mass. 336. The drawers of a bill of exchange, using a fictitious name, and obtaining a discount of such bill, are liable on it as drawers. Williamson v. Johnson, 1 Barn. & C. 146. And the giving of a note by a purchaser of goods, Robert, in a wrong name, William, is no forgery. Reg. v. Martin, 5 Q. B. Div. 34; Dunn's Case, 1 Leach, 59. And see, as to the adoption of a signature, Salomon v. Hopkins, 61 Conn. 49, 23 Atl. 716; and as to misnomer of a corporation maker as “village,” instead of “city,” Cornell University v. Village of Maumee, 68 Fed. 418; or of a firm, Melsheimer v. Hommel, 15 Colo. 475, 24 Pac. 1079.

³⁴⁰ Cooper v. Meyer, 10 Barn. & C. 468.

³⁴¹ Thöl, W. R. 148.

³⁴² DENMARK (Exch. Law 1825, § 3).

³⁴³ BELGIUM (see “France”); FRANCE (Code Nap. art. 112). The Code Napoleon governs also in GREECE, HAYTI, TURKEY, and SAN DOMINGO. So, too, in PORTUGAL (Code Com. art. 323).

³⁴⁴ ARGENTINE REPUBLIC (Code Com. art. 778); BRAZIL (Code Com. art. 354); HOLLAND (Exch. Law 1838, art. 102); ITALY (Code Com. art. 198).

Joint and Several Notes.

§ 149. A promissory note may be signed by several makers, and in such case it will be either joint or several, or joint and several. If no words are used to mark this distinction, it will be a joint note only.³⁴⁵ But if a note reading, "I promise," etc., is signed by several makers, it is both joint and several.³⁴⁶ And this is true, except as between themselves, although one party sign as surety, and add the word "Surety" to the signature of his name.³⁴⁷ Of the same

³⁴⁵ *Groves v. Sentell*, 153 U. S. 465, 14 Sup. Ct. 898. So far, at least, as to negative the idea of one maker being only surety. *Johnson v. King*, 20 Ala. 270.

³⁴⁶ *Byles*, Bills, 7; 1 *Daniel*, Neg. Inst. 104; 2 *Edw. Bills & N.* § 967; *Lane v. Salter*, 4 Rob. (N. Y.) 239; *Hemmenway v. Stone*, 7 Mass. 58; *Chaffee v. Jones*, 19 Pick. (Mass.) 263; *Ely v. Clute*, 19 Hun (N. Y.) 35; *Dill v. White*, 52 Wis. 456, 9 N. W. 404; *Maiden v. Webster*, 30 Ind. 317; *Groves v. Stephenson*, 5 Blackf. (Ind.) 584; *Lambert v. Lagow*, 1 Blackf. (Ind.) 388; *Ladd v. Baker*, 26 N. H. 76; *Monson v. Drakeley*, 40 Conn. 559; *Salomon v. Hopkins*, 61 Conn. 49, 23 Atl. 716; *Barnet v. Skinner*, 2 Bailey (S. C.) 88; *Wallace v. Jewell*, 21 Ohio St. 171, criticising *Brownell v. Winnie*, 29 N. Y. 409; *First Nat. Bank v. Fowler*, 36 Ohio St. 524; *Partridge v. Colby*, 19 Barb. (N. Y.) 248; *March v. Ward*, Peake, 130; *Clerk v. Blackstock*, Holt, N. P. 474; *Rees v. Abbot*, Cowp. 832. So, too, in *Keller v. McHuffman*, 15 W. Va. 64, although a seal be added to one signature, and the word "Security" to the other. This is true, also, of a bond in the first person singular, signed by several, *Sayor v. Chayton*, 1 Lutw. 695; *Lord Gallway v. Mathew*, 1 Camp. 403, 10 East, 264; and of a warrant of attorney, *Dalrymple v. Fraser*, 2 C. B. 698, 15 Law J. C. P. 193; and of a covenant signed by two, and sealed by only one of them, *Van Alstyne v. Van Slyck*, 10 Barb. (N. Y.) 383. But it is said in *Brownell v. Winnie*, 29 N. Y. 409, that a note in this form "is still a several contract, and is joint only for the purpose of the remedy upon it." But if a note reading, "I promise," etc., be signed, "For A., B. & C., B." B. being one of a firm consisting of A., B. & C., B. is not separately liable on the note. *Ex parte Buckley*, 14 Mees. & W. 469, overruling *Hall v. Smith*, 1 Barn. & C. 407, 2 Dowl. & R. 584, where a similar note was held to render the firm liable jointly, and also the signer severally. See, too, *Shipton v. Thornton*, 9 Adol. & E. 314, 1 Perry & D. 216, where a ruling similar to that in *Hall v. Smith* was made in the case of a contract for freight made in the first person singular, but signed with the firm name.

³⁴⁷ *Dart v. Sherwood*, 7 Wis. 523; *Keller's Adm'r v. McHuffman*, 15 W. Va. 64. In like manner, if joint in form, the makers will be jointly liable to the holder, although "surety" is added to the names of some of them in the body of the note, and they sign on the back of the paper. *Palmer v. Grant*,

force is a note signed by one maker only with a memorandum added by another, "I acknowledge myself holden as surety for the payment of the above note. Barnabás Adams."³⁴⁸ On the other hand, a note running, "We or either of us promise," etc., would be plainly a joint and several note.³⁴⁹

It has been said that "a joint and several note, though on one piece of paper, comprises in reality and in legal effect several notes. Thus, if A., B., and C. join in making a joint and several promissory note, there are in effect four notes. There is the joint note of the three makers, and there are also the several notes of each of the three."³⁵⁰ This broad statement is judiciously and correctly qualified by Judge Sharswood to mean that, *as to the remedy*, such a note is either one joint note or three several notes, at the holder's election, and in no case four notes. *In other respects* (indorsement, demand, etc.) it is but one note.³⁵¹ It would seem, therefore, more accurate to call such notes joint *or* several, since the holder may elect to sue any maker severally or all jointly, but cannot do both.³⁵² But this election of the holder is not binding upon the maker in his

4 Conn. 389; Hosmer, C. J., *dissenting*. As to recovery, under the common counts against such "surety," see *Vaughn v. Rugg*, 52 Vt. 235.

³⁴⁸ *Hunt v. Adams*, 5 Mass. 358.

³⁴⁹ *Pogue v. Clark*, 25 Ill. 333. And, in a declaration against all the makers, such note may be described as a joint note. But on a note reading, "We, or either of us, promise * * * in behalf of school district No. 6," etc., and signed, "A. B., Prest.; C. D. Secy.; E. F., Treas." the individual signers were held not to be liable in *Harvey v. Irvine*, 11 Iowa, 82, on the authority of *Harkins v. Edwards*, 1 Iowa, 426; *Winter v. Hite*, 3 Iowa, 142; *Lyon v. Adamson*, 7 Iowa, 509; and *Baker v. Chambles*, 4 G. Greene (Iowa) 428.

³⁵⁰ Byles, Bills, 8, citing *Fletcher v. Dyche*, 2 Term R. 32; *Owen v. Wilkinson*, 28 Law J. C. P. 3, 5 C. B. (N. S.) 526; *Bulbeck v. Jones*, 5 Jur. (N. S.) 1317; *Beecham v. Smith*, El., Bl. & El. 442; and observations of Parke, B., in *King v. Hoare*, 13 Mees. & W. 505. If one maker of a joint and several note die, it still remains the joint and several note of the surviving makers. *Corlies v. Fleming*, 30 N. J. Law, 349.

³⁵¹ See Judge Sharswood's note, Byles, Bills, 19. So, an alteration affecting the liability of one maker vitiates the entire instrument as to all. *Gardner v. Walsh*, 5 El. & Bl. 91.

³⁵² *Streatfield v. Halliday*, 3 Term R. 782. But see a suggestion to the contrary in 1 Pars. Notes & B. 251. In *Rees v. Abbott*, Cowp. 832, the note was to pay "jointly or severally"; and it was held by Lord Mansfield that the person to elect whether it should be joint or several was the person to whom it was payable, and that "or" was synonymous in that case with "and."

relation to his co-makers, and if he is sued as a several maker, and obliged to pay the whole note, his right to sue his co-makers for contribution is unimpaired.³⁵³

Such a note may be valid as a joint note, although the several note be void.³⁵⁴ So, it may be complete as a several note, and binding as such, upon one who has signed it and put it into circulation, although it was intended to be a joint and several note, and was put into circulation without the other signatures.³⁵⁵ If, on the other hand, a promissory note be issued by one person, but altered before its negotiation, without his knowledge, by the addition of another signature, as maker, it is said that this is not such a material alteration as will discharge him.³⁵⁶

Between such co-makers parol evidence is generally admissible to show their actual relation to one another.³⁵⁷ Thus, one joint maker may show, as against his co-makers, that he was only a surety for the others or one of them;³⁵⁸ but he cannot prove special conditions

³⁵³ Byles, Bills, 9.

³⁵⁴ *MacLae v. Sutherland*, 3 El. & Bl. 1.

³⁵⁵ *Dickerson v. Burke*, 25 Ga. 225.

³⁵⁶ *Brownell v. Winnie*, 29 N. Y. 400. But see, contra, *Hamilton v. Hooper*, 46 Iowa, 515; *Lunt v. Silver*, 5 Mo. App. 186.

³⁵⁷ Byles, Bills, 8; *Carpenter v. King*, 9 Metc. (Mass.) 515; *Branch Bank of Mobile v. Coleman*, 20 Ala. 145. And this is true although one of the several makers add to his name the word "security," which was held to be prima facie evidence of his bearing such character. *Robison v. Lyle*, 10 Barb. (N. Y.) 512.

³⁵⁸ Abb. Tr. Ev. 445; 1 Pars. Notes & B. 233; *Hubbard v. Gurney*, 64 N. Y. 457. This case, in a very able opinion of Church, C. J., reviews the leading cases on the subject, and overrules *Campbell v. Tate*, 7 Lans. (N. Y.) 370, and *Benjamin v. Arnold*, 5 Thomp. & C. (N. Y.) 54. See, to the same effect, *King v. Baldwin*, 17 Johns. (N. Y.) 384; *Archer v. Douglass*, 5 Denio (N. Y.) 509; *Pain v. Packard*, 13 Johns. (N. Y.) 173; *Bank of Steubenville v. Hoge*, 6 Ohio, 17; *Davis v. Barrington*, 30 N. H. 517. "The object of the instrument is to show their relation to the creditor, and ordinarily it imports no more. The question of their relation to each other remains an open one, and hence the admission of parol evidence to answer it does not violate the rule by which such evidence is not allowed to vary the legal import of a written instrument." *Lowrie, J.*, in *Holt v. Bodey*, 18 Pa. St. 214. "The note," says Chief Justice Parsons, "is not a written contract between the makers, although the language is prima facie evidence of their relations to each other, but it is a written contract between them and the payee." 1 Pars. Notes & B. 233. And where A., B., C., and D. sign a joint and several

of suretyship, which are not implied in their legal relation and contradict the writing.³⁵⁹ Parol evidence is also admissible against parties having knowledge of the relation of the makers to one another,³⁶⁰ but not against a bona fide holder for value without notice.³⁶¹

note, and C. and D. add "Surety" to their names, B. may show by parol, at suit of D., that he was only a surety for A. *McGee v. Prouty*, 9 Metc. (Mass.) 551. See, too, *Apgar's Adm'rs v. Hiler*, 24 N. J. Law, 512, where a note signed, "A.," and below him, "B., C., Sureties," was held to import prima facie that B. and C. were joint sureties for A.; but, at suit of B., C. was allowed to show by parol that he was surety for A. and B., and not jointly with B. Originally this evidence was only admissible in equity. *Rees v. Berrington*, 2 Ves. Jr. 542. And such evidence appears to be regarded in England with disfavor, notwithstanding the statute authorizing equitable defenses in actions at law. *Greenough v. McClelland*, 2 El. & El. 428. But see *King v. Baldwin*, 17 Johns. (N. Y.) 384, reversing 2 Johns. Ch. (N. Y.) 554.

³⁵⁹ Abb. Tr. Ev. 445; e. g. an agreement on payee's part in the nature of a condition that he would not part with the note, and would collect it promptly when due. *Thompson v. Hall*, 45 Barb. (N. Y.) 214.

³⁶⁰ Abb. Tr. Ev. 445; 1 Daniel, Neg. Inst. 319; *Bailey v. Edwards*, 4 Best & S. 761; *Ewin v. Lancaster*, 6 Best & S. 572; *Oriental Financial Corp. v. Overend*, L. R. 7 Ch. App. 152, affirmed L. R. 7 H. L. 348; *Smith v. Doak*, 3 Tex. 215; *Carpenter v. King*, 9 Metc. (Mass.) 516; *Shaw, C. J.*, saying in this case: "If it can be inquired into to adjust the relations of debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights." In this case the creditor had released the surety by discharging an execution against the principal. So, too, *Perry v. Hodnett*, 38 Ga. 104; *Rose v. Williams*, 5 Kan. 483. So, too, where the holder had also agreed to look to the principal. *Harris v. Brooks*, 21 Pick. (Mass.) 195. But see, contra, *Kritzer v. Mills*, 9 Cal. 21, where, however, the defense that the holder had neglected to sue the principal in due time was in itself unavailing. And it is not admissible against a bona fide holder without notice, *Orvis v. Newell*, 17 Conn. 103; nor against the payee of a bond having no notice, the maker being estopped from denying the character assumed by his signature, *Sprigg v. Bank*, 10 Pet. 264; *Pintard v. Davis*, 21 N. J. Law, 632, affirming 20 N. J. Law, 205; nor against the payee of a note, no notice of the fact appearing to have been given him, *Bull v. Allen*, 19 Conn. 101; *Farrington v. Gallaway*, 10 Ohio, 543, the proper remedy being said to be in equity; *Slipher v. Cooch*, 11 Ohio, 299; nor even,

³⁶¹ Abb. Tr. Ev. 445; *Byles, Bills*, 8; *Price v. Edmunds*, 10 Barn. & C. 578; *Strong v. Foster*, 17 C. B. 201; *Manley v. Boycot*, 2 El. & Bl. 46; *Summerhill v. Tapp*, 52 Ala. 227; *Benedict v. Cox*, 52 Vt. 247; *Rice v. Cook*, 71 Me. 559; *Hughes v. Littlefield*, 18 Me. 400. But see *Reynolds v. Wheeler*, 10 C. B. (N. S.) 561, 30 Law J. C. P. 351; *Hall v. Wilcox*, 1 Moody & R. 58; *Fentum v. Pocock*, 5 Taunt. 192, 1 Marsh. 14; *Perfect v. Musgrave*, 6 Price, 111.

And, except so far as may affect the rights of a surety, a joint note, given for a joint liability, will be presumed to be both joint and several.³⁶²

It has been held, against a payee with notice, *Yates v. Donaldson*, 5 Md. 389; *Manley v. Boycot*, 18 Eng. Law & Eq. 357; *Perfect v. Musgrave*, 6 Price, 111. But parol evidence has been held admissible in such case in favor of an accommodation acceptor, at suit of a holder having no notice of the accommodation character of the acceptor, and discharging him as a surety by giving the drawer further time for payment, *Bailey v. Edwards*, 4 Best & S. 761; and a fortiori at suit of a holder having such notice, *Ewin v. Lancaster*, 6 Best & S. 572. On the other hand, knowledge of the accommodation character of a joint maker is said to be no notice that he is a mere surety, or entitled to the privileges of one. *Strong v. Foster*, 17 C. B. 201. And, to like effect, as to a maker for accommodation of indorser, see *Bank of Montgomery Co. v. Walker*, 9 Serg. & R. (Pa.) 229; *Id.*, 12 Serg. & R. (Pa.) 382; *White v. Hopkins*, 3 Watts & S. (Pa.) 99; *Lewis v. Hanchman*, 2 Pa. St. 416. Notice to a holder, to subject him to such defense of suretyship, need not antedate his becoming a party to the instrument. *Oriental Financial Corp. v. Overend*, 7 Ch. App. 152, affirmed L. R. 7 H. L. 360; *Oakeley v. Pasheller*, 10 Bligh (N. S.) 548, *Id.*, 4 Clark & F. 207; *Swire v. Redman*, 1 Q. B. Div. 542; *Greenough v. McClelland*, 2 El. & El. 424, 30 Law J. Q. B. 15; *Pooley v. Harradine*, 7 El. & Bl. 431, 26 Law J. Q. B. 156. But see *Ex parte Graham*, 5 De Gex, M. & G. 356. It is, however, necessary that the relation of the surety should have existed at that time, and subsequent change giving rise to such relation will not affect even a holder with notice. *Swire v. Redman*, 1 Q. B. Div. 542. This case virtually overrules *Maingay v. Lewis*, Ir. R. 3 C. L. 495, in error *Id.* 229.

³⁶² Abb. Tr. Ev. 399. "Where a note," says Strong, J., in *Yorks v. Peck*, 14 Barb. (N. Y.) 647, "is made by two persons, which in terms is joint only, upon the death of one of the makers the surviving maker only is liable upon it, unless it appears by direct proof, or the facts of the case warrant the inference, that the parties intended it should be joint and several. 7 Bac. Abr. (Bouvier's Ed.) 249; Story, Eq. Jur. §§ 162-164; *Bradley v. Burwell*, 3 Denio (N. Y.) 61; *Hunt v. Rousmaniere's Adm'rs*, 8 Wheat. 174; *Id.*, 1 Pet. 1, 16; *Carpenter v. Provoost*, 2 Sandf. (N. Y.) 537. If such an intention is expressly proved, or may be inferred from the transaction, the note will be treated as if it was joint and several, and in that case the personal representatives of the deceased maker are liable for its payment. *Same cases*. In all cases of a joint note given upon a joint loan of money, or a joint liability of any kind, it will be presumed it was intended the note should be several as well as joint, and effect will be given to it according to that intention." Accordingly in the case cited (*Yorks v. Peck*) an action was sustained on a note joint in form against the surviving maker and the administrators of the deceased maker, sued together.

II. THE PAYEE.

- § 150. *Payee's Name*—Deceased Person—State.
- 151. *Payee*—Implied, not Named.
- 152. — Designated, not Named.
- 153. — Identical with Drawer or Drawee.
- 155. — Joint—Alternative.
- 156. — Agent, etc.—Personal Description.
- 157. — "Agent," "Cashier," etc.—Principal Intended.
- 158. — Executor—Public Officer—Trustee.
- 159. — "Bearer"—Presumption as to Value.
- 160. "A. or Bearer"—"Or Holder"—"A. B., Bearer."
- 161. *Payee Fictitious*.
- 162. — Transfer—Forgery.
- 163. — Innocent Parties.
- 165. Payee Misnamed—Correction by Parol Evidence.
- 166. Name Common to Several Persons.
- 167. Blank Payee.
- 169. English and American Statutes.
- 170. Foreign Statutes.

Payee's Name—Deceased Person—State.

§ 150. It is also necessary that the payee should be designated with certainty.³⁶³ The most usual and proper way of doing this is by naming the payee in the body of the instrument by his correct individual, partnership, or corporate name. The payee is, however, often designated by the word "bearer," the effect of which will be considered hereafter. None but an existing firm, corporation, or person can be the payee of a bill or note. Thus, commercial paper cannot be made payable to one who is dead.³⁶⁴ But if a note made to A. for his accommodation be renewed to him after his death, and

³⁶³ Byles, Bills, §2; Chit. Bills, 179; 1 Daniel, Neg. Inst. 109; 1 Edw. Bills & N. § 140; 1 Pars. Notes & B. 31; Story, Bills, § 54; Story, Prom. Notes, § 35; Gibson v. Minet, 1 H. Bl. 608; Yates v. Nash, 8 C. B. (N. S.) 581; Douglass v. Wilkeson, 6 Wend. (N. Y.) 637; Brown v. Gilman, 13 Mass. 158; Evertson v. Bank, 66 N. Y. 14; Mayo v. Chenoweth, 1 Ill. 200; Matthews v. Redwine, 23 Miss. 233; Prewitt v. Chapman, 6 Ala. 86; Smith v. Bridges, 1 Ill. 18. Thus, an order indorsed on a bill for goods, to pay it "and charge to our account," has been held to amount to a bill of exchange, but not to be negotiable, for want of a payee's name. Hoyt v. Lynch, 2 Sandf. (N. Y.) 328.

³⁶⁴ U. S. v. First Nat. Bank of Coffeyville, 182 Fed. 410.

indorsed in that name by his widow, carrying on the business in his name, it will have all the force of an assumed name, and be binding on the indorser who uses it, at suit of a bona fide holder.³⁶⁵ Again, where a bill has been indorsed by an agent to his principal residing abroad, in ignorance of his death, it has been held that his administrator may bring suit upon it, as if made to him.³⁶⁶ And where one of the United States is named as payee, although not answering the description of an ordinary corporation, it is a good promissory note.³⁶⁷

If, on the other hand, no payee be designated, the instrument is not properly a bill of exchange or note, and cannot be sued on by the holder as bearer, although an action may lie on the original consideration between the parties to it.³⁶⁸ Thus, an interest warrant or coupon, detached from a corporation bond and designating no payee, is not a negotiable instrument.³⁶⁹ In Illinois, however, a duebill in the simplest form, "Good for fifty cents," was treated as an instru-

³⁶⁵ *Van Etten v. Hemann*, 35 Mich. 513. Such cases are provided for in Kentucky by the following statute: "A written obligation to a person or persons, who or some of whom happen to be dead at the time of its execution, may be proceeded on by the representative of such person, or by the survivor, as if it had been executed in the lifetime of such dead person or persons." Gen. St. Ky. p. 250, § 9.

³⁶⁶ *Murray v. East India Co.*, 5 Barn. & Ald. 204, Abbott, C. J., saying: "We are of opinion that, as the money for which the bill was remitted belonged to Hope's estate, it was competent to the administrator to elect to take the bill as the mode of payment, and that thereby the property did vest in him, and he acquired a right to sue upon it." But an indorsement to a deceased person with an intent to effect a transfer to her personal representative is void. *Valentine v. Holloman*, 63 N. C. 475.

³⁶⁷ *State of Indiana v. Woram*, 6 Hill (N. Y.) 33, where a state was held to be a corporation, within the statute of Anne, as enacted in New York (1 Rev. St. p. 768, § 1).

³⁶⁸ *Prewitt v. Chapman*, 6 Ala. 86. So held, also, of a duebill without a payee, *Biskup v. Oberle*, 6 Mo. App. 583; and of a check, *McIntosh v. Lytle*, 26 Minn. 336, 3 N. W. 983; and of a sealed note, the intended payee being shown by parol evidence, *Barkley v. Tarrant*, 20 S. C. 574.

³⁶⁹ *Evertson v. Bank*, 66 N. Y. 14; *Enthoven v. Hoyle*, 13 C. B. 394. But see, contra, *Smith v. Clark Co.*, 54 Mo. 66; *McCoy v. Washington Co.*, 3 Wall. Jr. 381, Fed. Cas. No. 8,731; if attached to the bond. "They partake," says Grier, J. (page 385, 3 Wall. Jr., and page 1342, 15 Fed. Cas.), "of the nature of the peculiar instrument to which they are attached."

ment with the payee's name left blank, and the holder was allowed to add, "to myself or order," and to sue on it as a valid note.³⁷⁰

Payee Named by Implication.

§ 151. Although the payee should properly be named in all commercial paper in the instrument itself, this is not absolutely necessary. Thus, an order for payment at the bottom of a statement of account, the order naming no payee, implies payment to the creditor stating the account, and is a bill of exchange.³⁷¹ So, too, an order for payment indorsed on a promissory note, in which the payee is named, payment to him being plainly intended by the order.³⁷² So, a new promise written under a note, but naming no payee, is a promissory note to the payee named in the note above.³⁷³

In like manner, a note, naming no payee, beginning with a receipt naming the person from whom the consideration proceeds, is a note payable to such person, e. g. "Received of A. B., £100, which I promise to pay on demand."³⁷⁴ But where a promisee is named, it will control the previous statement of indebtedness. Thus, the following instrument, "Due to the bearer, £3, which I promise to pay to A. or

³⁷⁰ *Weston v. Myers*, 33 Ill. 424. But see, contra, *Brown v. Gilman*, 13 Mass. 158, *Parker, J.*, saying (page 161): "It is not expedient to widen the field of negotiable paper. Certainly none can be considered as such but that which has acquired the quality by statute, by usage, or by the terms of the contract; and this paper, in the form in which it is now sued, has not the sanction of either of these sources of authority." So, too, *Rush v. Haggard*, 68 Tex. 674, 5 S. W. 683.

³⁷¹ *Hoyt v. Lynch*, 2 Sandf. (N. Y.) 328. But it is not sufficient to promise to pay "thirty-five dollars on a judgment in the hands of L. M. against M. S. in favor of J. C." *Mayo v. Chenoweth*, 1 Ill. 200.

³⁷² *Leonard v. Mason*, 1 Wend. (N. Y.) 522.

³⁷³ *Commonwealth Ins. Co. v. Whitney*, 1 Metc. (Mass.) 23. But an order by the payee indorsed on a note drawn on the cashier of the bank where it is payable, and naming no payee, is not a bill of exchange. *Douglass v. Wilkesson*, 6 Wend. (N. Y.) 637.

³⁷⁴ *Byles, Bills*, 83; *Chit. Bills*, 161, 179; 1 *Daniel, Neg. Inst.* 112; 1 *Pars. Notes & B.* 31; *Story, Bills*, § 55; *Pothier*, pl. 31; *Ashby v. Ashby*, 3 *Moore & P.* 186; *Chadwick v. Allen*, 2 *Strange*, 706; *Green v. Davis*, 4 *Barn. & C.* 235, 6 *Dowl. & R.* 306; *Cummings v. Gassett*, 19 *Vt.* 308. As to the opinion of *Pardessus* to the contrary, see *Story, Bills*, § 55.

order," is a note payable to A. or order, and requires indorsement for its transfer.³⁷⁵

Negotiable paper generally contains words such as "order" or "bearer," referring to holders subsequent to, and deriving their title from, the original payee. The usual phrase in the former case is, "Pay to A. B. or order." But the expression, "Pay to the order of A. B.," although seeming not to name any immediate payee, is exactly equivalent to "A. B. or order."³⁷⁶ The original payee named, A. B., can sue upon it without indorsing it,³⁷⁷ but a purchaser from him can only sue after indorsement by him.³⁷⁸

Payee Designated, not Named.

§ 152. But it is not necessary, as has been said, that the payee be named, if he is otherwise plainly ascertained and identified.³⁷⁹ This may be done sufficiently even by an "I. O. U.," and parol evidence is in such case admissible to show the person intended.³⁸⁰ So, a note may be made payable to "the manager of the National Provincial Bank,"³⁸¹ or "the treasurer of the First parish of A,"³⁸² but

³⁷⁵ *Cock v. Fellows*, 1 Johns. (N. Y.) 143.

³⁷⁶ 1 Daniel, Neg. Inst. 115; Story, Bills, § 56; Story, Prom. Notes, § 35; *Fisher v. Pomfret*, 12 Mod. 125; *Smith v. McClure*, 5 East, 476; *Roby v. Phelon*, 118 Mass. 541; *Howard v. Palmer*, 64 Me. 86; *Durgin v. Bartol*, Id. 473; *Sherman v. Goble*, 4 Conn. 246. And an averment that it was made payable "to his order" is sufficient, Id.

³⁷⁷ *Huling v. Hugg*, 1 Watts & S. (Pa.) 418.

³⁷⁸ *Durgin v. Bartol*, 64 Me. 473; *Smalley v. Wight*, 44 Me. 442. But, when indorsed and delivered, it has the same force as any other note, *Hall v. Burton*, 29 Ill. 321.

³⁷⁹ Byles, Bills, 82; 1 Pars. Notes & B. 31; Story, Bills, § 55; *Storm v. Stirling*, 3 El. & Bl. 832; *Cowie v. Stirling*, 6 El. & Bl. 333; *Bacon v. Fitch*, 1 Root (Conn.) 181; *Adams v. King*, 16 Ill. 169. So, the real payee, A., may be described by his business name, as "A. & Co." *Smith v. Hanie*, 74 Ga. 324; or by the name of a fictitious corporation, *Jones v. Home Furnishing Co.*, 9 App. Div. 103, 41 N. Y. Supp. 71; or even of an actual corporation, treated as fictitious by the real payee, *In re Pendleton Hardware & Imp. Co.*, 24 Or. 330, 33 Pac. 544.

³⁸⁰ *Kinney v. Flynn*, 2 R. I. 329. See, too, *Curtis v. Rickards*, 1 Man. & G. 46.

³⁸¹ *Robertson v. Sheward*, 1 Man. & G. 511, 1 Scott, N. R. 419.

³⁸² *Buck v. Merrick*, 8 Allen (Mass.) 123. See, too, *Alston v. Heartman*, 2 Ala. 699. So, to "A., treasurer of the B. Church, and his successors,"

not "to the secretary for the time being" of a designated company.³⁸³ Notwithstanding this, a note to A. and B., "stewardesses for the time being of the P. D. Society," naming them, will sustain an indictment for forgery, although the society was not legally enrolled, and A. and B. were not legally stewardesses.³⁸⁴ So, in a note payable to "the steamboat Juda and owners or order," the owners are sufficiently designated as payees.³⁸⁵ It is also sufficient if a note be made payable to the "heirs of A.,"³⁸⁶ although A. be then living, his heirs apparent being the persons intended in such case.³⁸⁷ So, it is sufficient, if a note be payable to "A. or heirs,"³⁸⁸ or to "the administrator of A.,"³⁸⁹ or "the guardian of A.,"³⁹⁰ or "the trustees acting under A.'s will."³⁹¹ But it is not sufficient to make a note payable

action being brought on it by A.'s administrator. *Patton v. Melville*, 21 U. C. Q. B. 263.

³⁸³ *Yates v. Nash*, 8 C. B. (N. S.) 581; *Storm v. Stirling*, 3 El. & Bl. 832, affirmed as *Cowie v. Stirling*, 6 El. & Bl. 333. Lord Campbell, C. J., said in this case: "The use of the words 'for the time being,' in the first instance, the repetition of them afterwards, and the whole form and scope of the instrument, satisfy us that the payment was to be made to the individual who at the time of the instrument falling due should fill the situation of secretary of the company, and not to the plaintiff, unless he happen to be the secretary at that time. It was, we think, clearly intended as a floating promise, the performance of which was to be made to the person being secretary when the document became due. The other construction would in effect be to hold that the words 'the secretary for the time being,' meant the *now* secretary; but we think that the words were used for the very purpose of excluding that construction. * * * The defect is that it is a promise to pay some person to be ascertained *ex post facto*."

³⁸⁴ *Rex v. Box*, 6 Taunt. 325, Le Blanc, J., saying: "Though these ladies were not at the time legally stewardesses, yet it was a description by which they were known at the time; and, though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves during their life might recover on it."

³⁸⁵ *Moore v. Anderson*, 8 Ind. 18.

³⁸⁶ *Bacon v. Fitch*, 1 Root (Conn.) 181.

³⁸⁷ *Lockwood v. Jesup*, 9 Conn. 272; *Cox v. Beltzhoover*, 11 Mo. 142.

³⁸⁸ *Knight v. Jones*, 21 Mich. 161.

³⁸⁹ *Adams v. King*, 16 Ill. 169; *Moody v. Threlkeld*, 13 Ga. 55.

³⁹⁰ *Hemphill v. Hamilton*, 11 Ark. 425; *Bingham v. Calvert*, 13 Ark. 399; *Chitwood v. Cromwell*, 12 Heisk. (Tenn.) 658. Such a note is the individual property of the guardian, and can be sued by his executor. *Id.*

³⁹¹ *Megginson v. Harper*, 4 Tyrw. 96, 2 Crompt. & M. 322.

to "A. or B., administrators of C.,"³⁹² or to "the heirs, administrators, or assigns of A., deceased,"³⁹³ or to "the estate of M. L., deceased."³⁹⁴

Payee Identical with Drawer or Drawee.

§ 153. A bill of exchange may be made payable to the order of the person on whom it is drawn, although this is unusual.³⁹⁵ So, a negotiable promissory note may be payable to the maker's own order.³⁹⁶ And when made so payable and indorsed in blank by the maker, it is equivalent to a note payable to bearer.³⁹⁷ And the

³⁹² *Musselman v. Oakes*, 19 Ill. 81.

³⁹³ *Bennington v. Dinsmore*, 2 Gill (Md.) 348.

³⁹⁴ *Lyon v. Marshall*, 11 Barb. (N. Y.) 241; *Tittle v. Thomas*, 30 Miss. 122. But it is equivalent to a note payable to a fictitious payee. *Lewisohn v. Kent & Stanley Co.*, 87 Hun, 257, 33 N. Y. Supp. 826. And it may be regarded as a mere statement of account. *Bowles v. Lambert*, 54 Ill. 237. But such an instrument is a written contract and evidence of debt between the maker and the executor of the estate. *Hendricks v. Thornton*, 45 Ala. 309. And see *Peltier v. Babillion*, 45 Mich. 384, where such instrument was held to be a valid note payable to the legal representative. So, *Shaw v. Smith*, 150 Mass. 166, 22 N. E. 887.

³⁹⁵ *Chit. Bills*, 33; *Holdsworth v. Hunter*, 10 Barn. & C. 449; *Wildes v. Savage*, 1 Story, 29, Fed. Cas. No. 17,653. And a bill may be payable "to the order of the acceptor." *Witte v. Williams*, 8 S. C. 290. But it has been held that an order on A. B. to pay to his own order, accepted, but not indorsed, by him, lays the acceptor under no obligation to a third party, and is not a bill of exchange, for forging or uttering which an indictment will lie. *Regina v. Bartlett*, 2 Moody & R. 362. See, too, *Story, Bills*, § 35, and comments on it in *Wildes v. Savage*, supra.

³⁹⁶ *Miller v. Weeks*, 22 Pa. St. 89. And, if a joint note is made payable to the "order of myself," it may be shown by parol which maker is intended as payee. *Jenkins v. Bass*, 88 Ky. 397, 11 S. W. 293. So, a note reading, "I promise to pay to the order of myself," signed by A. and B., and placed in B.'s hands to be negotiated for his sole benefit, is virtually a joint and several note payable "to the order of ourselves or either of us," and binds A., although negotiated by the indorsement of B. only. *First Nat. Bank v. Fowler*, 36 Ohio St. 524.

³⁹⁷ *Masters v. Baretto*, 8 C. B. 433; *Wilder v. De Wolf*, 24 Ill. 190; *Roberts v. Lane*, 64 Me. 108; *Bishop v. Rowe*, 71 Me. 263; *Bank of Winona v. Wofford*, 71 Miss. 711, 14 So. 262; *Norfolk Nat. Bank v. Griffin*, 107 N. C. 173, 11 S. E. 1049 (payable to maker). So, in effect, a bill payable to "—— order." *Chamberlain v. Young* [1893] 2 Q. B. 206. See, too, *Gay v. Lander*, 17 Law J. C. P. 286; *Brown v. De Winton*, 6 C. B. 336. And, when such note in-

maker then becomes liable both as maker and as indorser.³⁹⁸ Such a note is, however, incomplete and of no binding force, until it has been indorsed by the maker.³⁹⁹ In like manner, a note payable "to our and each of our order," when indorsed, falls within the statute of Anne.⁴⁰⁰ In New York, however, by force of the Revised Statutes, where a note payable to the maker's order was transferred by him for value without indorsement, he was liable on it to a bona fide holder as on a note payable to bearer;⁴⁰¹ while, in Kentucky, a note

dorsed in blank by the maker comes into the hands of a bona fide holder for value before maturity, it will not be subject to defense by reason of equities between the original parties. *Roberts v. Lane*, supra. But it has been held that a note payable to the maker or bearer can only be sued in equity. *Keith v. Keith's Ex'rs*, 11 Rich. Eq. (S. C.) 83; *Glenn v. Caldwell*, 4 Rich. Eq. (S. C.) 168. And a note to the maker's order is not a note payable to bearer in the sense of the Illinois statute making the indorser of a note to bearer liable as a guarantor. *Chicago Trust & Savings Bank v. Nordgren*, 157 Ill. 663, 24 N. E. 148.

³⁹⁸ *Hall v. Burton*, 29 Ill. 321. But see *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 45 N. E. 1094.

³⁹⁹ *Brown v. De Winton*, 6 C. B. 336; *Wood v. Mytton*, 10 Q. B. 805, overruling *Flight v. Maclean*, 16 Mees. & W. 51, so far as it conflicts; *Moses v. Bank*, 149 U. S. 298, 13 Sup. Ct. 900; *Roby v. Phelon*, 118 Mass. 541; *Little v. Rogers*, 1 Metc. (Mass.) 108; *Kayser v. Hall*, 85 Ill. 513; *Pickering v. Cording*, 92 Ind. 306; *Succession of Rabasse*, 49 La. Ann. 1405, 22 So. 767; *Scull v. Edwards*, 13 Ark. 24, the first indorsee being in such case in reality the payee. But where a note was made payable to the order of the maker and B., and issued with B.'s indorsement only, the maker was held to be estopped from denying B.'s authority. *Main v. Hilton*, 54 Cal. 110.

⁴⁰⁰ *Absolon v. Marks*, 11 Q. B. 19, 11 Jur. 1016, 17 Law J. Q. B. 7.

⁴⁰¹ *Central Bank of Brooklyn v. Lang*, 1 Bosw. 202; *Plets v. Johnson*, 3 Hill, 115. The CALIFORNIA Code provides that notes made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, as if payable to bearer (Civ. Code, §§ 8101, 8102); NORTH DAKOTA (Rev. Code, §§ 4864, 4865); IDAHO (Rev. St. § 3466); MICHIGAN (How. Ann. St. § 1580); MINNESOTA (Gen. St. § 2236); MISSOURI (Rev. St. § 735); NEVADA (Gen. St. § 4885); OREGON (Ann. Laws, §§ 3188, 3191); WISCONSIN (Sanb. & B. Ann. St. § 1679); and WYOMING (Laws 1888, c. 70, art. 2, §§ 13, 14). And the accommodation indorser of such a note, with knowledge of the facts, is liable as on a note payable to bearer. *Irving Nat. Bank v. Alley*, 79 N. Y. 536, Earl, J., saying that the facts of which the defendant must have knowledge are "simply that the note is payable to the order of the maker or of a fictitious person."

to the maker's order indorsed in blank by him is not negotiable.⁴⁰²

It frequently occurs that a note or bill is drawn by, or payable to, several persons. In such case, if the same person be both maker and payee, he cannot sue on the note, but it remains good as a note to his co-payees, e. g. C. could sue on a note made by A. and B. to B. and C.⁴⁰³ So, if A., B., and C. make a joint and several note to B. and C., the payees can sue A. on his several obligation.⁴⁰⁴ But, if the note be a joint one by a firm to one of its partners, no suit can be brought on it by him. An assignee or indorsee can sue on it, however.⁴⁰⁵ In like manner, a joint partnership note by one firm to another firm, having one partner in common, cannot be sued by the payees, but their assignee or indorsee can sue.⁴⁰⁶

⁴⁰² *Muhling v. Sattler*, 3 Metc. (Ky.) 285. This was changed by statute in 1866, so that the blank indorsement may now be filled and sued upon as a fresh promise, *Pace v. Welmending*, 12 Bush, 141; or the holder may sue without filling the blank indorsement, *Id.* "Whenever a promissory note is made by the obligor payable to himself or to his order, and is signed on the back thereof by the said obligor, and then delivered, such signature and delivery shall operate as a promise to pay the face of the note at maturity to the party to whom the same shall have been delivered, and such party may fill up the blank with words of promise, and recover thereon in the same manner as if such party had been named as payee in the note, and such note shall be assignable as are other promissory notes." St. § 480.

⁴⁰³ *Quisenberry v. Artis*, 1 Duv. (Ky.) 30. But a note by A. and B. to B. cannot be sued either by B. or by his personal representatives, *Glenn v. Sims*, 1 Rich. (S. C.) 34; although it may be sued by B.'s indorsee, *Woods v. Ridley*, 11 Humph. (Tenn.) 194; *Muldrow v. Caldwell*, 7 Mo. 563; *Smith v. Gregory*, 75 Mo. 121.

⁴⁰⁴ *Beecham v. Smith, El., Bl. & El.* 442. If, however, a note be made by A. and B., payable to "A. or bearer," it has been held in South Carolina that a subsequent holder or "bearer" may sue both makers, *Devore v. Mundy*, 4 Strob. (S. C.) 15.

⁴⁰⁵ *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; *Davis v. Briggs*, 39 Me. 304; *Hapgood v. Watson*, 65 Me. 510; *Woodman v. Boothby*, 66 Me. 389; *Young v. Chew*, 9 Mo. App. 387; *Knaus v. Givens*, 110 Mo. 58, 19 S. W. 535; *Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276; *Wintemute v. Torrent*, 83 Mich. 555, 47 N. W. 358; *Walker v. Wait*, 50 Vt. 668; *Ormsbee v. Kidder*, 48 Vt. 361; *Norton v. Downer*, 15 Vt. 569;

⁴⁰⁶ *Murdock v. Caruthers*, 21 Ala. 785. And the fact of there being such common partner is not such notice of a fraud on either firm as to affect the bona fide character of an indorsee to whom such fact was known. *Stimson v. Whitney*, 130 Mass. 591.

§ 154. — The identity of the maker and payee may, indeed, be more apparent than real; as where a payee, intending to indorse the note for the purpose of transfer and guaranty, inadvertently signs his name on the face of the note, under the maker's signature. Such inadvertence will not render the note void, as if payable to the maker.⁴⁰⁷ The payee may, moreover, be a different person of the same name as the maker, and this has even been held to be the case *prima facie*, where the name is the same.⁴⁰⁸ As to such notes payable to the order of the maker, it has been held, also, that this fact constitutes no ground of suspicion which can cast a shadow on the bona fide character of the holder's title.⁴⁰⁹ And the indorsement of the maker's name on such a note constitutes a forgery, as completely as the signature on the face might do.⁴¹⁰

In the same manner a bill of exchange may be made payable to the order of the drawer, and the principles herein stated as to notes payable to the maker's order apply in general to such bills.⁴¹¹ A bill drawn in this way may be treated, at the option of the holder, as a promissory note⁴¹² or an accepted bill.⁴¹³ Of the same character

Heywood v. Wingate, 14 N. H. 73; *Tucker v. Bradley*, 33 Vt. 324. So, too, one partner cannot sue his firm on a joint partnership acceptance of a bill of exchange held by him. *Neale v. Turton*, 4 Bing. 149. And to the effect that, on a nonnegotiable note made by a firm to one of its partners, the makers cannot be sued by the indorsee, see *Hill v. McPherson*, 15 Mo. 204.

⁴⁰⁷ *Cason v. Wallace*, 4 Bush (Ky.) 388.

⁴⁰⁸ *Cooper v. Poston*, 1 Duv. (Ky.) 92.

⁴⁰⁹ *Roberts v. Lane*, 64 Me. 108.

⁴¹⁰ *Com. v. Dallinger*, 118 Mass. 439.

⁴¹¹ *Byles, Bills*, 90; *Chit. Bills*, 32, 182; *Story, Bills*, § 35; *Butler v. Crips*, 1 Salk. 130; *Randolph v. Parish*, 9 Port. (Ala.) 76; *Rice v. Hogan*, 8 Dana (Ky.) 133; *Hasey v. Sugar Co.*, 1 Doug. (Mich.) 193; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15. So, an instrument in the form of a bill payable to drawer's order, and indorsed in blank by him, and not accepted, or accepted merely by the drawee's name written across the face of the bill, may be declared on as a promissory note of the drawer indorsed by the drawee. *Armfield v. Allport*, 27 Law J. Exch. 42.

⁴¹² *Byles, Bills*, 90; *Chit. Bills*, 33; *Story, Bills*, §§ 35, 58; *Roach v. Ostler*, 1 Man. & R. 120; *Dickinson v. Valpy*, 10 Barn. & C. 128, 5 Man. & R. 126; *Butler v. Crips*, 1 Salk. 130; *Block v. Bell*, 1 Moody & R. 149; *Starke v. Cheesman*, Carth. 509; *Dehers v. Harriot*, 1 Show. 163; *Robinson v. Bland*, 2 Burrows, 1077; *Davis v. Clarke*, 6 Q. B. 16; *Randolph v. Parish*, 9 Port.

⁴¹³ *Cunningham v. Wardwell*, 12 Me. 466.

are bills drawn by an agent or officer of a corporation on another officer, or on the corporation itself.⁴¹⁴ But a bill drawn payable to the drawer's own order does not depend on the indorsement for its existence, but, if accepted and not indorsed, it is a bill payable to the drawer,⁴¹⁵ on which he may hold the acceptor, giving him notice that he holds the bill as payee.⁴¹⁶

Payees—Joint—Alternative.

§ 155. A note or bill may be payable to several persons jointly, using either their individual names or a firm name. In the former case such note can only be transferred by indorsement of all the payees.⁴¹⁷ And neither payee can, of course, indorse the names of the others without special authority.⁴¹⁸ The authority of an individual partner to indorse commercial paper payable to his firm forms an exception to the ordinary rule. But if the firm transacts business in the individual name of one partner, and a note is made payable to such name, it will be *prima facie* the individual property of that partner.⁴¹⁹ When a note is made payable half to one person and

(Ala.) 76; *Planters' Bank of Tennessee v. Evans*, 36 Tex. 592; *Wardens & Vestrymen of St. James Church v. Moore*, 1 Ind. 289.

⁴¹⁴ *Fairchild v. Railroad Co.*, 15 N. Y. 337; *Hasey v. Sugar Co.*, 1 Doug. (Mich.) 193; *Dennis v. Water Co.*, 10 Cal. 369; *Marion & M. R. Co. v. Dillon*, 7 Ind. 404; *Marion & M. R. Co. v. Hodge*, 9 Ind. 163; *Hazard v. Cole*, 1 Idaho, 276; *Taylor v. Newman*, 77 Mo. 257. But see *Wetumpka, & C. R. Co. v. Bingham*, 5 Ala. 657, where such instrument, it was held, should be declared on as a bill of exchange with usual averments of presentment for payment and dishonor.

⁴¹⁵ *Chit. Bills*, 182; *Smith v. McClure*, 5 East, 476; *Huling v. Hugg*, 1 Watts & S. (Pa.) 418.

⁴¹⁶ *Rice v. Hogan*, 8 Dana (Ky.) 133.

⁴¹⁷ *Wood v. Wood*, 16 N. J. Law, 428. So, too, *Ryhiner v. Feickert*, 92 Ill. 305, although payment at maturity to either would have been sufficient. The survivor may, however, transfer or bring suit on it. *Allen v. Tate*, 58 Miss. 585; *Draper v. Jackson*, 16 Mass. 480. A note payable to the order of "A. B. et al." is indefinite and nonnegotiable. *Gordon v. Anderson*, 83 Iowa, 224, 49 N. W. 86. But where the payees were man and wife, and the husband, dying first, made provisions for the wife in lieu of the note, and such provision was recognized and accepted by her, the note was held to belong to the estate of the deceased husband. *Sanford v. Sanford*, 45 N. Y. 723.

⁴¹⁸ *Wood v. Wood*, 16 N. J. Law, 428.

⁴¹⁹ *Boyle v. Skinner*, 19 Mo. 82. But, if a note payable to A. belongs really

half to another, it is still a joint note, on which they may have a joint action.⁴²⁰

On the other hand, commercial paper cannot be payable in the alternative to one or more of several payees. Thus, it is not sufficient for a note to be made payable to A. or B.,⁴²¹ or to "A. or B., administrators of C."⁴²² In a recent case, however, in North Carolina, a note payable to "Squire P. or Thomas Parkin" was construed to be payable to both, "or" being construed as "and."⁴²³ So, a note to "A. B. or heirs," has been held sufficient.⁴²⁴ Likewise, a note to "A. B. or C. B., his wife," they being, in contemplation of law, one person, and the note being equivalent to one made to the husband alone.⁴²⁵ And a note may be made to the "trustees of the Methodist Church or their collector," it being the intention to designate by this means an agent of the payee to whom the payment may be made.⁴²⁶ So, too, a note may be made to A., B., and C., "or their

to A. and B. jointly, B.'s interest will be protected in equity against A.'s creditors. *Cooper v. Perdue*, 114 Ind. 207, 16 N. E. 140.

⁴²⁰ *Flint v. Flint*, 6 Allen (Mass.) 34.

⁴²¹ *Byles*, Bills, 90; *Chit. Bills*, 179; 1 *Edw. Bills*, § 135; 1 *Pars. Notes & B.* 33; *Story*, Bills, § 55; *Blanckenhagen v. Blundell*, 2 *Barn. & Ald.* 417; *Osgood v. Pearson*, 4 *Gray* (Mass.) 455; *Carpenter v. Farnsworth*, 106 *Mass.* 561; *Reed v. Reed*, 11 *U. C. Q. B.* 26; *Walrad v. Petrie*, 4 *Wend. (N. Y.)* 575. But such note is sufficient evidence of a joint contract to support an action by both. *Westgate v. Healy*, 4 *R. I.* 523. And see *Spaulding v. Evans*, 2 *McLean*, 139, *Fed. Cas. No. 13,216*, where a note made in Illinois to A., B., or C. was held to be actionable by either of them; while in *Willoughby v. Willoughby*, 5 *N. H.* 244, such note was held to be joint and only actionable in a joint suit by A. and B. And such a note to "A or his wife" may be sued, at common law, by A. or by his executor. *Moodie v. Rowatt*, 14 *U. C. Q. B.* 273.

⁴²² *Musselman v. Oakes*, 19 *Ill.* 81.

⁴²³ *Parker v. Carson*, 64 *N. C.* 563.

⁴²⁴ *Knight v. Jones*, 21 *Mich.* 161.

⁴²⁵ *Young v. Ward*, 21 *Ill.* 223. After the husband's death, such a note may be transferred by the wife alone. *Prindle v. Caruthers*, 15 *N. Y.* 425. And, where such a note was indorsed after the husband's death with the name of the maker and the date of indorsement, it was held that no new promise was intended, but that the memorandum took the subsisting note out of the statute of limitations. *Bourdin v. Greenwood*, L. R. 13 *Eq.* 281.

⁴²⁶ *Noxon v. Smith*, 9 *Cent. Law J.* 436, 127 *Mass.* 485. In the language of *Cockburn, C. J.*, in *Holmes v. Jaques*, L. R. 1 *Q. B.* 376, in deciding to same effect upon a note payable "to the trustees of the Wesleyan Chapel or their treasurer for the time being": "All this instrument shows is that it is pay-

order, or the major part of them," and will support a joint action by all.⁴²⁷

Even where a note to "A. or B." is not properly a promissory note, an action will lie for the value paid for it and shown by it.⁴²⁸ It has been held that in such case A. and B. are joint owners, and must join in a transfer of it;⁴²⁹ although other cases hold that either may sue upon such an instrument.⁴³⁰ And, where a note was made to A., B., C., or D., it was held to be several as to all, and not joint as to A., B., and C., and A., B., and C. were not allowed to recover in a joint action by them, although it was said that they might have sued separately.⁴³¹ Moreover, a note may be payable to one of two payees in an alternative expressed by a condition, although in such case the condition destroys the negotiability of the note. If a note is made payable in this manner to A., "if she called for it before she died," and, if not, to B., it is payable after A.'s death to B., and not to the representatives of A.⁴³²

able in the first instance to the trustees, as payees, but with the option of the maker to pay to the treasurer for the time being as their agent. The treasurer would have no authority to sue in his own name, but only to receive the money on behalf of the trustees. I think it would be to introduce unnecessary strictness if we were to say that this was not a valid promissory note; and by holding that the treasurer for the time being is simply inserted as an indication that he, as the agent of the trustees, is authorized to receive payment on their behalf, no uncertainty is introduced into the instrument." So, too, *Gaytes v. Hibbard*, 5 Biss. 100, Fed. Cas. No. 5,287.

⁴²⁷ *Watson v. Evans*, 32 Law J. Exch. 137, 1 Hurl. & C. 662.

⁴²⁸ *Walrad v. Petrie*, 4 Wend. (N. Y.) 575.

⁴²⁹ *Quinby v. Merritt*, 11 Humph. (Tenn.) 440, disapproving *Ellis v. McLemore*, 1 Bailey (S. C.) 13. But it has been held in Texas that a written contract to pay to either of two persons may be assigned by or paid to either of them. *Record v. Chisum*, 25 Tex. 348.

⁴³⁰ *Ellis v. McLemore*, 1 Bailey (S. C.) 13; *Spaulding v. Evans*, 2 McLean, 139, Fed. Cas. No. 13,216.

⁴³¹ *Samuels v. Evans*, 1 McLean, 475, Fed. Cas. No. 12,289. But where a note was made to "A., B., and C., or the major part of them," all three can bring a joint action on it. *Watson v. Evans*, 32 Law J. Exch. 137, 1 Hurl. & C. 662.

⁴³² *Blanchard v. Sheldon*, 43 Vt. 512.

Payee's Name—Agent, etc.—Personal Description.

§ 156. The general rule that only those parties shall be holden on a bill or note who are plainly designated by name or description in the instrument is in its principle applicable to the payee's name also, in determining questions of ownership and right to sue. That is to say, in general, only the payee or indorsee designated in the instrument can sue upon it, and not any third party, although it may have been given for his benefit. Thus, an agent purchasing a bill of exchange for his principal, but making it payable to, and indorsing it with, his individual name only, is, as we have seen, personally responsible.⁴³³ But where a note for goods sold by an agent is made payable to him individually, the principal is at least so far identified with him as to preclude him from claiming to hold as a bona fide purchaser for value clear of equities existing between the original parties.⁴³⁴ Prima facie a note or bill is the property only of the payee designated in it, and only he can sue as such payee. This is true even of a note made to a married woman for a loan of money by her husband.⁴³⁵ It has, however, been held that a note, made payable to A., and sued upon by B. without indorsement, might be shown by parol evidence to have been made to A. as B.'s representative.⁴³⁶ And where a note was made by A. to C. for B.'s debt to C., and not accepted or credited by C., it was held that B. was prima facie C.'s agent in the matter, and might sue on the note in C.'s name.⁴³⁷

If a note is made to "A. B., agent," it has been held that his principal may sue on it in his own name.⁴³⁸ But the suffix may be

⁴³³ *Austin v. Roberts*, 2 Miles (Pa.) 254.

⁴³⁴ *Neil v. Cummings*, 75 Ill. 170.

⁴³⁵ *Tooke v. Newman*, 75 Ill. 215.

⁴³⁶ *Jacobs v. Benson*, 39 Me. 132. And, in case of a factor's bankruptcy, a note for money due the principal taken in the factor's name belongs to the principal, and not to the creditors of the factor. *Messier v. Amery*, 1 Yeates (Pa.) 533.

⁴³⁷ *Overman v. Grier*, 70 N. C. 693.

⁴³⁸ *National Life Ins. Co. v. Allen*, 116 Mass. 398. So, in general, of an undisclosed principal. *Taunton & S. B. Turnpike Corp. v. Whiting*, 10 Mass. 327. So, a note payable to "C. B. M., Agent," may be transferred by the principal's indorsement, "Granite Agricultural Works, C. B. M., Agent." *Farm-*

treated as a mere description, and the note sued on by the agent as his individual property.⁴³⁹ So, too, a draft to "A. B., treasurer," will be treated as payable to A. B., and not to the treasurer for the time being.⁴⁴⁰ So, a note to "A. B., president," for a firm doing business as the People's Bank, may be sued on by A. B., without joining his partners.⁴⁴¹ And, even where the principal is named in designating the agent named as payee, the agent may sue in his own name, e. g. a note payable to "A. B., agent of the P. H. Co.";⁴⁴² or to "A. B., treasurer of the R. & A. R. R.";⁴⁴³ or to "A. B., superintendent of the Decatur Agricultural Works";⁴⁴⁴ or to "A. B., lawful attorney for C. D." ⁴⁴⁵ This has been held also in the case of a note to "A. B., agent of the proprietors of the town of C.," although they appear to have been clothed with a quasi public character.⁴⁴⁶ And where a note was made payable to "A. B., permanent secretary of the Adelphi Lodge," it was held that he might bring suit in his own name, by authority of the members of the lodge, after he had ceased to be secretary.⁴⁴⁷

"Agent," "Cashier," etc.—Principal Intended.

§ 157. We have seen that a note payable to "A. B., agent," may be treated and sued upon as the property of the principal. And this

ington Sav. Bank v. Fall, 71 Me. 49. And a note payable to "A. B., Agent, His Assignees or Order," cannot be sued by his assignees in their own name, in North Carolina. Grist v. Backhouse, 4 Dev. & B. 362.

⁴³⁹ Toledo Agricultural Works v. Heisser, 51 Mo. 128. So, too, in a replevin suit for a bond made payable to A. as agent for B. Douglass v. Wolf, 6 Kan. 88.

⁴⁴⁰ Shaw v. Stone, 1 Cush. (Mass.) 228. But a note made to and indorsed by "R. B., Treasurer," was held, in New York, to be payable to the corporation, and transferred by it. Babcock v. Beman, 11 N. Y. 200. See, too, McBroom v. Lebanon, 31 Ind. 268.

⁴⁴¹ Wolcott v. Standley, 62 Ind. 198; Lester v. McIntosh (Ga.) 29 S. E. 7. See, too, Van Ness v. Forrest, 8 Cranch, 30; and, as to personal liability as indorser, Hatley v. Pike, 162 Ill. 241, 44 N. E. 441.

⁴⁴² Buffum v. Chadwick, 8 Mass. 103.

⁴⁴³ Chadsey v. McCreery, 27 Ill. 253.

⁴⁴⁴ Durfee v. Morris, 49 Mo. 55.

⁴⁴⁵ Austell v. Rice, 5 Ga. 472.

⁴⁴⁶ Bryant v. Durkee, 9 Mo. 168. As to notes to public officers, see *infra*.

⁴⁴⁷ Whitcomb v. Smart, 38 Me. 264.

is true a fortiori of a note payable to "A. B., agent of C. D." ⁴⁴⁸ So, too, of a note made payable to "A. B., agent of the E. Ins. Co.," in consideration of a policy of insurance issued by the company. ⁴⁴⁹ So, of a note to "A. B., president of the E. R. R.," ⁴⁵⁰ or "G. W., treasurer of the I. M. Co." ⁴⁵¹

And where a note is made to an officer so designated, "or his successors in office," it is still more plainly the property of the corporation, ⁴⁵² especially in the case of a public municipal corporation. ⁴⁵³ And it seems that such municipality may sue on the note in the name of the payee's official successor. ⁴⁵⁴ Where, however, a promissory note was made to "A., B., and C., trustees of the Apalachicola Land Company (a voluntary association), or their successors in office or order," it was held that these words might be treated as mere description, and suit brought on the note by the survivors, A. and B., although their term of office had expired and their successors had been appointed. ⁴⁵⁵

⁴⁴⁸ *Bean v. Dolliff*, 67 Me. 228. But if made "to A. B., for the use of C. D.," the latter has only an equitable interest, and can neither transfer the instrument nor sue upon it at common law in his own name. *Evans v. Cramlington*, Carth. 5, *Cramlington v. Evans*, 2 Vent. 307; or to "A. B., Agent for C. D.," *Clark v. Reed*, 12 Smedes & M. (Miss.) 554.

⁴⁴⁹ *Black v. Insurance Co.*, 33 Ind. 223.

⁴⁵⁰ *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561. So, too, though his official character as president be only designated by initial letters. *Dupont v. Ferry Co.*, 9 Rich. Law (S. C.) 255; or as "A. B., President," *Mann v. Second Nat. Bank*, 34 Kan. 746, 10 Pac. 150. But see *Hately v. Pike*, 162 Ill. 241, 44 N. E. 441. And parol evidence is admissible to show that the corporation was intended. *Lovejoy v. Bank*, 23 Kan. 331.

⁴⁵¹ *Trustees of Ministerial & School Fund in Levant v. Parks*, 10 Me. 441; *Vater v. Lewis*, 36 Ind. 288; *McBroom v. Lebanon*, 31 Ind. 268; *Rutland & B. R. Co. v. Cole*, 24 Vt. 33. But see, contra, as to a note made payable to "A. B., Supt. of the D. A. Works," *Durfee v. Morris*, 49 Mo. 55.

⁴⁵² *Trustees of Ministerial & School Fund in Levant v. Park*, supra; *Tainter v. Winter*, 53 Me. 348. And suit may be brought by the successor in office. *Packard v. Nye*, 2 Metc. (Mass.) 47; *Fisher v. Ellis*, 3 Pick. (Mass.) 321.

⁴⁵³ *Town of Arlington v. Hinds*, 1 D. Chip. (Vt.) 431; *Inhabitants of Garland v. Reynolds*, 20 Me. 45.

⁴⁵⁴ *Fisher v. Ellis*, 3 Pick. (Mass.) 322. But it has been held that such successor cannot bring suit on it in his own name. *Upton v. Starr*, 3 Ind. 508.

⁴⁵⁵ *Davis v. Garr*, 6 N. Y. 124. But in *Sayers v. Bank*, 89 Ind. 230, it was held that the title was vested in the corporation, and an indorsement, "Trustees of Indiana University, by A. B., Treasurer," passed the title prima facie.

If the payee be designated by his official title only, and not named, the corporation represented is with equal reason the owner of the note, and may bring suit upon it. This has been held in case of a note payable to "the commissioners of the V. C. R. R.,"⁴⁵⁶ and of a note payable to "the treasurer of the M. L. Inst.,"⁴⁵⁷ and of a note to "the Branch of the Bank of the State of Arkansas."⁴⁵⁸

The office of *cashier* and the cashier's official name have, by constant usage of the banks in the making and transfer of commercial paper, become synonymous with the bank itself. Such paper, payable to the cashier of a designated bank or his order, may be held and sued by the bank without indorsement.⁴⁵⁹ And it is not necessary that the bank be named in the instrument, but like effect will be given to a bill or note payable to "A. B., Cashier,"⁴⁶⁰ or to "A. B., Cas.," parol evidence being admitted to show "cashier" intended.⁴⁶¹ In all such cases parol evidence is admissible, if necessary, to show the bank intended as payee.⁴⁶²

⁴⁵⁶ Vermont Cent. R. Co. v. Claves, 21 Vt. 30.

⁴⁵⁷ Alston v. Heartman, 2 Ala. 699; Nichols v. Frothingham, 45 Me. 220; Vater v. Lewis, 36 Ind. 288. These cases go further, and hold that the suit *must* be brought by the corporation.

⁴⁵⁸ State Bank v. Jenkins, 7 Ark. 389; Bower v. State Bank, 5 Ark. 234.

⁴⁵⁹ Commercial Bank v. French, 21 Pick. (Mass.) 486; Nave v. Bank, 87 Ind. 204; Lookout Bank v. Aull, 93 Tenn. 645. And the cashier may bring an action in his own name on such paper, Porter v. Nekervis, 4 Rand. (Va.) 359; or he may sue for the use of the bank, Davis v. Baker, 71 Ga. 33; or the suit may be in the name of his successor, Dutch v. Boyd, 81 Ind. 146.

⁴⁶⁰ Commercial Bank v. French, 21 Pick. (Mass.) 486; Stamford Bank v. Ferris, 17 Conn. 259; Haynes v. Beckman, 6 La. Ann. 224; First Nat. Bank v. Hall, 44 N. Y. 395; Lacey v. Bank, 4 Neb. 179; Bank of State of New York v. Muskingum Branch Bank, 29 N. Y. 619; Bank of Manchester v. Slason, 13 Vt. 334; Rutland & B. R. Co. v. Cole, 24 Vt. 33; Nave v. Hadley, 74 Ind. 155; Wright v. Boyd, 3 Barb. (N. Y.) 523; Pratt v. Bank, 12 Kan. 570. But see, contra, Bank of U. S. v. Lyman, 20 Vt. 666. And suit may be brought by the cashier in his individual name. Fairfield v. Adams, 16 Pick. (Mass.) 381; McHenry v. Ridgely, 3 Ill. 309; Barney v. Newcomb, 9 Cush. (Mass.) 46; Garton v. Bank, 34 Mich. 279; Johnson v. Catlin, 27 Vt. 87. So held, also, as to a bond. Horah v. Long, 20 N. C. 274.

⁴⁶¹ Bank of Genesee v. Bank, 19 N. Y. 312; Bank of State of New York v. Muskingum Branch Bank, 29 N. Y. 619; Farmers' & Mechanics' Bank v. Day, 13 Vt. 36.

⁴⁶² Baldwin v. Newbury, 1 How. 234; Bank of State of New York v. Muskingum Branch Bank, 29 N. Y. 619. So, to relieve the agent (payee) from

Payee's Name—Executor—Public Officer—Trustee.

§ 158. In like manner, the addition to the payee's name of such words as "executor," "administrator," "executor of A. B.," etc., constitutes mere description, and such a bill or note will, in general, be treated as the individual property of the payee, and may be sued by him as such.⁴⁶³ But where the payee's letters testamentary have been revoked, and the will under which he acted set aside, it seems that he can no longer sue on such a note, but that the action must be brought by the administrator de bonis non.⁴⁶⁴

A distinction is made, however, between private agents and public officers, which is also the case, as we have seen, where they are makers or indorsers. Thus, a tax collector cannot sue in his individual name on a note given to him as collector for taxes.⁴⁶⁵ If, however,

individual liability on his indorsement to the corporation. *Heckscher v. Binney*, 3 Woodb. & M. 333, Fed. Cas. No. 6316.

⁴⁶³ *Thomas v. Relfe*, 9 Mo. 377; *Moss v. Witcher*, 35 Tex. 388; *Carter v. Saunders*, 2 How. (Miss.) 851; *Cravens v. Logan*, 7 Ark. 103; *Speelman v. Culbertson*, 15 Ind. 441; *Saffold v. Banks*, 69 Ga. 289. So, a note to the order of "A. B., Trustee," may be sued by A. B. in his own name, *Rice v. Rice*, 106 Ala. 636, 17 South. 628; or a note to the order of A. B., as guardian, may be transferred by his indorsement, and the indorsee may sue upon it in his own name, *Dorr v. Davis*, 76 Me. 301; *Zellner v. Cleveland*, 69 Ga. 631, and suit on such a note survives to the payee's own personal representative, whether the note was made to him as administrator, *Saffold v. Banks*, supra; or as guardian, *Zellner v. Cleveland*, 69 Ga. 631. But see, conversely, as to a note to him individually for a debt due the estate, *Krutz v. Stewart*, 76 Ind. 9. If a note is made to a guardian by his individual name for a consideration moving from the estate, however, he may sue on it in his own name. *McLean v. Dean*, 66 Minn. 369, 69 N. W. 140.

⁴⁶⁴ *Leach v. Lewis*, 38 Ind. 160.

⁴⁶⁵ *Dickson v. Gamble*, 16 Fla. 687. So, a note made payable to an Indian agent of the United States government in an official transaction, *Balcombe v. Northup*, 9 Minn. 172 (Gil. 159); or to a land agent of the state, *Irish v. Webster*, 5 Me. 171; *State v. Boies*, 11 Me. 474. But not so in the case of a note payable to "A. B., agent of the proprietors of the town of C." *Bryant v. Durkee*, 9 Mo. 169. In like manner suit may be maintained by the United States government on a bill of exchange payable to the treasurer of the United States by name and official designation, *Dugan v. U. S.*, 3 Wheat. 172; *Crowell v. Osborne*, 43 N. J. Law, 335; or by a state on a note taken by its agent in his own name, *State of Wisconsin v. Torinus*, 26 Minn. 1, 49 N. W. 259.

he had paid the taxes of the maker, and the note was given on account of such payment, the note would be no bar to a suit upon the original consideration, although the note had been made originally to A. B., and altered and made void by addition of "collector" to his name.⁴⁶⁶ On the other hand, it seems that a bill of exchange, payable to "the treasurer general of the royal treasury of Portugal," and delivered to A. B. as such, might be indorsed and transferred by A. B. after leaving office. And where a bill made payable in this way was indorsed by A. B., still being treasurer general, after the government which he first served had been changed by revolution, the title of such later government and of the indorsee could not be questioned.⁴⁶⁷

As we have seen, an official assignee is a quasi public officer, and a note made to "A. B., assignee," and so indorsed by him, will not render him personally liable as indorser.⁴⁶⁸

It remains only for us to consider in this place the effect of an official title in the payee as notice to subsequent holders of a trust lodged in the payee. A bill or note made payable in this way is generally held to carry on its face a notice to all takers of the fiduciary character of the holder. This has been held in the case of a note payable to, and indorsed by, "A. B., Sheriff."⁴⁶⁹ In like manner, a note payable to, and indorsed by, "A. B., Trustee," is not negotiable, and its transfer is subject to equitable defenses between the original parties.⁴⁷⁰ It has been held, however, in Minnesota, that a note payable to, and indorsed by, "A. B., Trustee of C. D.," does not carry to an innocent purchaser any notice of a restriction upon the payee's right to transfer it.⁴⁷¹

⁴⁶⁶ York v. Janes, 43 N. J. Law, 332.

⁴⁶⁷ Soares v. Glyn, 8 Q. B. 24.

⁴⁶⁸ Bowne v. Douglass, 38 Barb. (N. Y.) 312.

⁴⁶⁹ Renshaw v. Wills, 38 Mo. 201. But see, contra, Fletcher v. Schaumburg, 41 Mo. 501.

⁴⁷⁰ Third Nat. Bank of Baltimore v. Lange, 51 Md. 138. In like manner, a certificate of stock standing in the name of "A. B., trustee," puts a pledgee on inquiry as to the character of the trust, and the transfer is at his risk. Shaw v. Spencer, 100 Mass. 382. See, too, Sturtevant v. Jaques, 14 Allen (Mass.) 523; Bancroft v. Consen, 13 Allen (Mass.) 50; Duckett v. Bank (Md.) 38 Atl. 983. But see, contra, Bush v. Peckard, 3 Har. (Del.) 385; Fox v. Trust Co. (Tenn. Ch. App.) 37 S. W. 1102.

⁴⁷¹ Downer v. Read, 17 Minn. 493 (Gil. 470).

Payee's Name—"A. B. or Bearer"—Presumption as to Value.

§ 159. A bill of exchange, note, or check may be, and frequently is, made payable to "bearer." This term, unless restricted by statute, indicates the holder, whoever he may be. The distinction, however, between the original payee and subsequent holders remains unchanged as regards the admissibility of equitable defenses, the original bearer being subject to all defenses which would have affected him if he had been named as payee in the instrument. The burden of proof as to whether the holder is the original payee or a subsequent purchaser and holder for value is a matter reserved for discussion in a later part of this work.

Commercial paper payable to bearer is at common law transferable by delivery without indorsement.⁴⁷² It is now common to draw railroad and other corporation bonds payable to bearer, and, as we have already seen, such bonds possess many, if not all, the characteristics of commercial paper.⁴⁷³ It was formerly held that a bond could not be made payable to bearer, but might be indorsed by the payee named in it so as to become payable to the bearer.⁴⁷⁴ But a declaration upon a corporation bond payable to bearer need not now show to whom it was first delivered, although the bond be registered, and by the rules of the company transferable only on its books.⁴⁷⁵ Coupons for interest, payable to bearer, and detached from their bonds, are likewise negotiable instruments, and pass by delivery.⁴⁷⁶

The common-law rule making notes and bills, which are payable to bearer, transferable by delivery, has been restricted in Indiana to

⁴⁷² Chit. Bills, 180; 1 Daniel, Neg. Inst. 109; 1 Edw. Bills & N. § 139; 1 Pars. Notes & B. 30; Story, Bills, § 56; Story, Prom. Notes, § 36; Grant v. Vaughan, 3 Burrows, 1526; Bullard v. Bell, 1 Mason, 243, Fed. Cas. No. 2,121; Wilbour v. Turner, 5 Pick. (Mass.) 526; Sprowl v. Simpkins, 3 Ala. 515; Edison v. Frazier, 9 Ark. 219; Tillman v. Ailles, 5 Smedes & M. (Miss.) 373; Avery v. Latimer, 14 Ohio, 542; Jones v. Westcott, 2 Brev. (S. C.) 166.

⁴⁷³ See chapter 3.

⁴⁷⁴ Marsh v. Brooks, 33 N. C. 409.

⁴⁷⁵ Savannah & M. R. Co. v. Lancaster, 62 Ala. 555.

⁴⁷⁶ Walnut v. Wade, 103 U. S. 683; Town of Concord v. National Bank of Derby Line, 51 Vt. 144; First Nat. Bank of North Bennington v. Town of Mt. Tabor, 52 Vt. 93.

notes made payable at a bank in that state.⁴⁷⁷ And in Alabama such notes and bills are only transferable by delivery if made by a bank and “issued to circulate as money.”⁴⁷⁸ In other cases they are transferable only by indorsement or assignment,⁴⁷⁹ and the bearer cannot bring suit in his own name.⁴⁸⁰

In an early case in Massachusetts it was held that, in the absence of “value received” or other similar words importing consideration, the holder of an order payable to bearer must show himself to be a holder for value.⁴⁸¹ In general, however, it is true of commercial paper payable to bearer, as in the case of a payee designated by name, that the holder is presumed to be a holder for value.⁴⁸² This presumption is changed, and the burden of proof in respect to value is thrown on the holder, if the note be proved to have been lost or stolen from a former rightful owner.⁴⁸³

⁴⁷⁷ *McNitt v. Hatch*, 4 Blackf. 531.

⁴⁷⁸ “All bonds, bills or notes, except those issued to circulate as money, payable to anything or bearer, to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved; if payable to an existing person or bearer, must be construed as if payable to such person or order.” Code Ala. 1876, § 2098. The statute of Alabama, entitled an “Act to prevent the institution of illegal and oppressive suits in the United States courts in this state” (Meek’s Supp. 108, § 1), provides that “all bonds, bills or notes which shall be made payable to any person or persons or bearer, or to any corporation or bearer, shall have the effect of creating an obligation or liability in favor of the corporation or person or persons only to whom any such bond or note may be expressly made payable, and no one but such person or persons or their indorsee or personal representative shall have a right to maintain in his own name an action upon any such bond, bill or note.” This act has been held not to apply to such bond, bill, or note issued by a banking association. *Kemper & N. Navigation & Real-Estate Banking Co. v. Schieffelin*, 5 Ala. 493.

⁴⁷⁹ “All bonds, contracts, and writings for the payment of money or other thing, or the performance of any act or duty, are assignable by indorsement, so as to authorize an action thereon by each successive indorsee.” Code Ala. 1876, § 2099. This applies also to a nonnegotiable corporation bond payable to bearer. *Blackman v. Lehman*, 63 Ala. 547.

⁴⁸⁰ *Clark v. Field*, 1 Ala. 468. As to the effect of this statute in an action brought in Mississippi on an Alabama note, see *Hemphill v. Bank*, 6 Smedes & M. (Miss.) 44.

⁴⁸¹ *Ball v. Allen*, 15 Mass. 433.

⁴⁸² *Mauran v. Lamb*, 7 Cow. (N. Y.) 174.

⁴⁸³ *Jones v. Westcott*, 2 Brev. (S. C.) 166. And where a note payable to A.

“A. B. or Bearer”—“A. B., Bearer”—“A. or Holder.”

§ 160. At common law a bill or note payable to “A. B. or bearer” is equivalent to one payable to bearer only.⁴⁸⁴ And this is true, also, of a note payable to “A. B. or holder.”⁴⁸⁵ Such note or bill, like one payable to bearer, is transferable by delivery.⁴⁸⁶ The holder is *prima facie* the lawful owner, and need not prove title to the paper.⁴⁸⁷ And the declaration on such a note need only aver possession, without alleging any express promise to the plaintiff.⁴⁸⁸ So, too, if it has been transferred by the indorsement of A. B., the indorsement need not be proved.⁴⁸⁹ And such a note may be delivered in the first instance to any person without regard to the name of A. B. in it.⁴⁹⁰ But a distinction was formerly made in Ohio as to transfer by delivery between such notes and sealed notes payable to “A. B. or bearer,” and it was held that a sealed note so payable could only be transferred by indorsement.⁴⁹¹

In Illinois a distinction is made between notes and bills payable to “bearer” and those payable to “A. B. or bearer,” and the latter can

B. or bearer was in the hands of the payee a few days before his death, he dying intestate and in debt, and was afterwards held and negotiated by his widow without letters of administration, it was held to be *prima facie* part of the payee's estate unlawfully transferred. *Lounsbury v. Depew*, 28 Barb. (N. Y.) 47.

⁴⁸⁴ *Ellis v. Wheeler*, 3 Pick. (Mass.) 18; *Eddy v. Bond*, 19 Me. 461; *Smith v. Clopton*, 4 Tex. 109; *McDonald v. Harrison*, 12 Mo. 447; *Hart v. Taylor*, 70 Miss. 655, 12 South. 553; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *Bitzer v. Wagar*, 83 Mich. 223, 47 N. W. 210. Such a note is negotiable in Indiana if it complies with the statute requiring it to be made payable at a bank in the state. *Melton v. Gibson*, 97 Ind. 158.

⁴⁸⁵ *Putnam v. Crymes*, 1 McMul. (S. C.) 9.

⁴⁸⁶ *Id.* But a note payable to “A. B. or bearer, * * * to be kept in the hands of P. T.,” is not transferable by delivery by reason of the restriction contained in it. *Truesdell v. Thompson*, 12 Metc. (Mass.) 565. See, too, *Beekman v. Wilson*, 9 Metc. (Mass.) 434.

⁴⁸⁷ *Dole v. Weeks*, 4 Mass. 451; *Ellis v. Wheeler*, 3 Pick. (Mass.) 18; *Eddy v. Bond*, 19 Me. 461; *McDonald v. Harrison*, 12 Mo. 447.

⁴⁸⁸ *Dole v. Weeks*, 4 Mass. 451; *Gilbert v. Nantucket Bank*, 5 Mass. 97.

⁴⁸⁹ *Wilbour v. Turner*, 5 Pick. (Mass.) 526.

⁴⁹⁰ *Gage v. Sharp*, 24 Iowa, 15.

⁴⁹¹ *Avery v. Latimer*, 14 Ohio, 542.

only be transferred by indorsement.⁴⁹² This is so, also, in Missouri, or was so held in 1838 by an apparently forced construction of a statute existing in the same form in many states.⁴⁹³ The same rule is expressly laid down by statute, already cited, in Alabama,⁴⁹⁴ although a different rule prevailed there prior to 1837.⁴⁹⁵ A similar distinction in Texas was held not to apply to such a note indorsed in blank by A. B., until its transfer was again restricted by special indorsement.⁴⁹⁶

Where a note is made payable "to ——— or bearer," the original holder may sue upon it without filling the blank, on averment and proof that the note was delivered to him by the maker, and that he is the owner and bona fide holder of it.⁴⁹⁷

As we have seen, other words, such as "holder," may be used with the same effect as the word "bearer." Thus, if a note be payable "to the order of the indorser," it may be sued on by any bona fide holder.⁴⁹⁸ But a note payable to "A. B., bearer," is a note payable to A. B. only, and not to bearer, and is nonnegotiable.⁴⁹⁹ On the other hand, if a note made by two persons be payable to one of them "or bearer," the bearer may sue both makers, although the payee named could not do so.⁵⁰⁰

⁴⁹² *Garvin v. Wiswell*, 83 Ill. 215; *Wilder v. De Wolf*, 24 Ill. 190; *Roosa v. Crist*, 17 Ill. 450; *Hilborn v. Artus*, 4 Ill. 344. The Illinois statute provides that any note, etc., "payable to any person named as payee therein, shall be assignable by indorsement thereon," etc. Rev. St. p. 726, § 4.

⁴⁹³ *Beatty v. Anderson*, 5 Mo. 447, under the provision of the statute (Rev. Code, 104) making it "due and payable as therein expressed."

⁴⁹⁴ *Clark v. Field*, 1 Ala. 468; *Carew v. Northrup*, 5 Ala. 367.

⁴⁹⁵ *Sprowl v. Simpkins*, 3 Ala. 515; even though such note be made by an unchartered bank, *Kemper & N. Navigation & Real-Estate Banking Co. v. Schieffelin*, 5 Ala. 493.

⁴⁹⁶ *Johnson v. Mitchell*, 50 Tex. 212.

⁴⁹⁷ *Rich v. Starbuck*, 51 Ind. 87.

⁴⁹⁸ *U. S. v. White*, 2 Hill (N. Y.) 59.

⁴⁹⁹ *Warren v. Scott*, 32 Iowa, 22. So, an instrument reading, "Due to the bearer, five pounds, which I promise to pay to A. or order." *Cock v. Fellows*, 1 Johns. (N. Y.) 143.

⁵⁰⁰ *Devore v. Mundy*, 4 Strob. (S. C.) 15.

Payee's Name—Fictitious.

§ 161. Notes and bills are sometimes made payable to the order of a fictitious person, where this is not forbidden or restricted by statute. Such paper is treated in general as if made payable to bearer.⁵⁰¹ And this is the force likewise of a bill or note payable to a fictitious person "or bearer."⁵⁰² Of the same force is a bill or note payable to "bills payable";⁵⁰³ or to "the order of 1658";⁵⁰⁴ or "to number 100 or bearer";⁵⁰⁵ or "to J. S. or ship Fortune or bearer."⁵⁰⁶

In the same way, the name used may be unintentionally that of a real person. Such name is still simply that of a fictitious payee, and the bearer can recover on the paper without indorsement.⁵⁰⁷ Or the name of the payee may be mistaken for a correct name that is similar to it, e. g. "E. S. & Sons," for "E. S.' Sons." In such case, the parties intended may recover, as on an instrument payable to a fictitious person.⁵⁰⁸ So, too, a note payable to a nonexisting corporation has a fictitious payee,⁵⁰⁹ or a note payable to and indorsed by a firm after the death of one of the partners.⁵¹⁰

So, a note for payment "to order" simply, may be sued upon by the bearer as payable to a fictitious payee.⁵¹¹ And the same thing is

⁵⁰¹ Byles, Bills, 85; Chit. Bills, 181; 1 Daniel, Neg. Inst. 141; 1 Edw. Bills & N. § 136; 1 Pars. Bills & N. 32; Story, Bills, § 56; Story, Prom. Notes, § 39; Ex parte Royal Bank of Scotland, 19 Ves. 311; Hunter v. Jeffery, Peake, Add. Cas. 146; Phillips v. Im Thurn, 18 C. B. (N. S.) 694; Id., L. R. 1 C. P. 463; Stevens v. Strang, 2 Sandf. (N. Y.) 138; Farnsworth v. Drake, 11 Ind. 101; Foster v. Shattuck, 2 N. H. 446; Kohn v. Watkins, 26 Kan. 691.

⁵⁰² Nevada v. Cleavland, 6 Nev. 181.

⁵⁰³ Willets v. Bank, 2 Duer (N. Y.) 121; Mechanics' Bank of the City of New York v. Straiton, *42 N. Y. 365; Id., 5 Abb. Prac. N. S. (N. Y.) 11.

⁵⁰⁴ Willets v. Bank, 2 Duer (N. Y.) 121.

⁵⁰⁵ Ball v. Allen, 15 Mass. 433, no consideration being imported where none expressed.

⁵⁰⁶ Grant v. Vaughan, 3 Burrows, 1526.

⁵⁰⁷ Foster v. Shattuck, 2 N. H. 446.

⁵⁰⁸ Stevens v. Strang, 2 Sandf. (N. Y.) 138. And such a note is within the New York statute relating to fictitious payees. 1 Rev. St. p. 768, § 5. See, too, Neg. Inst. Law, § 28.

⁵⁰⁹ Farnsworth v. Drake, 11 Ind. 101.

⁵¹⁰ Cavitt v. James, 39 Tex. 189. In such case the maker is liable without indorsement.

⁵¹¹ Davega v. Moore, 3 McCord (S. C.) 482.

said of a note made payable to the order of A. for the purpose of raising money, but actually negotiated to B. for value paid by him.⁵¹² On the contrary, where the maker had indorsed such a note in the payee's name, it was held that the holder could not treat A. as fictitious, and sue without his indorsement.⁵¹³ But, if the holder treats as fictitious the name of a real payee forged by the maker, the maker has been held to be estopped from any contest on that ground.⁵¹⁴ It is evident that in this regard the acceptor's position is quite different from that of the drawer. But where he has accepted the bill and paid it to a bona fide holder under such an indorsement by the drawer, he cannot, after the drawer's insolvency, recover the money paid.⁵¹⁵

Payee Fictitious—Transfer—Forgery.

§ 162. Where the payee's name is fictitious, it may be indorsed on the paper by the person to whom the bill or note is delivered.⁵¹⁶ But a fraudulent indorsement of a fictitious payee's name will constitute a forgery.⁵¹⁷ If a note or bill is payable to a fictitious person "or bearer," he may make title without indorsement.⁵¹⁸ And, if the instrument be payable to an assumed name, the holder may aver himself to be the person intended, and parol evidence will be admitted to prove this.⁵¹⁹ But the burden is on the holder to prove

⁵¹² Hunt v. Aldrich, 27 N. H. 31; Elliot v. Abbot, 12 N. H. 549; Cross v. Rowe, 22 N. H. 77; Rhyan v. Dunnigan, 76 Ind. 178. See, too, Hortsman v. Henshaw, 11 How. 177. But in Illinois such a note is invalid. First Nat. Bank v. Strang, 72 Ill. 559. In Elliot v. Abbot, supra, it was held that the holder could not sue *as indorsee*, although he had procured the nominal payee's indorsement after the maturity of the note.

⁵¹³ Rogers v. Ware, 2 Neb. 29.

⁵¹⁴ Meacher v. Fort, 3 Hill (S. C.) 227.

⁵¹⁵ Hortsman v. Henshaw, supra.

⁵¹⁶ Blodgett v. Jackson, 40 N. H. 21.

⁵¹⁷ Chit. Bills, 182; Rex v. Taft, Leach, 172; Tatlock v. Harris, 3 Term R. 174; Vere v. Lewis, Id. 182; Minet v. Gibson, Id. 482, 1 H. Bl. 569; Collis v. Emett, 1 H. Bl. 313. And the drawer cannot question such indorsement to a bona fide holder, although at the time of drawing the check he did not know the fictitious character of the payee's name. Anderson v. Bank, 66 Hun, 613, 21 N. Y. Supp. 925.

⁵¹⁸ Lane v. Krekle, 22 Iowa, 399.

⁵¹⁹ Chenot v. Lefevre, 8 Ill. 637.

that the payee named is a fictitious person.⁵²⁰ And, where there is neither drawee named nor recital of "value received," the holder of an order must prove that he paid value for it.⁵²¹

Payee Fictitious—Innocent Parties.

§ 163. Where the holder himself at the time he received such a bill knew that the payee was fictitious, and discounted the bill for the drawer's accommodation, he cannot recover against the acceptor, although the acceptance was made with like knowledge of the facts.⁵²² A note payable to the order of a fictitious person is, however, valid as a note payable to bearer in the hands of all parties against the maker and against all parties with notice by force of statute in many states.⁵²³ In the absence of such statute, the rule to be deduced from both English and American cases seems to require knowledge or acts constituting an estoppel to hold either maker, drawer, or acceptor liable to any holder under indorsement of the pretended payee's name.⁵²⁴

As a general rule, all parties having knowledge of the fictitious character of the payee's name are liable on the paper at suit of a bona fide holder for value.⁵²⁵ This is the case, also, with reference

⁵²⁰ *Maniort v. Roberts*, 4 E. D. Smith (N. Y.) 83.

⁵²¹ *Ball v. Allen*, 15 Mass. 433.

⁵²² *Chit. Bills*, 181; 1 *Edw. Bills & N.* § 136; *Hunter v. Jeffery. Peake*, Add. Cas. 146.

⁵²³ *Maniort v. Roberts*, 4 E. D. Smith (N. Y.) 83. But the maker must have known the fictitious character of the payee when he executed the note. *Id.* As to what knowledge of facts is necessary by the statute of New York, see *Irving Nat. Bank v. Alley*, 79 N. Y. 536. For the statute of New York and other states on this point, see *infra*, § 169.

⁵²⁴ Indorser to fictitious indorsee. *Chism v. Bank*, 96 Tenn. 641, 36 S. W. 387. Drawer of check to fictitious payee. *Armstrong v. Bank*, 46 Ohio St. 512, 22 N. E. 866; *Shipman v. Bank*, 126 N. Y. 318, 27 N. E. 371; *Fifth Nat. Bank v. Bank*, 52 N. Y. 636, 46 N. E. 1146, affirming 82 Hun, 559, 31 N. Y. Supp. 541. Where, however, the name of a real customer was used, and the check issued *by the drawer's cashier* in fraud of the drawer, and with no intention on the drawer's part to make a check to the payee, the drawer was held, as in England, liable to a bona fide holder under the indorsement by the cashier of the payee's name. *Phillips v. Bank*, 140 N. Y. 556, 35 N. E. 982, affirming 67 Hun, 378.

⁵²⁵ *Byles*, Bills, 84; *Chit. Bills*, 181; 1 *Edw. Bills & N.* § 136; *Ex parte Royal*

to fictitious names forged by the person negotiating the paper, and with reference to paper negotiated by the drawer with a forged signature and indorsement.⁵²⁶

§ 164. Where an acceptor has knowledge of the fictitious character of the payee's name and indorsement, he is liable upon the paper to a bona fide holder.⁵²⁷ And where a bill of exchange is drawn by an arrangement between B. and C. in the name of a fictitious person, A., and to the order of A., and is accepted by B., and indorsed to C., B. is liable upon his acceptance even to C., and is estopped from setting up the fictitious character of the payee.⁵²⁸ In order to hold the acceptor on a bill payable to, and indorsed in, a fictitious name, being the name of the drawer also, it is only necessary to prove the signature and indorsement to have been made by the same person.⁵²⁹ It has also been held that one who accepts a bill, knowing the name of the payee and indorser to be fictitious, is liable to a bona fide holder for value on the common money counts.⁵³⁰

As evidence of the acceptor's knowledge in such case, the circumstance of other similar acceptances is admissible.⁵³¹ And, in an

Bank of Scotland, 19 Ves. 311; *Hunter v. Jeffery, Peake, Add. Cas.* 146; *Ex parte Clarke*, 3 Browne, Ch. 238. This was first held in *Stone v. Freeland*, cited in 1 H. Bl. 316, and at bar, in *Tatlock v. Harris*, 3 Term R. 174. See, too, *Vere v. Lewis*, 3 Term R. 182; *Minet v. Gibson*, Id. 481; Id., 1 H. Bl. 569; *Collis v. Emett*, 1 H. Bl. 313; *Gibson v. Hunter*, 2 H. Bl. 187, 288; *Ex parte Clarke*, 3 Browne, Ch. 238; *Thicknesse v. Bromilow*, 2 Crompt. & J. 425; *Forbes v. Espy*, 21 Ohio St. 474; *McCall v. Corning*, 3 La. Ann. 409; *Farnsworth v. Drake*, 11 Ind. 101. Thus, the maker of a note cannot deny the legal existence of the payee as a corporation, in the suit of a bona fide holder. *Reynolds v. Roth*, 61 Ark. 317, 33 S. W. 105; *Brickley v. Edwards*, 131 Ind. 3, 30 N. E. 708; or the official character of a payee described as "treasurer," etc., *Abbott v. Chase*, 75 Me. 83.

⁵²⁶ An acceptor negotiating a bill payable to the drawer's order, knowing the drawer's signature and indorsement to be forged, cannot deny either drawing or indorsement. *Beeman v. Duck*, 11 Mees. & W. 251. Whether such an instrument should not be declared on as payable to bearer, *quære*. Id.; *Gibson v. Minet*, 1 H. Bl. 569; *Bennett v. Farnell*, 1 Camp. 130.

⁵²⁷ *Hunter v. Blodget*, 2 Yeates (Pa.) 480.

⁵²⁸ *Ashpittel v. Bryan*, 32 Law J. Q. B. 91, 33 Law J. Q. B. 328, and 3 Best & S. 474.

⁵²⁹ *Cooper v. Meyer*, 10 Barn. & C. 468.

⁵³⁰ *Tatlock v. Harris*, 3 Term R. 174.

⁵³¹ *Gibson v. Hunter*, 2 H. Bl. 187, 288. It is maintained, however, by Mr. Daniel (1 Neg. Inst. 118), that the acceptor is liable, whether he have notice

action on such paper by a bona fide holder against the acceptor, the plaintiff need not prove consideration in the first instance.⁵³²

In England it has been held that a bill payable to a fictitious payee is not equivalent to one payable to bearer in a suit against a party not knowing of the fictitious character of the payee.⁵³³ But one who accepts such a bill for the honor of the drawer may be liable upon it by force of an estoppel, although ignorant of the payee's name being fictitious, and although the drawer's signature had been forged.⁵³⁴ And it has been held in the United States that where one pretending to be the agent of the fictitious owner of a patent right sold it and took a note for the purchase money, the maker of the note was liable upon it at suit of a bona fide holder, although he had no knowledge of the fiction employed.⁵³⁵

of the fictitious character of the payee's name or not. But the cases cited by him appear to apply this rule only where the maker has by his words or conduct raised an estoppel against himself. This was the case, also, in *Bank of England v. Vagliano* [1891] App. Cas. 107, reversing *Vagliano v. Bank of England*, 22 Q. B. Div. 103, 23 Q. B. Div. 243, where the facts were held to constitute an estoppel. As to facts in this case, and construction of the British statute governing the case, see section 169, note, *infra*. See, too, *Robarts v. Tucker*, 16 Q. B. 560.

⁵³² *Vere v. Lewis*, 3 Term R. 182.

⁵³³ In *Bennett v. Farnell*, 1 Camp. 130, Lord Ellenborough held such a bill to be void and not equivalent to a bill payable to bearer. He, however, permitted a recovery by the holder of the consideration actually paid as money had and received. See, however, *Id.*, 1 Camp. 180c. And this rule is now changed by the bills of exchange act and the later English cases. See section 169, note, *infra*.

⁵³⁴ *Phillips v. Im Thurn*, 18 C. B. (N. S.) 694, L. R. 1 C. P. 463. See, too, *Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580, where the maker of a note was held on like ground of estoppel, although ignorant that the note was made to a fictitious firm.

⁵³⁵ *Lane v. Krekle*, 22 Iowa, 399. And the same is true as to the liability of the drawer of a bill of exchange under similar circumstances. *Kohn v. Watkins*, 26 Kan. 691. In *Lane v. Krekle*, *supra*, the note was payable to "A. or bearer," and the fraudulent indorsement in A.'s name was immaterial. Judge Dillon, however, argues in this case (page 404): "It was the defendant who made the note. By making it payable as he did, he affirmed the existence of such a person as the payee therein named, and he should not, against a person ignorant of that fact, the one who may be reasonably presumed to have acted upon the faith of the fact thus represented,—be allowed to assert the contrary. * * * In respect to such a holder, the maker is bound to

Payee Misnamed—Correction by Parol Evidence.

§ 165. It frequently occurs that the name of the payee in a commercial instrument is erroneously stated by mistake. Such misnomer is immaterial where no doubt is left as to the identity of the person intended.⁵³⁶ In case of such mistake, as also in case of ambiguity arising from the existence of several persons of the same name, parol evidence is admissible to explain the intention of the parties.⁵³⁷ And it follows, from what has been said, that the mere misspelling in the indorsement of the payee's name is also immaterial.⁵³⁸

The following are instances of immaterial mistake in the payee's name, corrected by parol evidence of intention: "W. S. Bake" for "W. S. Baker";⁵³⁹ "W. R. & P. Resor" for "W. & R. P. Resor";⁵⁴⁰ "Elizabeth Willis" for "Elizabeth Willison."⁵⁴¹ Again, where a note was made to E. H., and secured by mortgage to E. H., 3d, parol evidence was admitted to show that a firm consisting of E. H. and E. H., 3d, and doing business in the individual name of E. H., was intended.⁵⁴² And, where the payee has been wrongly named in a

know that the payee is a real person or thereafter hold his peace." So, as to drawer of a draft payable and delivered to the party intended acting in an assumed name, under which he took and indorsed the draft. *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 11 Pac. 141; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619; *Famous Shoe & Clothing Co. v. Crosswhite*, 124 Mo. 34, 27 S. W. 397.

⁵³⁶ *Rex v. Box*, 6 Taunt. 325. But a note payable, by mistake, to Joseph R., and delivered to John R., cannot be transferred by the latter's indorsement, although he was the person intended, both being persons in esse. *Bolles v. Stearns*, 11 Cush. (Mass.) 320.

⁵³⁷ *Chit. Bills*, 180; *Willis v. Barrett*, 2 Starkie, 29; *Mead v. Young*, 4 Term R. 28; *Medway Cotton Mfg. Co. v. Adams*, 10 Mass. 360; *Jester v. Hopper*, 13 Ark. 43; *Taylor v. Strickland*, 37 Ala. 642; *Leaphardt v. Sloan*, 5 Blackf. (Ind.) 278. So, where the note is a joint promise by two makers "to the order of myself." *Jenkins v. Bass*, 88 Ky. 397, 11 S. W. 293.

⁵³⁸ *Colson v. Arnot*, 57 N. Y. 253.

⁵³⁹ *Williams v. Baker*, 67 Ill. 238. So, "A. Formey" for "A. Formby." *Taylor v. Strickland*, 37 Ala. 642.

⁵⁴⁰ *Patterson v. Graves*, 5 Blackf. (Ind.) 593.

⁵⁴¹ *Willis v. Barrett*, 2 Starkie, 29. Or "Charles V. Jacobs" instead of "Charles B. Jaques." *Jacobs v. Benson*, 39 Me. 132.

⁵⁴² *Hall v. Tufts*, 18 Pick. (Mass.) 455.

note or bill, the holder may show that he was himself intended as payee, and that the paper was delivered to him as such.⁵⁴³ So, where a sealed bond was made to the standing committee of the New York African Society, the corporation was allowed to show itself intended as obligee, and to maintain an action as such on the bond.⁵⁴⁴ And where a corporation named as payee has changed its name, e. g. from "Sonoma Academy" to "Cumberland College," it may maintain an action in its new name on a note given to it by its old name on mere proof of identity.⁵⁴⁵

Name Common to Several Persons.

§ 166. Where a father and son bear the same name, there is a presumption, it is said, that the father was intended in a note payable to the name borne by both, unless the contrary appear.⁵⁴⁶ Possession and indorsement by the son will be deemed sufficient, however, to rebut this presumption.⁵⁴⁷

Although, as we have seen, a mere mistake of name is immaterial and capable of correction by parol evidence, a note made to a payee by a wrong name, actually borne by another existing person, cannot be indorsed by the payee who was intended, but not named, e. g. John P. Reed being the payee named, and Joseph P. Reed assuming himself to be the payee intended and indorsing the note as such.⁵⁴⁸ And, in Illinois, it is not even admissible to prove a note made payable to "Bart. Whalen" under a declaration setting forth a note to "Bartholomew Whalen."⁵⁴⁹ Where a person of the same name as the payee, not being the person intended in the instrument, obtains possession of it and indorses it, his indorsement is a forgery, and

⁵⁴³ *Jester v. Hopper*, 13 Ark. 43; *Patterson v. Graves*, 5 Blackf. (Ind.) 593; *Hall v. Tufts*, 18 Pick. (Mass.) 455.

⁵⁴⁴ *New York African Soc. v. Varick*, 13 Johns. (N. Y.) 38.

⁵⁴⁵ *Cumberland College v. Ish*, 22 Cal. 641.

⁵⁴⁶ *Sweeting v. Fowler*, 1 Starkie, 106; *Wilson v. Stubs*, Hob. 330; *Stebbing v. Spicer*, 8 C. B. 827.

⁵⁴⁷ *Stebbing v. Spicer*, 8 C. B. 827.

⁵⁴⁸ *Bolles v. Stearns*, 11 Cush. (Mass.) 320.

⁵⁴⁹ *Rives v. Marrs*, 25 Ill. 315. And a judgment against "Barent H." will not support a declaration against "Barnard H." *Ducommun v. Hysinger*, 14 Ill. 249.

does not effect a transfer of the paper.⁵⁵⁰ In a case of this sort, where a note was made payable, by mistake, to the order of H. L. C., instead of L. L. C., and was delivered to the right person, L. L. C., and by him transferred to the plaintiff for valuable consideration, but was actually paid to H. L. C., who knew of the mistake and availed himself of it, H. L. C. was held liable to the plaintiff in an action for money received.⁵⁵¹

Payee—Blank.

§ 167. The payee's name, like other parts of a bill or note, may be left blank at the time when the paper is issued. Where this happens, the bill or note is, in legal effect, payable to bearer.⁵⁵² Such blank may be filled up by a bona fide holder for value with his own name, and sued upon by him as if originally payable to him.⁵⁵³ And it may be filled in this manner at any time before trial.⁵⁵⁴ It has been held in Illinois that a duebill reading, "Good for fifty cents," may be completed by the holder by adding the words "to myself or order," and that filling such blank at all is wholly unnecessary to make the

⁵⁵⁰ Byles, Bills, 83; *Mead v. Young*, 4 Term R. 28.

⁵⁵¹ *Camp v. Tompkins*, 9 Conn. 545.

⁵⁵² 1 *Daniel*, Neg. Inst. 151; *Cruchley v. Clarence*, 2 Maule & S. 91; *Wookey v. Pole*, 4 Barn. & Ald. 6; *Wood v. Wellington*, 30 N. Y. 218; *Dinsmore v. Duncan*, 57 N. Y. 573.

⁵⁵³ Byles, Bills, 85; *Chit. Bills*, 162, 179; 1 *Daniel*, Neg. Inst. 151; 1 *Edw. Bills & N.* § 141; 1 *Pars. Bills & N.* 33; *Story, Bills*, § 55; *Story, Prom. Notes*, § 37; *Cruchley v. Clarence*, 2 Maule & S. 90; *Crutchley v. Mann*, 1 Marsh. 31, 5 Taunt. 529; *Powell v. Duff*, 3 Camp. 182; *Usher v. Dauncey*, 4 Camp. 97; *Atwood v. Griffin*, Ryan & M. 425; *Dinsmore v. Duncan*, 57 N. Y. 573; *Hardy v. Norton*, 66 Barb. (N. Y.) 527; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170; *Bank of Kentucky v. Garey*, 6 B. Mon. (Ky.) 626; *Greenhow v. Boyle*, 7 Blackf. (Ind.) 56; *Boyd v. McCann*, 10 Md. 118; *Sittig v. Birkestack*, 38 Md. 158; *Dunham v. Clogg*, 30 Md. 284; *Weston v. Myers*, 33 Ill. 424; *Seay v. Bank*, 3 Sneed (Tenn.) 558; *Schooler v. Tilden*, 71 Mo. 580; *Aiken v. Cathcart*, 3 Rich. Law (S. C.) 133; *Witte v. Williams*, 8 S. C. 290; *Rich v. Starbuck*, 51 Ind. 87; *Van Etta v. Evenson*, 28 Wis. 33; *Brummel v. Enders*, 18 Grat. (Va.) 873; *Farmers' & Merchants' Bank v. Horsey*, 2 Houst. (Del.) 385; *Townsend v. France*, Id. 441. Or if indorsed by the original payee, the blank may be filled with his name. *Elliott v. Chesnut*, 30 Md. 562.

⁵⁵⁴ *Schooler v. Tilden*, 71 Mo. 580.

instrument a promissory note.⁵⁵⁵ This case seems to conflict with the rule restricting the authority to fill blanks to cases in which a blank has been plainly and intentionally left by the maker.

Sometimes the intention of the maker, as to a blank, may be explained by a contemporaneous instrument construed with the note or bill. This occurs in the case of a note payable to "A. or ———," and explained by a collateral mortgage as intending the bearer, and the assignee of the mortgage as such bearer may maintain an action on the note.⁵⁵⁶ A blank indorsement, like the blank for payee in the body of the instrument, may be filled out by a bona fide holder with his own name.⁵⁵⁷ But it has been held that, to render an acceptor liable upon a bill of exchange issued with a blank for the payee's name, the holder must prove his authority from the drawer to fill such blank with his own name.⁵⁵⁸

Where the payee's name is left blank, the instrument remains incomplete, and it is said not to be a bill of exchange until such blank is filled.⁵⁵⁹ If, however, a draft is signed, and is also indorsed by the drawer, it is sufficient and complete, although made payable "to the order of ———," and the blank not filled.⁵⁶⁰ So, if a note is made payable "to ——— or bearer," the holder may sue upon it without filling up the blank, alleging and proving that the note was delivered to him by the maker, and that he is the bona fide holder and owner of it.⁵⁶¹

§ 168. — It has been held, in England, that an instrument in the form of a bill of exchange, made payable "to ——— or order," being incomplete, and therefore no bill of exchange, cannot be the subject

⁵⁵⁵ *Weston v. Myers*, 33 Ill. 424.

⁵⁵⁶ *Elliott v. Deason*, 64 Ga. 63.

⁵⁵⁷ *Hubbard v. Williamson*, 26 N. C. 266; *Wilder v. De Wolf*, 24 Ill. 190.

⁵⁵⁸ *Crutchley v. Mann*, 1 Marsh. 31, 5 Taunt. 529; *Attwood v. Griffin*, Ryan & M. 425, 2 Car. & P. 368; *Awde v. Dixon*, 6 Exch. 869.

⁵⁵⁹ *Greenhow v. Boyle*, 7 Blackf. (Ind.) 56.

⁵⁶⁰ *Usry v. Saulsbury*, 62 Ga. 179. And a remote transferee, filling such a blank with his own name as payee, is a "subsequent holder," within the meaning of the act of congress, and as such is not entitled to seek the jurisdiction of the federal courts, *Steel v. Rathbun*, 42 Fed. 390. Under the English bills of exchange act, such bill is a valid bill, as though drawn to the drawer's order. *Chamberlain v. Young* [1893] 2 Q. B. 206.

⁵⁶¹ *Rich v. Starbuck*, 51 Ind. 90. See, too, *Wood v. Wellington*, 30 N. Y. 218; *Weston v. Myers*, 33 Ill. 424.

of a forgery.⁵⁶² But the contrary doctrine has been held in a recent case in Indiana.⁵⁶³

Whether a blank of this character, left in a sealed bond, can be filled by the holder, is a question upon which there is a wide disagreement among numerous authorities.⁵⁶⁴ It has been held that a bond under seal, payable to a railroad company "or its assigns," is not negotiable, and cannot be transferred by an assignment "to ——— or bearer."⁵⁶⁵ And it seems that a blank left for payee's name in a nonnegotiable sealed bond cannot be filled by the holder.⁵⁶⁶

The implied authority to fill a blank left for the payee's name extends to a surety who has executed a note and left it with such a blank in the hands of his principal.⁵⁶⁷ Such implied authority is given by the maker of a note to a co-maker, for whose accommodation he has executed the note, notwithstanding an agreement between the makers that the blank should be filled out with some particular name only; and a bona fide holder, without notice of such agreement, may recover against both makers upon a note which has been filled up in contravention of the agreement.⁵⁶⁸ But where a note has been filled up with the name of A., and delivered to him by the maker, in disregard of an agreement between the maker and an indorser (who indorsed the note as guarantor before delivery) to the effect that a particular name other than A.'s should be inserted as payee, A. cannot recover against such indorser, although he has taken the note for value and without notice of such agreement.⁵⁶⁹

⁵⁶² *Rex v. Richards*, Russ. & R. 193; *Rex v. Randall*, Id. 195. See, too, 2 East, P. C. 933.

⁵⁶³ *Harding v. State*, 54 Ind. 359.

⁵⁶⁴ To the effect that such blank can be filled, see *Gourdin v. Commander*, 6 Rich. Law (S. C.) 497. For other cases as to blanks left to be filled in sealed bonds, see chapter VI.

⁵⁶⁵ *Clarke v. City of Janesville*, 1 Biss. 98, Fed. Cas. No. 2,854.

⁵⁶⁶ *Barden v. Southerland*, 70 N. C. 528.

⁵⁶⁷ *Armstrong v. Harshman*, 61 Ind. 52; Id., 43 Ind. 126.

⁵⁶⁸ *Wilson v. Kinsey*, 49 Ind. 35.

⁵⁶⁹ *Riddle v. Stevens*, 32 Conn. 378.

Payee's Name—English and American Statutes.

§ 169. In many of the United States some provision is made by statute as to the name of the payee in commercial paper.⁵⁷⁰ In

⁵⁷⁰ In CALIFORNIA "the person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made." Civ. Code, § 3089. Such instrument, "payable to a person named, but with the words added, 'or to his order,' or 'to bearer,' or words equivalent thereto, is in the former case payable to the written order of such person and in the latter case payable to the bearer." Id. 3101. Such instrument "payable to the order of the maker or of a fictitious person, if issued by the maker for a valid consideration without indorsement, has the same effect against him and all other persons having notice of the facts as if payable to bearer" (Id. § 3102); and, "if made payable to the order of a person obviously fictitious, is payable to the bearer" (Id. 3103). In NORTH DAKOTA, the same provisions have been enacted as in CALIFORNIA. Rev. Codes. §§ 4855, 4864, 4865. In GEORGIA, a promissory note is defined by statute to be a "written promise made by one or more to pay to another, or order, or bearer," etc. Code, § 3677. Notes payable to bearer are transferable by delivery. Id. § 3678. In IDAHO, notes to any person, order, or bearer are made negotiable. Rev. St. § 3465. If made payable "to the maker thereof or to the order of a fictitious person," and negotiated by the maker, they are equivalent to notes payable to bearer as against the maker and all persons having knowledge of the facts. Id. § 3466. In ILLINOIS, notes payable to bearer are transferable by delivery, and the indorser is in such case liable as guarantor. Rev. St. c. 98, § 8. Notes "payable to any person therein named as payee" are assignable by indorsement so that the assignee may sue in his own name, and the assignor is liable if the assignee use due diligence. Id. §§ 4-7. In KANSAS, bonds, notes, and bills "payable to any person or order, or to any person or bearer, shall be negotiable by indorsement thereon if payable to order, and by delivery if payable to bearer." Gen. St. c. 115, § 1. In KENTUCKY, a promissory note made by the maker, payable to himself or order, and indorsed by him, is binding on him. St. § 48. In MICHIGAN, negotiable notes may be payable "to any other person or to his order, or to the order of any other person, or unto the bearer" (Ann. St. § 1577); and if made to the order of the maker or of a fictitious person, and negotiated by the maker, such note has the effect of a note payable to the bearer as against the maker and all persons having knowledge of the facts (Id. § 1580). In MINNESOTA, a note payable to the order of the maker or of a fictitious person, and negotiated by the maker, is by statute made equivalent to a note payable to bearer as against the maker and all persons having knowledge of the facts. Gen. St. § 2236. In MISSOURI, negotiable notes may be made payable to bearer (Rev. St. § 733) or order, or to a payee therein named. If

England, St. 17 Geo. III. c. 30, required bills, and all other negotiable instruments under £5, to express the names and respective places of abode of the persons to whom or to whose order the same should be payable. This act was made perpetual by St. 27 Geo. III. c. 16, and is still in force.⁵⁷¹ The bills of exchange act of 1882 now provides for the naming or designating of the payee.⁵⁷²

made payable to the order of the maker or of a fictitious person, and negotiated by the maker, they are equivalent to notes payable to bearer as against the maker and all persons having knowledge of the facts. *Id.* § 735. In NEBRASKA, negotiable instruments must be made payable "to a person or order, or a person or assigns." Comp. St. § 3380. In NEVADA, all negotiable notes must be to another person than the maker or his order, or to the order of such person or to bearer. Gen. St. § 4885. If made payable to the order of the maker, or of a fictitious person, and negotiated by the maker, they are equivalent to notes payable to bearer as against the maker and all persons having knowledge of the facts. *Id.* But see *Wayman v. Torreyson*, 4 Nev. 124. In NEW JERSEY, negotiable notes under the statute must be payable to another person than the maker, or order, or unto bearer. 2 Gen. St. p. 2604, § 1. In OHIO, negotiable instruments must be payable to "a person or order, or a person, or assigns." Ann. St. § 3171. In OREGON, there are the same statutory provisions on this subject as in Nevada. Ann. Laws, §§ 3188, 3191. In RHODE ISLAND, negotiable notes may be payable to "bearer." Gen. Laws, c. 166, § 7. In SOUTH CAROLINA, only notes payable "to another person [than the maker] or corporation, or their order, or unto bearer," are made negotiable. Rev. St. § 1393. So, in TENNESSEE, "to any other person or order, or to the order of any other person." Code, §§ 3505, 3506. In VERMONT, notes and bills may be made payable to any person, or order, or bearer. Gen. St. § 2306. In WISCONSIN, notes made to the order of the maker, or of a fictitious person, and negotiated by the maker, have the effect of notes payable to bearer as against the maker and all persons with notice. Ann. St. § 1679. In WYOMING as in California. Laws, c. 70, art. 1, §§ 4, 13, 14. In NEW YORK and MARYLAND (§ 28), COLORADO, VIRGINIA, CONNECTICUT, and FLORIDA (§ 9), by the Negotiable Instrument Law, it is provided that a bill is in effect payable to bearer "when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable." So, in WASHINGTON (Ann. St. § 3654).

⁵⁷¹ Chit. Bills, 180. And see 7 Geo. IV. c. 6. And it seems that in England such instruments, if made payable to bearer, are neither negotiable nor transferable. Chit. Bills, 188, note m; *Quarterman v. Green*, 1 Car. & P. 92; *Hill v. Lewis*, 1 Salk. 132.

⁵⁷² For the full text of section 7 of the Bills of Exchange Act, see App. II., vol. III., of this work. Subsection 3 of this section reads as follows: "Where

Foreign Statutes.

§ 170. By foreign statutes the payee's name is generally made a necessary part of every bill of exchange, promissory note, or other commercial instrument.⁵⁷³ And in some foreign countries, chiefly

the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." This has been held to apply to the case of a check drawn by A. to the order of B., on the fraudulent representation to A., by his confidential clerk, C., that he owed money to B. for certain work, there being no such person as B., and the check having been indorsed by C. in the name of B. to a bona fide holder, and paid by the bank. *Clutton v. Attenborough* [1897] App. Cas. 90, affirming [1895] 2 Q. B. 707, 306. And in the case of *Bank of England v. Vagliano* [1891] App. Cas. 107, reversing 23 Q. B. Div. 243, 22 Q. B. Div. 103, where the payee designated was a real person, but the drawer's name was forged by the drawee's clerk, and no payee really intended by the drawer, the drawee, who was induced to accept by the fraud of his confidential clerk, was held liable to bona fide holders under fraudulent indorsements of the payee's name by the clerk. As already stated in section 164, note, *supra*, the negligence of the acceptor in this case was held to constitute an estoppel against him, but the statute was held to have changed the common-law rule, and to have dispensed with the requirement of knowledge on the acceptor's part of the fictitious character of the payee. In this case, in the words of Watson, L. J., page 134: "I think that the language of the subsection (section 7, subsec. 3), taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either nonexistent, or, being in existence, has not, and never was intended to have, any right to its contents." This case is distinguished from *Robarts v. Tucker*, 16 Q. B. 560, where both drawer and payee were real persons, and the drawer forged the payee's name, as follows: Selbourne, L. C. (page 125): "Between that case [*Robarts v. Tucker*] and one like the present there is this very substantial difference,—that the acceptor in that case has not in any way contributed to mislead the bankers; and, when there is a real, bona fide payee, the acceptor remains liable to him. But if, when there is no such payee, the person who signs as drawer indorses the bill with the name of a pretended payee, there is no outstanding liability from which a discharge is needed for the acceptor's protection." And in the words of Morris, L. J. (page 163): "In the case of a real drawer, that the payee is a fictitious person (unless it is obvious on the face of the bill) must be proved by the holder; but in the case of an unreal drawer, as a fact, the unreality, and therefore fictitious character, of the person named as payee, follows necessarily."

⁵⁷³ ARGENTINE REPUBLIC (Code Com. arts. 776, 916); BOLIVIA (Code Com. arts. 362, 463, 469); BRAZIL (Code Com. arts. 354, 427); GERMANY

those governed by Spanish law, the payee's full name is required.⁵⁷⁴ In France and the other countries governed by the Code Napoleon, a bill of exchange must be payable to the order either of the drawer or of a third person.⁵⁷⁵

In Spain and the Spanish-American states it is also necessary to a good indorsement of commercial paper that the indorsee's name should be expressed, and if this is not done the indorsement is void.⁵⁷⁶ The indorsee's name is also required in France and in some other countries, and its omission renders the indorsement a mere power of attorney to collect payment for the indorser.⁵⁷⁷ In some of the states of South America, while the indorsee's name is necessary to a complete indorsement, an indorsement in blank is nevertheless available, and is equivalent to an indorsement to the order of the bearer.⁵⁷⁸ Other foreign statutes, while prescribing that a proper indorsement shall name the indorsee, provide that an indorsement in blank shall

(Exch. Law, art. 4); AUSTRIA (Exch. Law, art. 4); HOLLAND (Exch. Law, arts. 101, 208, 210); HUNGARY (Exch. Law, c. 1, § 14); ITALY (Code Com. arts. 196, 273); NICARAGUA (Code Com. arts. 241, 312, 316); GUATEMALA, HONDURAS, and PARAGUAY (Ord. Bilbao, c. 13, § 2; Id. c. 14, § 1); PERU (Code Com. art. 381); PORTUGAL (Code Com. arts. 321, 426); SWEDEN and NORWAY (Exch. Law, c. 1, § 1); SWITZERLAND (Oblig. R. 722); URUGUAY (Code Com. art. 789); VENEZUELA (Code Com. art. 1; Law II. art. 1).

⁵⁷⁴ CHILI (Code Com. arts. 633, 771); COLOMBIA (Code Com. arts. 384, 517); COSTA RICA (Code Com. arts. 373, 510); ECUADOR (same as "Spain"); MEXICO (Code Com. arts. 223); PERU (Code Com. art. 522, as to notes); RUSSIA (Exch. Law, art. 541); SALVADOR (Code Com. art. 381); SPAIN (Code Com. arts. 426, 563).

⁵⁷⁵ FRANCE (Code Com. art. 110; 1 Bedarride, Droit Com. p. 139). The Code Napoleon governs also BELGIUM, GREECE, and TURKEY.

⁵⁷⁶ BOLIVIA (Code Com. arts. 381, 383); COLOMBIA (Code Com. art. 426); COSTA RICA (Code Com. art. 416); ECUADOR (same as "Spain"); MEXICO (Code Com. arts. 360, 362); NICARAGUA (Code Com. art. 261); GUATEMALA, HONDURAS, and PARAGUAY (Ord. Bilbao, c. 13, § 3); SALVADOR (Code Com. art. 423); SPAIN (Code Com. art. 469).

⁵⁷⁷ FRANCE (Code Com. arts. 137, 138). This law governs BELGIUM, GENEVA, GREECE, HAYTI, SAN DOMINGO, and TURKEY. So, too, in HUNGARY (Exch. Law, §§ 30, 34); ITALY (Code Com. art. 223); PORTUGAL (Code Com. arts. 355, 357); VENEZUELA (Code Com. arts. 34, 36).

⁵⁷⁸ ARGENTINE REPUBLIC (Code Com. arts. 803, 805); BRAZIL (Code Com. arts. 361, 362); URUGUAY (Code Com. arts. 822, 823).

carry with it power to the indorsee to fill the blank.⁵⁷⁹ And in Russia this is the case even after acceptance of the bill.⁵⁸⁰

By most foreign statutes it is provided that a bill or note may be made payable to the drawer or maker.⁵⁸¹ But in Germany, if a bill or note is made payable in this way and indorsed in blank, it is said to be invalid.⁵⁸²

And a bill or note cannot be made payable to bearer in Germany.⁵⁸³ And formerly such bills were forbidden in France, but it is said by Mr. Chitty that they are now allowed.⁵⁸⁴ In Brazil a note made by a merchant payable to bearer has the same force as a "provincial bill," and does not require protest.⁵⁸⁵ In the Argentine Republic, notes, duebills, and orders may be made payable to bearer and pass by delivery.⁵⁸⁶ So, too, in Lower Canada;⁵⁸⁷ and, as to promissory notes, in Uruguay;⁵⁸⁸ and, as to bills of exchange, in

⁵⁷⁹ CHILI (Code Com. arts. 658, 661); SWEDEN and NORWAY (Exch. Law, c. 1, § 12); SWITZERLAND (Oblig. R. 730).

⁵⁸⁰ RUSSIA (Exch. Law, arts. 559, 562).

⁵⁸¹ FRANCE (Code Com. art. 110; 1 Bedarride, Droit Com. p. 136). This provision of the Code Napoleon is in force also in BELGIUM, GENEVA, GREECE, HAYTI, SAN DOMINGO, and TURKEY. The statute makes like provision in BOLIVIA (Code Com. art. 353); CHILI (Code Com. art. 639); COLOMBIA (Code Com. art. 388); COSTA RICA (Code Com. art. 377); DENMARK (Exch. Law, § 5); GERMANY (Exch. Law, art. 6); AUSTRIA (Exch. Law, art. 6); HOLLAND (Exch. Law, art. 101); ECUADOR (same as "Spain"); ITALY (Code Com. art. 196); MEXICO (Code Com. art. 325); PERU (Code Com. art. 387); PORTUGAL (Code Com. art. 322); LOWER CANADA (Civ. Code, §§ 2282, 2346); RUSSIA (Exch. Law, art. 541); SALVADOR (Code Com. art. 385); SPAIN (Code Com. art. 430); SWEDEN and NORWAY (Exch. Law, c. 1, § 2); SWITZERLAND (Oblig. R. 724); VENEZUELA (Code Com. art. 2).

⁵⁸² Thöl, W. R. 151.

⁵⁸³ Thöl, W. R. 150.

⁵⁸⁴ Chit. Bills, 180; Decrees of June 7, 1611, and March, 1624. See Poth. pl. 221; Chit. Bills, 180, and 1 Pardess. 358, as to later law. The Code Napoleon (article 110) contemplates the payee being named in a bill of exchange, and provides, as we have already seen, only for bills payable to "the order of a third person or of the drawer himself."

⁵⁸⁵ BRAZIL (Code Com. art. 426).

⁵⁸⁶ ARGENTINE REPUBLIC (Code Com. art. 916).

⁵⁸⁷ LOWER CANADA (Civ. Code, §§ 2282, 2344).

⁵⁸⁸ URUGUAY (Code Com. art. 933).

Denmark;⁵⁸⁹ while in Mexico and Salvador both notes and certificates of deposit made payable to bearer are void.⁵⁹⁰

Leaving a blank for the payee's name renders a bill invalid in Germany.⁵⁹¹ But such blank is permitted and may be filled by a bona fide holder, as at common law, in some of the South American states.⁵⁹²

⁵⁸⁹ DENMARK (Exch. Law, § 6).

⁵⁹⁰ MEXICO (Code Com. art. 452); SALVADOR (Code Com. art. 516).

⁵⁹¹ Thöl, W. R. 150.

⁵⁹² ARGENTINE REPUBLIC (Code Com. art. 776); URUGUAY (Code Com. art. 789).

III. THE DRAWEE.

§ 171. Drawee's Name—In General.

172. Drawee's Name Identical with Drawer or Payee.

Drawee's Name—In General.

§ 171. From the nature of a bill of exchange, it follows that the person upon whom it is drawn, and who is expected to pay it, should appear in the instrument. This is usually effected by a direction to the drawee by name, e. g. "To A. B.," with or without his address on the face of the bill at the top or bottom.⁵⁹³ The latter is, however, the more common. In Italy and Holland the direction to the drawee is often placed on the back of the bill. It is a general rule of the common law that the drawee's name should appear on the bill.⁵⁹⁴ But the omission of it may be supplied by an acceptance, this being construed to amount either to an admission or waiver of a more formal address.⁵⁹⁵ It is also generally required by foreign statutes that the drawee's name should appear.⁵⁹⁶ In Italy and in Chili the

⁵⁹³ But if a bill is directed to no one, but signed across its face by A., and in the position usual for the drawee's name by B., the latter is *prima facie* the drawee, and the former an indorser, guarantor, or acceptor *supra protest*, as may be determined by parol evidence, and such evidence is admissible against the payee. *Walton v. Williams*, 44 Ala. 347.

⁵⁹⁴ *Byles*, Bills, 89; *Chit. Bills*, 188; 1 *Daniel*, Neg. Inst. 106; 1 *Edw. Bills & N.* § 209; 1 *Pars. Bills & N.* 61; *Peto v. Reynolds*, 9 Exch. 410, 11 Exch. 418; *Watrous v. Halbrook*, 39 Tex. 572.

⁵⁹⁵ *Byles*, Bills, 89; *Chit. Bills*, 188; *Story*, Bills, § 58; *Gray v. Milner*, 8 Taunt. 739, 3 Moore, 90; *Watrous v. Halbrook*, *supra*. "The acceptance," says *Ingraham, J.*, "may be considered as supplying the defect, and as being an admission by the acceptor that he is the person intended. At any rate, it does not lie with him to make such defense after having admitted by the acceptance that he was the person intended, and after having promised to pay the draft at maturity. He is estopped by his own act from such a defense." *Wheeler v. Webster*, 1 E. D. Smith (N. Y.) 3.

⁵⁹⁶ ARGENTINE REPUBLIC (Code Com. art. 776); BELGIUM (Code Nap. art. 110); BOLIVIA (Code Com. arts. 362, 463); BRAZIL (Code Com. arts. 354, 427); GERMANY (Exch. Law, art. 4); AUSTRIA (Exch. Law, art. 4); HOLLAND (Exch. Law, art. 100); HUNGARY (Exch. Law, c. 1, § 14); NICARAGUA (Code Com. art. 241); PERU (Code Com. art. 381); PORTUGAL (Code Com. art. 321); SWEDEN and NORWAY (Exch. Law, c. 1, § 1); SWITZ-

drawee's full name is requisite,⁵⁹⁷ and in the Spanish-American states and some others his name and residence must both appear on the bill.⁵⁹⁸

At common law the name of the drawee is not necessary if he be otherwise sufficiently designated. This is the case in a bill addressed to the "Steamer Dorrance and owners,"⁵⁹⁹ or to "the agent and owners of" a certain ship.⁶⁰⁰ Moreover, a bill of exchange may be directed to a person in a representative or official character, and so accepted by him.⁶⁰¹ So, too, it may be addressed to him as an individual, and accepted by him in a representative capacity,⁶⁰² or vice versa.⁶⁰³ So, it may be drawn on a company, and accepted by its manager as such;⁶⁰⁴ and the corporation, being misnamed as drawee, will not relieve it from liability, if its identity be unquestioned.⁶⁰⁵

ERLAND (Oblig. R. 722); URUGUAY (Code Com. art. 789); VENEZUELA (Code Com. art. 1).

⁵⁹⁷ CHILI (Code Com. art. 633); ITALY (Code Com. art. 196).

⁵⁹⁸ CHILI (Code Com. art. 633); COLOMBIA (Code Com. art. 384); COSTA RICA (Code Com. art. 373); ECUADOR (same as "Spain"); MEXICO (Code Com. art. 223); GAUTEMALA, HONDURAS, and PARAGUAY (Ord. Bilbao, c. 13, § 2); RUSSIA (Exch. Law, art. 543); SALVADOR (Code Com. arts. 381, 510); SPAIN (Code Com. art. 426).

⁵⁹⁹ Alabama Coal-Min. Co. v. Brainard, 35 Ala. 476.

⁶⁰⁰ Taber v. Cannon, 8 Metc. (Mass.) 456. In such case an acceptance by the agent alone in his individual name renders him alone liable.

⁶⁰¹ Tassey v. Church, 4 Watts & S. (Pa.) 346. In this case an acceptance by "J. T., Administrator," of a bill drawn on him in like manner, was held to render him personally liable. But the contrary has been held of a similar acceptance by "N. D., Agent of the Com. Co.," of a bill drawn on him in that form. Shelton v. Darling, 2 Conn. 435. For fuller consideration of the personal responsibility of an agent as acceptor, see section 145, supra.

⁶⁰² Bruce v. Lord, 1 Hilt. (N. Y.) 247. Here the acceptance, "J. P. L., Treasurer N. M. Co.," rendered J. P. L. prima facie personally liable. The draft was drawn on J. P. L. simply.

⁶⁰³ Nicholls v. Diamond, 9 Exch. 153. In the language of Alderson, B.: "He chooses to accept them for himself and others. He had no right to accept them for the other persons, but it is not the less a good acceptance as against him." In this case a draft on "J. D., Purser W. D. Mining Co.," was accepted, "J. D., per Proc. W. D. Mining Co.," the company being an unincorporated one, and J. D. was held personally on his acceptance.

⁶⁰⁴ Okell v. Charles, 34 Law T. (N. S.) 822.

⁶⁰⁵ Hascall v. Association, 5 Hun (N. Y.) 151. So, an acceptance by a firm

But a bill of exchange cannot be addressed to one person and accepted by another.⁶⁰⁶ Nor can a letter of credit, drawn by mistake on John & Joseph Naylor & Co., be accepted by John & Jeremiah Naylor & Co., so as to hold the drawer, although they were intended by him.⁶⁰⁷ But a bill may be directed to A., "or, in his absence, to B.," and accepted by A., and it will be sufficient to declare on such acceptance without taking any notice of B.⁶⁰⁸ Again, a bill may be drawn on several persons, and accepted by only part of them, and may then be described, in a declaration against those who accepted, as drawn on, and accepted by, them only.⁶⁰⁹ And if a bill be drawn upon, and accepted by, a partnership in its firm name, it will bind all partners, whether ostensible or secret, but the holder need only sue those who were known to him as such when he took the bill.⁶¹⁰ We have seen that an omission of the drawee's name may be supplied by the acceptance. Where, however, a bill is indorsed before delivery, and delivered with a blank left for the drawee and acceptor, the indorser cannot be changed into an acceptor without material alteration.⁶¹¹ But a bill may be addressed "at" instead of "to" the

in its right name of a bill drawn on it in a wrong name is a good acceptance. *Lloyd v. Ashby*, 2 Barn. & Adol. 23. So, where a bill is dated at Lafayette, and drawn on the First Nat. Bank, the bank of Lafayette will be intended. *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086.

⁶⁰⁶ *Chit. Bills*, 189; *Jackson v. Hudson*. 2 Camp. 447; *Davis v. Clarke*, 6 Q. B. 16, 13 Law J. Q. B. 305.

⁶⁰⁷ *Grant v. Naylor*, 4 Cranch, 224. As to this case, Marshall, C. J., says (page 235): "If it be a case of mistake, it is a mistake of the writer only, not of him by whom the goods were advanced, and who claims the benefit of the promise. * * * The company to which it is delivered are not imposed upon with respect to the address, but, knowing that the letter was not directed to them, they trust the bearer, who came to make contracts on his own account. In such a case the letter itself is not a written contract between D. G., the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract is going further than courts have ever gone, where the writing is itself the contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it."

⁶⁰⁸ *Chit. Bills*, 188; *Story, Bills*, § 58; *Byles, Bills*, 90; *Anon.*, 12 Mod. 447.

⁶⁰⁹ *Story, Bills*, § 58; *Mountstephen v. Brooke*, 1 Barn. & Ald. 224.

⁶¹⁰ *De Mautort v. Saunders*, 1 Barn. & Adol. 398.

⁶¹¹ *Mahone v. Bank*, 17 Ga. 111.

drawee, without impairing its validity.⁶¹² And it may even be directed to a particular house instead of to the drawee by name.⁶¹³

Sometimes an instrument in the form of a promissory note is addressed to, and accepted by, some third person, and a question then arises whether such instrument is a bill or note. It may be treated by the holder, at his option, as either.⁶¹⁴ The acceptor of such an instrument is liable as the acceptor of a bill of exchange,⁶¹⁵ and the drawer remains liable as the maker of a note.⁶¹⁶

Drawer and Drawee One Person—So Drawee and Payee.

§ 172. A bill of exchange is valid at common law, although drawn by the drawer upon himself. Such a bill is in all essentials a promissory note, and may be treated as such.⁶¹⁷ And the same thing is true of a bill drawn by a principal on his agent,⁶¹⁸ or by the directors of a company on its cashier.⁶¹⁹ Such a bill may also be

⁶¹² *Stuhlteworth v. Stephens*, 1 Camp. 407; *Allan v. Mawson*, 4 Camp. 115; *Rex v. Hunter*, Russ. & R. 511.

⁶¹³ *Attwood v. Griffin*, Ryan & M. 423. So, a memorandum, "Payable at No. 1 Wilmot St." *Gray v. Milner*, 8 Taunt. 739, 3 Moore, 90.

⁶¹⁴ *Edis v. Bury*, 6 Barn. & C. 433.

⁶¹⁵ *Lloyd v. Oliver*, 18 Q. B. 471.

⁶¹⁶ *Brazelton v. McMurray*, 44 Ala. 323; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166.

⁶¹⁷ *Byles*, Bills, 90; 1 *Daniel*, Neg. Inst. 134; 1 *Pars.* Bills & N. 62; *Chit. Bills*, 188; *Block v. Bell*, 1 *Moody & R.* 149; *Starke v. Cheesman*, Carth. 509; *Dehers v. Harriot*, 1 *Show.* 163; *Robinson v. Bland*, 2 *Burrows*, 1077; *Miller v. Thomson*, 3 *Man. & G.* 576; *Hasey v. White Pigeon B. S. Co.*, 1 *Doug. (Mich.)* 193; *Bailey v. Bank*, 11 *Fla.* 266; *Fairchild v. Railroad Co.*, 15 *N. Y.* 337; *Com. v. Butterick*, 100 *Mass.* 12. So, after acceptance, *Wetumpka & C. R. Co. v. Bingham*, 5 *Ala.* 657. And the effect is the same where a bill is drawn by a firm in London on its house in Liverpool. *Miller v. Thomson*, *supra*; *Willans v. Ayers*, 3 *App. Cas.* 133.

⁶¹⁸ *Hardy v. Pilcher*, 57 *Miss.* 18; *Wardens & Vestrymen of St. James Church v. Moore*, 1 *Ind.* 289. This was the case of a draft by the secretary on the treasurer of the church corporation.

⁶¹⁹ For examples treated as notes, see *Fairchild v. Railroad Co.*, 15 *N. Y.* 337; *Mobley v. Clark*, 28 *Barb. (N. Y.)* 390; *Tripp v. Paper Co.*, 13 *Pick. (Mass.)* 291; *Indiana & I. C. R. Co. v. Davis*, 20 *Ind.* 6; *Chicago, C. & L. R. Co. v. West*, 37 *Ind.* 216; *Allen v. Assurance Co.*, 9 *C. B.* 574. For examples treated as bills, see *Burnheisel v. Field*, 17 *Ind.* 609; *Wetumpka & C. R. Co. v. Bingham*, 5 *Ala.* 657.

regarded as an accepted bill of exchange,⁶²⁰ and no notice of non-acceptance is necessary in order to hold the drawer.⁶²¹ Neither is a notice of dishonor necessary in such case, but it seems that a demand of payment must be made.⁶²² In like manner a bill drawn on a fictitious drawee may be treated as a promissory note, on which the drawer may be held liable without demand of payment or notice of dishonor.⁶²³ And a bill of exchange is also valid, although the person named in it as payee be also the drawee.⁶²⁴ In France the drawer of a bill of exchange cannot, by the Code Napoleon, be the drawee, although this was permitted by the earlier exchange law of 1673.⁶²⁵ And this is also prohibited by statute in Denmark and Hungary.⁶²⁶ In some other foreign states it is expressly permitted by statute.⁶²⁷ And in Switzerland it is permitted, if the bill be drawn upon another place.⁶²⁸

⁶²⁰ 1 Daniel, Neg. Inst. 134; *Cunningham v. Wardwell*, 12 Me. 466. Or it may be treated as a promissory note or an accepted bill at the holder's option. *Planters' Bank of Tennessee v. Evans*, 36 Tex. 594; *Randolph v. Parish*, 9 Port. (Ala.) 76.

⁶²¹ *Roach v. Ostler*, 1 Man. & R. 120. But it must be proved in order to sustain a recovery on a count in the declaration describing the drawee as a different person from the drawer of the same name. *Id.*

⁶²² 1 Daniel, Neg. Inst. 134; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15; *Lyell v. Lapeer Co.*, 6 McLean, 446, Fed. Cas. No. 8,618; *Mobley v. Clark*, 28 Barb. (N. Y.) 390; *Dennis v. Water Co.*, 10 Cal. 369. But contra as to necessity for demand. *Indiana & I. C. R. Co. v. Davis*, 20 Ind. 6.

⁶²³ *Smith v. Bellamy*, 2 Starkie, 223. In this case an accepted bill was delivered to the plaintiff, who failed to find the acceptor, and was nonsuited for want of proof of presentment. But it was held that he might have charged and held the drawer for drawing a bill on a person who was not in existence.

⁶²⁴ *Chit. Bills*, 33; *Holdsworth v. Hunter*, 10 Barn. & C. 449; *Wilder v. Savage*, 1 Story, C. C. 29, Fed. Cas. No. 17,653; *Com. v. Butterick*, 100 Mass. 12. Or it may be payable to the "order of the acceptor." *Witte v. Williams*, 8 S. C. 290. And an instrument in which drawer, drawee, and payee are all one person may be properly described as a bill of exchange in an indictment for forgery. *Com. v. Butterick*, *supra*.

⁶²⁵ 1 Bedarride, *Droit Com.* p. 94.

⁶²⁶ DENMARK (Exch. Law, § 2); HUNGARY (Exch. Law, art. 15), as to drafts.

⁶²⁷ AUSTRIA (Exch. Law, art. 6); GERMANY (Exch. Law, art. 6); ITALY (Code Com. art. 197); SWEDEN and NORWAY (Exch. Law, c. 1, § 2).

⁶²⁸ SWITZERLAND (Oblig. R. 724).

CHAPTER VI.

FORM—WORDS RELATING TO TRANSFER, CONSIDERATION, ETC.

- I. NEGOTIABLE WORDS.
- II. EXPRESSION OF CONSIDERATION.
- III. BLANKS.
- IV. MEMORANDA AND CONTEMPORANEOUS AGREEMENTS.
- V. ADDITIONAL STIPULATIONS.

I. NEGOTIABLE WORDS.

- § 173. Negotiability—What It is.
- 174. Order—Bearer—How Far Necessary.
- 175. "Bearer"—"A. or Bearer."
- 176. Negotiability—Enlarged or Restricted.
- 177. Nonnegotiable Instruments.

Negotiability—What It is.

§ 173. The word "negotiable" is often used to signify merely that a contract or instrument is assignable. In a more restricted sense, it may mean that an instrument is assignable, and may be sued by the assignee in his own name.¹ Its proper commercial sense is still more restricted; and, when applied in this sense to commercial paper, it means not only that the negotiable instrument may be assigned, and that the assignee may bring an action on it in his own name, but also that such assignment shall be subject to no equities between prior parties, and that out of the assignments or transfers of the paper shall grow an orderly commercial relation and liability between the holder and all persons whose names are on the paper. It is in this sense that commercial paper is said to be "negotiable" or "nonnegotiable." Negotiability is not necessary to the existence of a valid bill of exchange, note, or check, although this

¹ "The term 'negotiable,' in its enlarged signification, applies to any written security which may be transferred by indorsement or delivery, so as to vest in the indorsee the legal title so as to enable him to maintain a suit thereon in his own name." Scott, J., in *Odell v. Gray*, 15 Mo. 337.

was at one time doubted.² And, where an action is brought on a lost note, there is not even a presumption of its having been negotiable in form, and this must be proved by the plaintiff.³

“Order”—“Bearer”—How Far Necessary to Negotiability.

§ 174. The negotiability of an instrument is generally indicated by the words “or order,” “or bearer,” after the name of the payee. It is also frequently expressed by the forms, “Pay to the order of A. B.,” “Pay to bearer.” It is sometimes said that the word “order” or “bearer” is essential to negotiability.⁴ The rule, more correctly stated, is that these words *or their equivalent* are necessary for that purpose.⁵ No particular words are necessary, provided the intention of the instrument is clear.⁶ It is said by Mr. Justice Story

² Chit. Bills, 182; 1 Daniel, Neg. Inst. 114; 1 Edw. Bills & N. § 199; Wells v. Brigham, 6 Cush. (Mass.) 6; Smith v. Kendall, 6 Term R. 123, 1 Esp. 231; Rex v. Box, 6 Taunt. 328; Goshen & M. Turnpike Road Co. v. Hurtin, 9 Johns. (N. Y.) 217; Duncan v. Institution, 10 Gill & J. (Md.) 299; Downing v. Backenstoos, 3 Caines (N. Y.) 137; Kendall v. Galvin, 15 Me. 132; Sibley v. Phelps, 6 Cush. (Mass.) 173; Coursin v. Ledlie's Adm'rs, 31 Pa. 506.

³ Yingling v. Kohlhas, 18 Md. 148.

⁴ Byles, Bills, 85; 2 Pars. Notes & B. 45; Fernon v. Farmer, 1 Har. (Del.) 32; Roe v. Hallett, 20 Wkly. Dig. (N. Y.) 34. And, it seems, this is also the rule as to bills of lading. Henderson v. Comptoir d'Escompte, L. R. 5 P. C. 253.

⁵ Story, Bills, § 60; Chit. Bills, 225; 1 Edw. Bills & N. § 194; Hill v. Lewis, 1 Salk. 132; Noland v. Ringgold, 3 Har. & J. (Md.) 216; Huntington v. Harvey, 4 Conn. 124; Backus v. Danforth, 10 Conn. 297; Lyon v. Summers, 7 Conn. 399; Bank of Sherman v. Apperson, 4 Fed. 25; Graves v. Mining Co., 81 Cal. 303, 22 Pac. 665; Curtiss v. Hazen, 56 Conn. 148, 14 Atl. 771; New York Security & Trust Co. v. Storm, 81 Hun, 33, 30 N. Y. Supp. 605; Smurr v. Forman, 1 Ohio, 272; Parker v. Riddle, 11 Ohio, 102; Hackney v. Jones, 3 Humph. (Tenn.) 612; Albright v. Griffin, 78 Ind. 182; Sinclair v. Johnson, 85 Ind. 527. But see, contra, Whiteman v. Childress, 6 Humph. (Tenn.) 307; Porter v. City of Janesville, 3 Fed. 617; Fawsett v. National Life Ins. Co., 97 Ill. 11, by force of Illinois statute. The addition of the words “or bearer,” therefore, constitutes a material alteration. McCauley v. Gordon, 64 Ga. 221.

⁶ Chit. Bills, 183, 226; 1 Daniel, Neg. Inst. 115; 1 Edw. Bills & N. § 194; Story, Prom. Notes, § 44; Raymond v. Middleton, 29 Pa. 529; U. S. v. White, 2 Hill (N. Y.) 59.

that the word "assigns" is sufficient.⁷ But in England a corporation bond payable "to A. and B., their executors, administrators, or assigns, or to the bearer hereof," was held to be assignable clear of prior equities *in equity only*.⁸ And a like bond payable "to C., or his executors, administrators, or transferees, or to the holder for the time being," was held to be nonnegotiable and subject to equities.⁹ But a note payable to "A. or holder" is equivalent to one payable to "A. or bearer," and is negotiable.¹⁰ And the interposition

⁷ Story, Bills, § 60; Story, Prom. Notes, § 44. Thus a coupon bond payable to a blank payee, "his executors, administrators, and assigns," has been held to be negotiable. *Dutchess County Ins. Co. v. Hachfield*, 1 Hun (N. Y.) 675. But not so a note to the trustees of a church "or their collector." *Noxon v. Smith*, 127 Mass. 485.

⁸ *In re Blakely Ordnance Co.*, L. R. 3 Ch. 154.

⁹ *In Re Natal Invest. Co.*, L. R. 3 Ch. 355, Lord Chancellor Cairns says of these words (page 360): "The covenant is made with him. The payment is to be to him or his executors, administrators, or transferees. Stopping at that point, the word 'transferees' would obviously be simply equivalent to 'assigns,' and 'assigns' would mean, according to the ordinary construction of such an instrument, an assign by deed,—an assign in a way in which an assignee of a bond or other chose in action of the same kind is created. The executors and the administrators would be subject, if the claim for payment were made by them, to any equities which might exist against Coqui himself. So, also, assignees or assigns by deed would be subject to the same equities. There is nothing, therefore, in the debenture up to that point which would negative the usual rule of equity, that the assignee must take subject to all the equities between the original parties to the contract. We then find added these words, after the word 'transferees,' 'or to the holder for the time being of this debenture.' As I understand those words, they do nothing more than this: In order to save the trouble and expense of assignments by deed, they provide that the company will recognize any person who holds the debenture to be in as good a position as if he had become the assign of it by deed, and will not insist upon his proving his title by producing a formal assignment; but there is nothing whatever in these words which, as it seems to me, is intended to put the holder for the time being in a better position than an assignee by deed. It would be in the highest degree unreasonable to suppose that an assign by the most formal mode of assignment would take subject to the equities against Coqui, whereas an assign, not by deed but by merely manual transfer of the document, would take free from those equities." *Sir R. Malins, V. C.*, however, in commenting on this opinion two years later, in *Re Imperial Land Co.*, L. R. 11 Eq. 493, says: "I am unable to see any distinction between 'payable to bearer' and 'to the holder for the time being.'"

¹⁰ *Putnam v. Crymes*, 1 McMul. (S. C.) 9. So, a bond to A. "or holder, if

of a word of description, as "to A. B., *trustee*, or order," does not affect the negotiability of the instrument.¹¹ It seems, too, that words of negotiability are unnecessary in a bill or note held by the king or by the government.¹²

Such words seem generally to be required by statute in the United States.¹³ But in Great Britain,¹⁴ as formerly in Scotland,¹⁵ the law

the bond is transferred by the signature of the president." *Wilson Co. v. National Bank*, 103 U. S. 770.

¹¹ *Bush v. Peckard*, 3 Har. (Del.) 385.

¹² Story, Bills, § 60. And therefore the assignment of a nonnegotiable note to the United States will vest the legal title in the government. *U. S. v. White*, 2 Hill (N. Y.) 59; *U. S. v. Buford*, 3 Pet. 12. So, the government can take legal title to a note payable to A. B., by operation of law without indorsement. *Lambert v. Taylor*, 4 Barn. & C. 151.

¹³ Such words were formerly not necessary to negotiability in COLORADO. *Thackaray v. Hanson*, 1 Colo. 365.

In CALIFORNIA a negotiable instrument must be "to order or bearer" (Civ. Code, § 8087), "or words equivalent thereto" (Id. § 8101). So, in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 1), MARYLAND and NEW YORK (§ 20), by the Negotiable Instrument Law.

In NORTH DAKOTA the above-mentioned provisions of the California Code have been copied. Rev. Code, §§ 4853, 4864.

In DELAWARE "all bonds, specialties and notes in writing payable to any person or order or assigns," may be assigned or indorsed and sued upon by the assignee in his own name. Rev. Code, c. 63, § 8.

In GEORGIA a promissory note is defined as "a promise made by one or more to pay to another or order or bearer," etc. Code, § 3677.

In ILLINOIS notes and bills payable to any person named as payee therein are transferable by indorsement. Rev. St. (Hurd's Ed.) c. 98, § 4.

In INDIANA only such notes as are payable to order or bearer, and in an Indiana bank, are negotiable clear of defense. Horner's Rev. St. § 5506. Inland, and of course foreign, bills of exchange are governed by the same rule. Id. § 5505.

In IOWA promissory notes for the payment of a sum of money, to be negotiable, must be payable to the payee, "or his order or bearer or to bearer only." Code, § 3043. "Bonds, duebills and all instruments in writing * * * to pay to another, without words of negotiability, a sum of money in property or

¹⁴ Bills of Exchange Act, § 8, subd. 4. And the acceptor, by striking out the words "or order," and accepting "in favor of A. only," does not avoid liability to an indorsee. *Decroix v. Meyer*, 25 Q. B. Div. 343.

¹⁵ *Chit. Bills*, 183, 225; *Thomp. Bills*, 101; 1 *Edw. Bills & N.* § 198.

no longer requires the words "or order" in a bill of exchange to render it transferable by indorsement. In other foreign countries it is re-

labor," are assignable by indorsement, subject to equities. Id. § 3044. Bonds, bills, etc., "to pay a sum of money in property or labor, or to pay or deliver property or labor, * * *" are negotiable, with all the incidents of negotiability, whenever it is manifest from the terms that such was the intent of the maker, but the use of the technical words "order" or "bearer" alone will not manifest such intention. Id. § 3045.

In KANSAS negotiable words are necessary to the negotiability of bonds, bills, and notes, and such instruments made "payable to any person alone, and not drawn payable to any order, bearer, or assigns," are not negotiable. 2 Gen. St. c. 115, § 1.

In KENTUCKY notes "payable to any person or persons or to a corporation," if payable at certain banks, are placed on the footing of foreign bills. Ky. St. § 483.

In MARYLAND the statute of Anne is still in force. Bill of Rights, art. 5; Alexander's British Statutes, p. 649.

In MASSACHUSETTS bonds and other obligations of corporations and joint stock companies for the payment of money to order or to bearer, or to a designated person or bearer, are negotiable. Pub. St. c. 77, § 4.

In MICHIGAN promissory notes for the payment of money to any person "or his order, or to the order of any other person or unto the bearer," are made negotiable. How. Ann. St. § 1577.

In MISSISSIPPI promises for the payment of money or of any other thing, "whether payable to order or assigns or not," are made assignable subject to equities. Ann. Code, § 3503.

In MISSOURI negotiable notes must be "to a payee therein named or order or bearer." Rev. St. § 733.

In NEBRASKA negotiable instruments must be drawn payable "to order, bearer or assigns." Comp. St. § 3380.

In NEVADA only notes which are payable "to any other person (than the maker) or to his order, or to the order of any other person or unto the bearer," and those which are negotiated by the maker payable to his own order or to that of a fictitious person, are made negotiable. 1 Comp. Laws, c. 5, § 9.

In NEW JERSEY the statute relating to negotiable notes includes only those payable to another person (than the maker) or order or bearer. 2 Gen. St. p. 2604, § 1.

In NORTH CAROLINA negotiable instruments may be "expressed or not to be to order." Code, § 41.

In OHIO they must be payable to order, bearer, or assigns. Rev. St. § 3171.

In PENNSYLVANIA negotiable notes dated in Philadelphia, under the act of 1797, must be payable "to the order of the payee" (Purd. Dig. p. 1731, § 1); so, too, all bills, notes, drafts, checks, etc., drawn or indorsed in Penn-

quired by statute that such words or their equivalent be used.¹⁶ Making an instrument payable "to the order of A." has the same effect as

sylvania payable elsewhere (Purd. Dig. p. 1732, § 2). Other bills, notes, etc., seem to have been left to the rule of the common law.

In RHODE ISLAND negotiable notes must be payable to order or bearer. G. L. c. 166, § 7.

In SOUTH CAROLINA likewise. Rev. St. § 1393.

In TENNESSEE only notes payable "to any other person [than the maker] or order, or to the order of any other person," are made negotiable by the statute. Code, § 3505. But see *Whiteman v. Childress*, 6 Humph. (Tenn.) 307.

In VERMONT negotiable bills and notes must be payable to a person or order or bearer. St. § 2306.

So, in WISCONSIN. Sanb. & B. Ann. St. § 1675. In this state it is further provided that no order drawn on the treasurer of a municipal corporation and no instrument executed by a corporation shall be negotiable "unless expressly authorized by law to be made negotiable" (Sanb. & B. Ann. St. § 1675); and that warehouseman's receipts shall be negotiable unless "Not negotiable" is written on them (Id. § 1676).

In WASHINGTON as in Michigan. Ann. St. § 3652.

In WYOMING as in California. Laws 1888, c. 70, §§ 2, 13.

¹⁶ Chit. Bills, 225; 1 Pardessus, 346, 358. But a Bank of England note, payable to bearer, and transferred by delivery in France, is sufficiently transferred to vest the legal title in the holder. *De La Chaumette v. Bank*, 2 Barn. & Add. 385. See, also, Id. 9 Barn. & C. 208.

Code Nap. § 110, requires a bill of exchange to be drawn to the order of a third person or of the drawer. This law applies to FRANCE, HAYTI, GREECE, SAN DOMINGO, and TURKEY.

In SPAIN no order or promise to pay is a commercial contract, without being drawn to order. Code Com. art. 570. If drawn in favor of the bearer, and no payee named, it is the foundation of no liability or action at law. Article 572. But a bill of exchange may be drawn to the order of the drawer, with a statement of consideration to be received by himself. Article 430.

So, too, in COLOMBIA (Code Com. arts. 388, 524, 526);

COSTA RICA (Code Com. arts. 377, 517, 519);

ECUADOR (Code Com. same as that of Spain);

MEXICO (Code Com. arts. 325, 449, 452);

PERU (Code Com. arts. 387, 531, 533).

In URUGUAY negotiable drafts, bills of exchange, indorsements, and promissory notes must all be to order (Code Com. arts. 790, 824, 933); but duebills, promissory notes, and other instruments for the payment of money to the bearer are transferable by delivery (Id. 933).

To be transferable by indorsement, a bill of exchange must be drawn to

making it "to A. or his order."¹⁷ Making it payable simply "to order" is equivalent to making it payable to a fictitious person, and hence to bearer.¹⁸

"order," in the ARGENTINE REPUBLIC (Code Com. art. 777), or, it may be, to the order of bearer (Id. 781); and so as to promissory notes (Id. 916);

BOLIVIA (Code Com. §§ 460, 461);

VENEZUELA (Code Com. art. 2);

BRAZIL (Code Com. art. 354), and it must appear whether it is payable to order, and to whose order;

CHILI (Code Com. art. 634). But "to the rightful owner," "to the disposition of," etc., or other equivalent words, will do as well; drafts and notes between merchants being excepted from the requirement of such words.

In DENMARK a bill may be drawn to the order of a third person or of the drawer, or to the bearer. Exch. Law, §§ 5, 6.

In GERMANY (Exch. Law, art. 9) and AUSTRIA (Exch. Law, art. 9) provision can be made against the negotiating of a bill of exchange by the words "not to order," or other equivalent words.

In HOLLAND only instruments payable to order are made negotiable by indorsement. Exch. Law, art. 133.

In HUNGARY the words "or order," after the payee's or indorsee's name, are requisite to its negotiability. Exch. Law, §§ 15, 31.

In ITALY a bill of exchange is either payable to the order of a third person or of the drawer. Code Com. art. 196.

In NICARAGUA a draft must be payable "to order" or "to indorsement." Code Com. art. 315.

In PORTUGAL bills of exchange not drawn to "order" are mere evidences of debt. Code Com. art. 425. So, too, inland bills and promissory notes. Id. 428, 437. But a letter of credit can only be made payable to a particular person, and not to order. Id. 445.

In SWEDEN and NORWAY bills of exchange are transferable without negotiable words. Exch. Law, c. 1, § 11.

¹⁷ *Huling v. Hugg*, 1 Watts & S. (Pa.) 419; *Howard v. Palmer*, 64 Me. 86; *Durgin v. Bartol*, Id. 473. And a bill drawn payable to the order of the drawer is payable to the drawer, and can be sued upon by him after its acceptance. *Smith v. McClure*, 5 East, 476; *Frederick v. Cotton*, 2 Show. 8.

¹⁸ *Davega v. Moore*, 3 McCord (S. C.) 482. But it seems that an indorsement, "pay the amount to order for my use," destroys the negotiability of a note. *Brown v. Jackson*, 1 Wash. C. C. 512, Fed. Cas. No. 2,015.

“Bearer”—Transferable by Delivery.

§ 175. Commercial paper payable to bearer is negotiable by delivery;¹⁹ and an action will lie in the name of any holder. This is true of a check as well as a bill of exchange or note.²⁰ An instrument payable to “A. or bearer” is equivalent to one made payable to A. “or order” by Alabama statute;²¹ and in general to one made payable to bearer.²² Formerly such instruments were thought not to be negotiable, because they contained no authority to make assignment.²³ They are now, however, held to be negotiable as fully as if payable to “order.”²⁴ But in some states they are assignable by indorsement only.²⁵ The word “bearer,” if used merely as description of a payee named in the instrument,—e. g. “to the bearer, A.”—adds no force, negotiable or otherwise, to the name; and the instrument is one payable to A. only, and not negotiable.²⁶

¹⁹ *Cobb v. Duke*, 36 Miss. 60. For cases on this subject, see chapter on Transfer, *infra*.

²⁰ *Keene v. Beard*, 8 C. B. (N. S.) 372.

²¹ Code, § 1761, amended 1888-89 (P. L. 111).

²² *Byles, Bills*, 85; 1 *Daniel, Neg. Inst.* 114; 1 *Edw. Bills & N.* § 194; *Grant v. Vaughan*, 3 *Burrows*, 1516; *Bullard v. Bell*, 1 *Mason*, 252, *Fed. Cas. No. 2,121*.

²³ *Chit. Bills*, 225; 1 *Daniel, Neg. Inst.* 114; *Horton v. Coggs*, 3 *Lev.* 299; *Hodges v. Steward*, 1 *Salk.* 125; *Nicholson v. Sedgwick*, 1 *Ld. Raym.* 180.

²⁴ *Chit. Bills*, 225; 1 *Edw. Bills & N.* § 194; *Bullard v. Bell*, 1 *Mason*, 252, *Fed. Cas. No. 2,121*; *Hutchings v. Low*, 13 *N. J. Law*, 246; *Tillman v. Ailles*, 5 *Smedes & M. (Miss.)* 373; *Matthews v. Hall*, 1 *Vt.* 317; *Greeneaux v. Wheeler*, 6 *Tex.* 515; *Hopkins v. Seymour*, 10 *Tex.* 202.

²⁵ *Garvin v. Wiswell*, 83 *Ill.* 215; *Rev. St. (Hurd's Ed.) c. 98, § 3*. So, too, in Ohio. *Avery v. Latimer*, 14 *Ohio*, 542; *Fallis v. Howarth*, *Wright*, 303; *Laws 1820*, p. 217. So, too, in Alabama, where, however, the statute did not extend to then existing instruments. *Sprowl v. Simpkins*, 3 *Ala.* 515. In Kansas such instruments were formerly subject to defense when transferred by indorsements. *Blood v. Northrup*, 1 *Kan.* 28. But this is now true only of indorsements after maturity (1859) *P. L.* 71; *Gen. St. c. 115, § 2*. In Illinois instruments payable to bearer may be transferred by delivery. *Rev. St. c. 98, § 8*.

²⁶ *Warren v. Scott*, 32 *Iowa*, 22.

Negotiability—Enlarged or Restricted.

§ 176. The negotiable character of an instrument, as shown upon its face, is sometimes enlarged by the terms of an indorsement. Thus, a note payable to A. "or order," being afterwards indorsed payable to B. "or bearer," is thereby rendered transferable by delivery.²⁷ But, if originally negotiable, it will not be rendered non-negotiable by a special indorsement to A. B., or to A. B. "at his own risk,"²⁸ although, in the latter case at least, the indorser would not be liable on his indorsement.²⁹ So, a negotiable note is not rendered nonnegotiable by the indorsement of a nonnegotiable guaranty upon it;³⁰ nor, e converso, is a nonnegotiable guaranty made negotiable by a negotiable indorsement.³¹ And it has been held that an agreement by the payee of a note not to sell it, indorsed on a note, is not part of it, and cannot defeat the holder's right to recover.³²

²⁷ *Shelton v. Sherfey*, 3 Iowa, 108.

²⁸ *Rice v. Stearns*, 3 Mass. 225; *Leavitt v. Putnam*, 3 N. Y. 494, reversing 1 Sandf. (N. Y.) 199.

²⁹ *Rice v. Stearns*, 3 Mass. 225.

³⁰ 2 Pars. Notes & B. 135; *Upham v. Prince*, 12 Mass. 14. And see *Taylor v. Binney*, 7 Mass. 479.

³¹ *Fell*, Guar. 298; 2 Pars. Notes & B. 133; *Hayden v. Weldon*, 43 N. J. Law, 128; *Miller v. Gaston*, 2 Hill (N. Y.) 192; *Lamourieux v. Hewit*, 5 Wend. 307; *Leggett v. Raymond*, 6 Hill (N. Y.) 639, the guarantor being held in this case as an indorser; *True v. Fuller*, 21 Pick. (Mass.) 140; *Tuttle v. Bartholomew*, 12 Mete. (Mass.) 452; *Belcher v. Smith*, 7 Cush. (Mass.) 482; *McDoal v. Yeomans*, 8 Watts (Pa.) 361. It is said, however, by Chancellor Walworth, that "a guaranty indorsed upon a negotiable note, whereby the guarantor agrees with the holder of the note that he will be answerable that the note shall be paid to him, or to his order, or the bearer thereof, when it becomes due is probably negotiable by the transfer of the note upon which it is written." *McLaren v. Watson*, 26 Wend. (N. Y.) 430. So, too, *Ketchell v. Burns*, 24 Wend. (N. Y.) 456. So, there may be a valid restriction on the face of a check, that it "will not be paid to the G. Banking Co. or its agents." *Commercial Nat. Bank of Charlotte v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524.

³² *Leland v. Parriott*, 35 Iowa, 454. But an indorsement, "This note is not transferable," has been held to destroy its negotiability. *Freidman v. Wagner*, 1 Tex. App. 734.

But, where a note payable to A. or order is assigned by delivery without indorsement, it passes subject to equities.³³

Nonnegotiable Instruments.

§ 177. A bill of exchange or other commercial instrument, as has been seen, may be made payable only to the payee named in it. In such event it is nonnegotiable, but constitutes a perfectly valid obligation between the original parties.³⁴ It is also now generally assignable at law, and always was so in equity.³⁵ And in some states, at least, the assignee of such instrument may sue upon it in his own name.³⁶ Indeed, as affecting the relation of the original parties to one another, the words "or order" are so immaterial that their omission in pleading is of no consequence.³⁷

But, in general, where words of negotiability are wanting, the indorsee or assignee takes the instrument subject to equities existing between the original parties.³⁸ In substance, therefore, the only liability of maker or drawer is what he originally assumed towards the payee named by him.³⁹ And an indorsement of a nonnegotiable instrument by the payee will not render it negotiable,⁴⁰ nor give

³³ Jones v. Witter, 13 Mass. 305.

³⁴ Byles, Bills, 85; 1 Daniel, Neg. Inst. 115; 1 Edw. Bills & N. § 199; Smlth v. Kendall, 6 Term R. 123; Rex v. Box, 6 Taunt. 325; Louisville, E. & St. L. Ry. Co. v. Caldwell, 98 Ind. 245; Corbett v. Clark, 45 Wis. 403. And it may be declared on as a note, Downing v. Backenstoos, 3 Caines (N. Y.) 137; and imports a valid consideration, Louisville Ry. Co. v. Caldwell, supra; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835.

³⁵ Halsey v. Dehart, 1 N. J. Law, 93; Maxwell v. Goodrum, 10 B. Mon. (Ky.) 286.

³⁶ Goodman v. Fleming, 57 Ga. 350. Subject, however, to any defense arising out of original want of consideration. Cohen v. Prater, 56 Ga. 203.

³⁷ Maxwell v. Goodrum, 10 B. Mon. (Ky.) 286.

³⁸ Dyer v. Homer, 22 Pick. (Mass.) 253; Sanborn v. Little, 3 N. H. 539; Wiggin v. Damrell, 4 N. H. 69.

³⁹ Hill v. Lewis, 1 Salk. 132; Hackney v. Jones, 3 Humph. (Tenn.) 612; Fernon v. Farmer, 1 Har. (Del.) 32; Warren v. Scott, 32 Iowa, 22; Reed v. Murphy, 1 Ga. 236; Hosford v. Stone, 6 Neb. 380; Maule v. Crawford, 14 Hun (N. Y.) 193; Backus v. Danforth, 10 Conn. 297; Noland v. Ringgold, 3 Har. & J. (Md.) 216.

⁴⁰ Gregg v. Johnson, 37 Tex. 558.

the indorsee an action against prior parties,⁴¹ although it will render such indorser liable to his indorsee,⁴² and will, if he use fit words in the indorsement, render him liable to all subsequent indorseees.⁴³

Without words of negotiability, a note may still, by the statute of Anne, be entitled to grace.⁴⁴ But as to this a different rule has been followed in Connecticut.⁴⁵ An omission of the words "or order" by mistake may be corrected, and in England the omitted words may be inserted without stamping the instrument afresh.⁴⁶

Sometimes commercial paper is drawn "negotiable" at a particular bank or other place. This is held to authorize payment by the bank clear of any set-off that the maker or drawer might have.⁴⁷ But making it payable and negotiable at such bank has, in general, no effect upon the question of its negotiability.⁴⁸ In Pennsylvania, however, a distinction has been made between a note "payable and negotiable without defalcation at the Kensington Bank" and one "negotiable and payable at," etc., the former being held to be nego-

⁴¹ Chit. Bills, 183; 1 Daniel, Neg. Inst. 115; Douglass v. Wilkeson, 6 Wend. (N. Y.) 637; Pratt v. Thomas, 2 Hill (S. C.) 634; Barriere v. Nairac, 2 Dall. 249; Gerard v. La Coste, 1 Dall. 194.

⁴² 1 Daniel, Neg. Inst. 115; Story, Bills, §§ 60, 199; Hill v. Lewis, 1 Salk. 132; Sweetser v. French, 13 Metc. (Mass.) 262. And see Smurr v. Forman, 1 Ohio, 272.

⁴³ Chit. Bills, 183, 226; Codwise v. Gleason, 3 Day (Conn.) 12; Josselyn v. Ames, 3 Mass. 274; Seymour v. Van Slyck, 8 Wend. (N. Y.) 421. But to give such effect, under the English stamp act, a second stamp is now necessary there. Chit. Bills, 226; Plimley v. Westley, 2 Scott, 423, 2 Bing. N. C. 249.

⁴⁴ Smith v. Kendall, 6 Term R. 123, 1 Esp. 231; Burchell v. Slocock, 2 Ld. Raym. 1545. So, too, Duncan v. Savings Inst., 10 Gill & J. (Md.) 299. And, if the maker himself put such a note in circulation elsewhere, he cannot object to its being negotiated without regard to the restriction. Wardell v. Hughes, 3 Wend. (N. Y.) 418.

⁴⁵ Backus v. Danforth, 10 Conn. 297.

⁴⁶ Chit. Bills, 183, 225; Kershaw v. Cox, 3 Esp. 246; Knill v. Williams, 10 East, 431; Cole v. Parkin, 12 East, 471.

⁴⁷ 1 Daniel, Neg. Inst. 116; 1 Edw. Bills & N. § 195. "It would be a fraud on the bank to set up offsets against the note in consequence of any transactions between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up." Marshall, C. J., in *Mandeville v. Bank*, 9 Cranch, 9.

⁴⁸ 1 Edw. Bills & N. § 195.

tiable only if negotiated at the designated bank.⁴⁹ And in Kentucky it seems that a note is commercial paper only if made payable and negotiable at a bank and negotiated there.⁵⁰

Other words and circumstances affecting the negotiability of an instrument are considered in other parts of this work. In considering the transfer of commercial paper hereafter, it will be seen that the question of continued negotiability arises upon each change of ownership, and is determined in general by the same rules which fix the original character of the paper. As used in this work, the terms "bill," "note," and "check" relate to negotiable instruments, unless nonnegotiable instruments are mentioned or clearly intended.

⁴⁹ *Raymond v. Middleton*, 29 Pa. St. 529.

⁵⁰ *Stapp v. Anderson*, 1 A. K. Marsh. (Ky.) 398. See, too, *Bell v. Morehead*, 3 A. K. Marsh. (Ky.) 158; *Jones v. Wood*, Id. 162.

II. EXPRESSION OF CONSIDERATION.

§ 178. "Value Received"—Presumption.

179. Statutes as to Consideration.

180. Effect of "Value Received"—Pleading—Evidence.

"Value Received"—Presumption.

§ 178. The words "value received" are usually found in bills of exchange and promissory notes, and sometimes in drafts, to express the consideration. In a note these words can only refer to a consideration moving from the payee to the maker.⁵¹ So, in the case of a bill of exchange payable to the order of the drawer, there can be no ambiguity, as the words can only mean value received by the acceptor from the drawer.⁵² But, in bills of exchange payable to the order of a person other than the drawer, the words may mean either a consideration moving from the payee to the drawer, or from the drawer to the acceptor. Of these meanings the former is to be preferred.⁵³

The words "value received" import a valid consideration.⁵⁴ And even in the case of a guaranty they express a consideration suffi-

⁵¹ Chit. Bills, 186; Story, Prom. Notes, § 51; Clayton v. Gosling, 5 Barn. & C. 361, 8 Dowl. & R. 110.

⁵² Byles, Bills, 88; Chit. Bills, 186; Benj. Chalm. Dig. 15; Highmore v. Primrose, 5 Maule & S. 65. And, if otherwise averred in the declaration in such case, it would be a variance. Highmore v. Primrose, *supra*.

⁵³ Byles, Bills, 88; Chit. Bills, 185; Grant v. Da Costa, 3 Maule & S. 351, Lord Ellenborough saying in this case: "It appears to me that 'value received' is capable of two interpretations, but the more natural one is that the party who draws the bill should inform the drawee of a fact which he does not know, rather than one of which he must be well aware." So, Bayley, J., in the same case: "The object of inserting the words 'value received' is to show that it is not an accommodation bill, but made on a valuable consideration given for it by the payee."

⁵⁴ Chit. Bills, 185; Holliday v. Atkinson, 5 Barn. & C. 503; Thacher v. Dinsmore, 5 Mass. 299; Delano v. Bartlett, 6 Cush. (Mass.) 364; Mandeville v. Welch, 5 Wheat. 277; Dugan v. Campbell, 1 Ohio, 115; Hill v. Todd, 29 Ill. 101; Hoyt v. Jaffray, Id. 104; Martin v. Powder Co., 2 Colo. 596; Sawyer v. Vaughan, 25 Me. 337; Stevens v. McIntire, 14 Me. 14; Thompson v. Armstrong, 5 Ala. 383; Cox v. Slade, 13 N. C. 8. So, too, in nonnegotiable

ciently to satisfy the statute of frauds.⁵⁵ But they do not, at least in a nonnegotiable note, import necessarily a cash consideration.⁵⁶ However usual, and however important they were once thought, they are at common law not essential to commercial paper,⁵⁷ and, in the absence of statutory requirements, may be safely omitted. At common law all commercial paper implies a consideration, although none be expressed by these or other words.⁵⁸ And this has been

notes. 1 Edw. Bills & N. § 202. So, too, in a contract for indemnity. *Lapham v. Barrett*, 1 Vt. 247.

⁵⁵ *Miller v. Cook*, 23 N. Y. 495; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516. And to the same effect, obiter, *Brewster v. Silence*, 8 N. Y. 207. But it is not conclusive, so as to enable the holder to recover on a naked gift to him by the guarantor. *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547. As to expression of consideration in indorsement by stranger in guaranty, see §§ 843, 875, *infra*.

⁵⁶ *Chit. Bills*, 186; *Morgan v. Jones*, 1 Tyrw. 21.

⁵⁷ *Bytes*, Bills, 87; *Chit. Bills*, 79, 184; 1 *Daniel*, Neg. Inst. 117; 1 *Edw. Bills & N.* § 202; 1 *Pars. Notes & B.* 193; *Story*, Bills, § 63; *Story*, Prom. Notes, § 51; *White v. Ledwick*, 4 Doug. 247; *Grant v. Da Costa*, 3 Maule & S. 351; *Poplewell v. Wilson*, 1 Strange, 264; *Claxton v. Swift*, 2 Show. 496; *Mackleod v. Snee*, 2 Ld. Raym. 1481; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, affirming 57 Hun, 518, 11 N. Y. Supp. 278. For an early authority to the contrary, see *Cramlington v. Evans*, 1 Show. 5. See, also, *Banbury v. Lisset*, 2 Strange, 1212; 2 Bl. Comm. 468. In GERMANY the rule is the same as in England and in the United States. *Thöl. W. R.* 143. In New Hampshire the omission of the words "value received" is said to create suspicion. *Harriman v. Sanborn*, 43 N. H. 128.

⁵⁸ *Bytes*, Bills, 87; *Chit. Bills*, 184; 1 *Daniel*, Neg. Inst. 117; 1 *Edw. Bills & N.* § 202; 1 *Pars. Notes & B.* 193; *Story*, Bills, § 63; *Story*, Prom. Notes, § 51; *Grant v. Da Costa*, 3 Maule & S. 351; *Mandeville v. Welch*, 5 Wheat. 277; *Underhill v. Phillips*, 10 Hun (N. Y.) 591; *Dean v. Carruth*, 108 Mass. 242; *Townsend v. Derby*, 2 Metc. (Mass.) 363; *Hughes v. Wheeler*, 8 Cow. (N. Y.) 83; *Goshen & M. Turnpike Road Co. v. Hurtin*, 9 Johns. (N. Y.) 217; *Kimball v. Huntington*, 10 Wend. (N. Y.) 680; *Kinsman v. Birdsall*, 2 E. D. Smith (N. Y.) 395; *Carnwright v. Gray*, *supra*; *Hook v. Pratt*, 78 N. Y. 371; *Hubble v. Fogartie*, 3 Rich. (S. C.) 413; *Kendall v. Galvin*, 15 Me. 131; *Hanley v. Lang*, 5 Port. (Ala.) 154; *Matlock v. Livingston*, 9 Smedes & M. (Miss.) 480; *Murry v. Clayborn*, 2 Bibb (Ky.) 300; *Peasley v. Boatwright*, 2 Leigh (Va.) 195; *People v. McDermott*, 8 Cal. 288; *Cook v. Gray*, Hemp. 84, Fed. Cas. No. 3,156a. Especially if the consideration be expressed by other equivalent words, *Bourne v. Ward*, 51 Me. 191. And a note without such words may be given in evidence under the money counts. *Townsend v.*

held true even in the case of a note delivered in a sealed envelope with request that it be not opened until the maker's death, and indorsed with the words, "Please accept this from your true friend, A. B." ⁵⁹ Consideration is in like manner implied between indorsee and maker. ⁶⁰

But in the absence of such words no consideration is imported for the signature of a new maker added to the note after its delivery. ⁶¹ Nor does the rule apply, in Pennsylvania, to a sealed order for money. ⁶² And it appears to be confined in some states to negotiable paper; ⁶³ while in Iowa all written contracts import a consideration, if signed by the maker. ⁶⁴ And the common-law rule on this subject is changed by statute in some of the United States. ⁶⁵

Derby, 3 Metc. (Mass.) 363. Even where the statute requires the consideration of a guaranty to be expressed, a guaranty without such expression indorsed on a note not containing the words "value received" is sufficient. *Moses v. Bank*, 149 U. S. 298, 13 Sup. Ct. 900.

⁵⁹ *Dean v. Carruth*, 108 Mass. 242. But see, contra, *Harris v. Clark*, 3 N. Y. 93.

⁶⁰ *Mason v. Buckmaster*, 1 Ill. 27.

⁶¹ *Courtney v. Doyle*, 10 Allen (Mass.) 122; *Clopton v. Hall*, 51 Miss. 482. And even where the note contains the words "value received," if a new promisor signs it after its delivery, there must be evidence of a fresh consideration. *Green v. Shepherd*, 5 Allen (Mass.) 589.

⁶² *Sidle v. Anderson*, 45 Pa. St. 464.

⁶³ Thus, in Massachusetts, an order payable to bearer, with no drawer named, was held not to import a consideration. *Ball v. Allen*, 15 Mass. 433. So, in Connecticut, as to nonnegotiable instruments, *Edgerton v. Edgerton*, 8 Conn. 6; but not if the instrument be negotiable, *Bristol v. Warner*, 19 Conn. 7; *Camp v. Tompkins*, 9 Conn. 545.

⁶⁴ *Jones v. Berryhill*, 25 Iowa, 289.

⁶⁵ In ARKANSAS no assignment of a promissory note need set forth the consideration. Sand. & H. Dig. § 498. The words "value received" are, however, necessary to the recovery of certain statutory damages. Sand. & H. Dig. § 482. In CALIFORNIA every signature on a negotiable instrument "is presumed to have been made for a valuable consideration." Civ. Code, § 3104. Likewise in WYOMING (Rev. St. c. 70, § 16) and NORTH DAKOTA (Rev. Code, § 4867). In MISSOURI the words "value received" must be expressed in a negotiable note. Rev. St. § 733. So, too, *Beatty v. Anderson*, 5 Mo. 447; *Macy v. Kendall*, 33 Mo. 164; *Stix v. Mathews*, 63 Mo. 371; *Bailey v. Smock*, 61 Mo. 213. In NORTH CAROLINA negotiable instruments need not be expressed to be for "value received." Code, § 41. So, COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 6), NEW YORK and MARYLAND (§

Statutes as to Consideration.

§ 179. The English statutes providing for the protest of inland bills of exchange relate only to bills "for value received," but it seems that protest of inland bills was, and still is, unnecessary; and their force, in other respects, remains unaltered by the statutes above referred to.⁶⁶ The coal act formerly required, under a penalty, that certain notes should contain the words "value received in coals"; but it seems that such notes were not rendered invalid by the omission of the words.⁶⁷ And many foreign statutes require a particular statement of the consideration both in the bill and in the indorsement.⁶⁸ So, in the United States it is often required that notes or bills given for a patent right shall express that fact.⁶⁹

25), by the Negotiable Instrument Law. In PENNSYLVANIA the act of 1797 (Purd. Dig. p. 1731, § 1) requires negotiable notes "bearing date in the city or county of Philadelphia" to be expressly "for value in account or for value received."

⁶⁶ Chit. Bills, 375; Byles, Bills, 87; 3 & 4 Anne, c. 9, § 4; 9 & 10 Wm. III. c. 17, § 1.

⁶⁷ 3 Geo. II. c. 26, §§ 7, 8, now repealed; *Wigan v. Fowler*, 1 Starkie, 463.

⁶⁸ The consideration (e. g. value received, for account, etc.), as also the kind of consideration, must be expressed in bills, indorsements, and notes by the Code Napoleon (sections 110, 137, 188), which is in force in FRANCE, BELGIUM, GREECE, HAYTI, SAN DOMINGO, and TURKEY. For the origin and construction of these provisions in France, see Bedarride, *Droit Commercial*, vol. 1, pp. 112, 458. The law is similar in BOLIVIA (Code Com. art. 362) and in ITALY (Code Com. art. 196; and, in indorsements, article 223). So, too, in BRAZIL (Code Com. arts. 354, 359), where a statement is also required of the person from whom it was received in case of indorsement, and without such statement of consideration the indorsement is merely a power to collect (*Id.* 361), although a blank autograph indorsement, properly dated, will imply both consideration and transferability (*Id.* 362). In CHILI (Code Com. arts. 633, 658, 660) both bill or note and indorsement must contain like statement of consideration, and without it the indorsement amounts, not to a transfer, but only to a power to collect. So, drafts and notes must contain such statement. *Id.* 771. In HOLLAND the value, and whether received or to account, must be expressed in bills (*Exch. Law* 1838, art. 100) and notes (*Id.* 208), but not in drafts (*Id.* 210). In HUNGARY it is unnecessary, but may be added without harm. *Law* of 1860, § 16. In MEXICO the consideration, its kind and manner of payment, must be expressed in bills, drafts, notes, and indorsements. Code

⁶⁹ See § 86, *supra*.

Effect of "Value Received"—Pleading and Evidence.

§ 180. The words "value received" are not in general essential to the negotiability of a bill of exchange or promissory note.⁷⁰ But

Com. §§ 223, 360, 447. So, too, in NICARAGUA (Code Com. arts. 241, 261) as to bills and their indorsement,—the indorsement without such expression amounting only to a power to collect. The expression "for value agreed" or "to account" makes the acceptor liable to the drawer. In SPAIN (Code Com. art. 426) the consideration, its kind, and from whom received, and whether received or on account, must be expressed both in bills, indorsements of bills (Id. 467), and drafts and notes (Id. 563); and, if for value agreed or to account, the payee is *prima facie* liable therefor to the drawer (Id. 428). So in COLOMBIA (Code Com. arts. 384, 386, 424, 517), COSTA RICA (Code Com. arts. 373, 375, 414, 510), ECUADOR, and SALVADOR (Code Com. arts. 381, 421, 510). In URUQUAY (Code Com. art. 822) a statement as to consideration, and from whom it proceeds, is only required in indorsements, but a blank indorsement implies consideration (Id. 823). The expressions, "value as agreed," "value to account," are *prima facie* evidence of the acceptor's liability to the drawer. Id. 793. In VENEZUELA bills, drafts, notes, and indorsements must express the consideration, and how it is received or to be accounted for (Code Com. arts. 1, 34, and Law 2, art. 1), and in the absence of such expression an indorsement has only the force of a power to collect (Id. 36). The consideration must be expressed in bills of exchange and indorsements, as well as from whom it proceeds, and in what form, and whether received or to account, in HONDURAS, GUATEMALA, and PARAGUAY. Ord. Bilbao, c. 13, §§ 2, 3. The statement of "value received" is not necessary to the regularity of a bill of exchange in the ARGENTINE REPUBLIC (Code Com. art. 779); its absence having no effect on third persons, and its expression serving only to show *prima facie* the relation between the drawer and acceptor. In PERU the consideration, its kind, and how received or to be accounted for, must be expressed in bills (Code Com. art. 381), indorsements (Id. 425), drafts, and notes (Id. 522); and if for value agreed, or to account, the acceptor is *prima facie* liable therefor to the drawer (Id. 384). In PORTUGAL the consideration, and whether it has been received or is to be accounted for, must be expressed by the words, "value received," "value to account," in bills of exchange (Code Com. art. 321), promissory notes (Id. 424, 426), and indorsements (Id. 355); and in indorsements it must also appear if the consideration proceeds

⁷⁰ *White v. Ledwick*, 4 Doug. 247; *Cresswell v. Crisp*, 2 Crompt. & M. 634; *Bristol v. Warner*, 19 Conn. 7; *Coursin v. Ledlie*, 31 Pa. St. 506; *Hubble v. Fogartie*, 3 Rich. (S. C.) 413; *Kendall v. Galvin*, 15 Me. 131; *Noyes v. Gilman*, 65 Me. 589; *Clarke v. Marlow* (Mont.) 50 Pac. 713.

they are required by statute in Missouri.⁷¹ And they are also necessary in Missouri to the recovery of the statutory damages on a bill of exchange.⁷² As the want of such words does not in general affect the negotiability of an instrument, so a full statement of the consideration of a negotiable instrument does not affect its negotiability.⁷³ And it is now well settled that an action of "debt" lies upon an instrument without such words.⁷⁴

In declaring upon a bill of exchange or note, no averment is necessary that it contains the words "value received" or their equivalent.⁷⁵

from a third person (Id. 355), but value is implied in a blank indorsement, if signed and dated (Id. 356). Except as above executed, an indorsement is merely a power to collect (Id. 357), and a promissory note merely evidence of debt (Id. 426). In RUSSIA the consideration and kind of consideration must be stated in bills and notes (Exch. Law, art. 541) and in indorsements (Id. 559), and the person from whom it proceeds may be added in the latter case. In DENMARK "value received" is only prima facie evidence of consideration. Exch. Law, § 5. It must also appear in the indorsement, and whether received or to account; and an acknowledgment of consideration, without specifying its nature, implies cash. Id. § 12. In LOWER CANADA the words "value received" are but prima facie evidence of that fact, and, if omitted, the instrument is not thereby invalidated. Civ. Code, § 2285.

⁷¹ Lowenstein v. Knopf, 2 Mo. App. 159; International Bank v. German Bank, 3 Mo. App. 362; Bailey v. Smock, 61 Mo. 213; Rev. Code Mo. p. 104, § 2; Austin v. Blue, 6 Mo. 265; Beatty v. Anderson, 5 Mo. 447. Otherwise it is nonnegotiable, under Rev. St. § 547; Hart v. Wire Co., 91 Mo. 414, 4 S. W. 123; Savings Bank of Kansas v. National Bank of Commerce, 38 Fed. 800; but is still a valid bill, with prima facie consideration, Taylor v. Newman, 77 Mo. 257. And this statute does not apply to checks. Famous Shoe & Clothing Co. v. Crosswhite, 124 Mo. 34, 27 S. W. 397.

⁷² Rev. Code 1835, p. 298, § 7; Riggs v. City of St. Louis, 7 Mo. 438.

⁷³ Doherty v. Perry, 38 Ind. 15; Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995; Clanin v. Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35.

⁷⁴ Byles, Bills, 88; Chit. Bills, 185; Story, Prom. Notes, § 52; Watson v. Kightley, 11 Adol. & E. 702, 3 Perry & D. 408; Hatch v. Traves, Id. Although this was formerly questioned. Bishop v. Young, 2 Bos. & P. 78; Priddy v. Henbrey, 3 Dowl. & R. 165, 1 Barn. & C. 674.

⁷⁵ Byles, Bills, 88; Chit. Bills, 185, 637; 1 Daniel, Neg. Inst. 118; 1 Edw. Bills & N. § 202; Story, Bills, § 63; Coombs v. Ingram, 4 Dowl. & R. 211; Bond v. Stockdale, 7 Dowl. & R. 140; Underhill v. Phillips, 10 Hun (N. Y.) 591; Rector v. Fornier, 1 Mo. 204; Richmond v. Patterson, 3 Ohio, 368. But see, contra, Rossiter v. Marsh, 4 Conn. 196. And where the words "for value received" in the declaration "were used and intended for a description of the

And, in declaring upon an assignment of a note, the averment that it contains such words is immaterial, and need not be proved.⁷⁶ But, if a note has been assigned without recourse, the declaration should aver that the assignment was for a valuable consideration.⁷⁷ As averment of these words is immaterial in a declaration, so a plea averring their absence is immaterial, and will not support a conviction for perjury.⁷⁸ It follows from what has been already said that an averment in a declaration that the note was "for value received" is sustained by proof of a note not containing those words, but reciting the particular consideration.⁷⁹

Notwithstanding the words "value received," a want of consideration may be proved between the original parties.⁸⁰ And it has even been held that, where a note purported to be "for commission due for business transacted for" the maker, the maker might show, at suit of the payee, that the real consideration was services to be there-

note declared on, and not as an averment inserted by the pleader," proof of a note without such words has been held to constitute a variance. *Saxton v. Johnson*, 10 Johns. (N. Y.) 418.

⁷⁶ *Wilson v. Codman*, 3 Cranch, 193.

⁷⁷ *Welch v. Lindo*, 7 Cranch, 159.

⁷⁸ *People v. McDermott*, 8 Cal. 288.

⁷⁹ *Byles, Bills*, 88; *Coombs v. Ingram*, 4 Dowl. & R. 211; *Bond v. Stockdale*, 7 Dowl. & R. 140; *Bingham v. Calvert*, 13 Ark. 399. And this is true, also, of a declaration on a bond. *James v. Scott*, 7 Port. (Ala.) 30. But, where a special and particular consideration is averred in the declaration, it should be proved. *Infra*.

⁸⁰ *Byles, Bills*, 88; *Chit. Bills*, 80; *Benj. Chalm. Dig.* 15; 1 *Edw. Bills & N.* § 202; 1 *Pars. Notes & B.* 194; *Story, Prom. Notes*, § 51; *Whitaker v. Edmunds*, 1 *Adol. & E.* 638; *Abbott v. Hendricks*, 1 *Man. & G.* 796, 2 *Scott, N. R.* 183; *Holliday v. Atkinson*, 5 *Barn. & C.* 503; *Hill v. Buckminster*, 5 *Pick. (Mass.)* 391; *Parish v. Stone*, 14 *Pick. (Mass.)* 198; *Thacher v. Dinsmore*, 5 *Mass.* 299; *Schoonmaker v. Roosa*, 17 *Johns. (N. Y.)* 301; *Litchfield v. Falconer*, 2 *Ala.* 280; *Snyder v. Jones*, 38 *Md.* 542; *Raymond v. Sellick*, 10 *Conn.* 479; *Sawyer v. Vaughan*, 25 *Me.* 337; *Stevens v. McIntire*, 14 *Me.* 14; *Russell v. Hall*, 8 *Mart. N. S. (La.)* 558. See, too, *Hill v. Wilson*, 42 *Law J. Ch.* 817. But see, *contra*, *Bowers v. Hurd*, 10 *Mass.* 427, where it was held that the maker's representative was estopped from denying the admissions as to consideration. This case must now be considered as overruled. In *Ridout v. Bristow*, 1 *Crompt. & J.* 231, 1 *Tyrw.* 84, however, an administratrix, having been given a note "for value received from my late husband," was held to be estopped from showing that the note was given only for indemnity against another contract.

after performed, which never had been performed.⁸¹ So, a maker may set up usury notwithstanding the words "value received."⁸² As, however, all commercial paper imports a consideration, it follows that in all cases where want of consideration is made a defense the burden of proof is on the defendant.⁸³

Defenses as to the consideration of a bill or note, and its sufficiency, legality, or failure, as well as the admissibility of such defenses and the presumptions made, and evidence required by law in such cases, are more particularly considered in a later chapter of this work.

⁸¹ *Abbott v. Hendricks*, 1 Man. & G. 791, 2 Scott, N. R. 183. In this case it is said by Tindall, C. J.: "The distinction seems to be this: You may show either that there was no consideration for the contract, or that it has failed; but you cannot set up a different contract, for that is contrary to the general principles of the law. As a defendant may prove, where 'value received' is expressed in a note, that there was no consideration, so, where a special consideration is stated, I think he is at liberty to show that it has failed." So, Maule, J.: "The cases show that, although a consideration is stated in the note, you may prove that it was given for a different consideration, or without any consideration at all."

⁸² *Clark v. Sisson*, 22 N. Y. 312.

⁸³ *Chit. Bills*, 80; *Story, Prom. Notes*, § 181; *Kinsman v. Birdsall*, 2 E. D. Smith, 395; *Greer v. George*, 8 Ark. 131; *Ware v. Kelly*, 22 Ark. 441; *Jerome v. Whitney*, 7 Johns. (N. Y.) 321. But if the plaintiff, in his declaration, avers a special and particular consideration, he must prove it. *Jerome v. Whitney*, *supra*; *Knill v. Williams*, 10 East, 431.

III. BLANKS.

- § 181. Blanks—Power to Fill.
- 182. Omissions not Blanks.
- 183. When Blank must be Filled.
- 184. Blanks in Sealed Bonds and Notes.
- 185. *Particular Blanks*—Signature—Party's Name.
- 186. — Date—Time and Place of Payment—Rate of Interest.
- 187. — Amount—Authority Exceeded.
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- 189. American and Foreign Statutes.

Blanks—Power to Fill.

§ 181. The leaving of blanks in a contract, and the delivery of the instrument with such blanks, create an agency in the receiver and his assigns to fill the blanks in the way agreed upon or contemplated by the maker; and any departure from this agreement will defeat the right of such original holder to recover upon the instrument. The maker has, however, held out the agent to others as clothed with general powers, and cannot set up against a bona fide holder for value that his authority has been overstepped by the agent.⁸⁴

The authority to fill a blank in such case is derived wholly, as will be seen, from the implied agency created by the maker's act in putting the paper into circulation. Without voluntary delivery,—as, for instance, where the instrument has been stolen before its completion,—even a bona fide holder has no authority to bind the maker by filling the blanks.⁸⁵ The delivery of a bill of exchange,

⁸⁴ *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567. In general, where the authority has been exceeded, it will be cured by subsequent ratification. *Bremner v. Fields* (Tex. Civ. App.) 34 S. W. 447.

⁸⁵ *Baxendale v. Bennett*, 3 Q. B. Div. 525; *Ledwich v. McKim*, 53 N. Y. 307. In the latter case this distinction is made very clear in the language of Folger, J. (page 314): "The implied authority is found in the fact of delivery for use. For as it is not to be presumed that the delivery for use was meant to be a nugatory and unavailing act, and as it is apparent that it would be if the instrument may not be perfected before put to use, the law implies an intention, and hence an authority, that he to whom it is thus delivered may supply all needs for making it a perfect and binding negotiable instrument. But this authority is not implied from the fact alone that the paper is in hands

note, or check with a blank left by the maker or drawer in any part of it implies an authority to the holder to fill it as he may please, unless there are restrictions apparent on the face of the instrument.⁸⁶ And the writing of an acceptance on a piece of blank stamped paper has been held sufficient evidence of authority to draw a bill for the amount covered by the stamp.⁸⁷ In like manner, a note may be

other than those of him who is to be bound, but from that fact joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation. * * * No authority has been cited which decides that the maker of an instrument, negotiable but for some lack susceptible of being supplied, so that it is yet imperfect, who has not by his own act, or by the act of another authorized or confided in by him, put it in circulation, confers a power upon even a bona fide holder to supply that lack. He must have been himself instrumental in its leaving his possession and control and passing into that of another, and have been so with the purpose of its becoming effectual for circulation, or with some trust in the person to whom committed, before he can be held liable. He must in some way, and for some purpose, have created an agency in some one to act with or to hold the paper; and, to find an authority in a subsequent holder to make perfect the imperfect paper, this agency must first be established." And see, as to blank checks left by the drawer with the drawee's cashier, and fraudulently used by him four years afterwards, *Daniels v. Bank*, 92 Hun, 450. 38 N. Y. Supp. 580.

⁸⁶ *Byles*, Bills, 89; *Chit. Bills*, 38; 1 *Daniel*, Neg. Inst. 145; 1 *Edw. Bills & N.* §§ 88, 91; 1 *Pars. Bills & N.* 33, 115; *Story*, Bills, § 53; *Story*, Prom. Notes, § 10; *Collis v. Emett*, 1 H. Bl. 313; *Ives v. Bank*, 2 Allen (Mass.) 236; *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 373; *Aiken v. Cathcart*, 3 Rich. Law (S. C.) 133; *Bank of Pittsburg v. Neal*, 22 How. 96; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93; *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Doll*, 54 N. Y. 234; *Witte v. Williams*, 8 S. C. 290; *Young v. Ward*, 21 Ill. 223; *Griggs v. Howe*, 31 Barb. (N. Y.) 100; *Abbott v. Rose*, 62 Me. 194; *Bank of Commonwealth v. Curry*, 2 Dana (Ky.) 142; *Bank of Kentucky v. Garey*, 6 B. Mon. (Ky.) 626; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 537; *Armstrong v. Harshman*, 61 Ind. 52; *Goodman v. Simonds*, 20 How. 343; *Green v. Kennedy*, 6 Mo. App. 577; *McArthur v. McLeod*, 51 N. C. 475; *National Exch. Bank v. White*, 30 Fed. 412; *Market & Fulton Nat. Bank v. Sargent*, 85 Me. 349, 27 Atl. 192.

⁸⁷ *Montague v. Perkins*, 22 Law J. C. P. 187. Even though the bill was not drawn until twelve years afterwards. *Id.* And the authority to fill up such a blank bill extends to the administrator of the original holder. *Seard v. Jackson*, 34 Law T. (N. S.) 65. But the holder of such blank acceptance cannot fill up the blank left for the drawer's signature after he has notice of the

written over a blank signature given for that purpose.⁸⁸ So, too, an indorsement on blank paper authorizes the drawing of a promissory note to the order of such indorser.⁸⁹ And the same authority is implied from a blank indorsement on a printed note blank.⁹⁰ In such cases it is immaterial whether a negotiable or nonnegotiable note be written on the blank paper.⁹¹

But if a blank bill form is signed by any one, and afterwards filled out as a note, the maker will not be liable on it at suit of the person who has filled it up.⁹² Where a paper is negligently signed by one who mistakes it for a contract of different character, he will be liable on a note afterwards filled out above his signature.⁹³ But where

absence of authority from the acceptor to do so. *Hogarth v. Latham*, 26 Wkly. Rep. 388, 3 Q. B. Div. 643.

⁸⁸ *Patton v. Shanklin*, 14 B. Mon. (Ky.) 13. But, so far as concerns the interest clause in such a note, no authority will be implied for more than legal interest, and the excess cannot be recovered. *Id.* But such paper cannot be sealed and filled up as a bond. *Manning v. Norwood*, 1 Ala. 429; *Smith v. Carder*, 33 Ark. 709.

⁸⁹ 1 Edw. Bills & N. § 88; 1 Pars. Bills & N. 114; *Story, Prom. Notes*, §§ 10, '37; *Violett v. Patton*, 5 Cranch, 151; *Moody v. Threlkeld*, 13 Ga. 55; *Young v. Ward*, 21 Ill. 223; *Bradford Nat. Bank v. Taylor*, 75 Hun, 297, 27 N. Y. Supp. 96; *Ferguson v. Childress*, 9 Humph. (Tenn.) 382. Or to the maker's own order, *Binney v. Bank*, 150 Mass. 574, 23 N. E. 380; although the signer may have intended to be bound only as a surety, *Moody v. Threlkeld*, *supra*; or although his conditions have been violated by the agent in filling and delivering the note, *First Nat. Bank v. Compo-Board Mfg. Co.*, 61 Minn. 274, 63 N. W. 731.

⁹⁰ *Russel v. Langstaffe*, 2 Doug. 514; Lord Mansfield in this case declaring such indorsement to be "a letter of credit for an indefinite sum."

⁹¹ 1 Daniel, Neg. Inst. 149; *Orrick v. Colston*, 7 Grat. (Va.) 189; *Douglass v. Scott*, 8 Leigh (Va.) 43; *Spitler v. James*, 32 Ind. 202.

⁹² *Luellen v. Hare*, 32 Ind. 211. And see, as to suit by a bona fide holder, *Mahaiwe Bank v. Douglass*, 31 Conn. 170. See, too, for implied ratification of such act, *Ward v. Williams*, 26 Ill. 447. And it has been held in Alabama that one signing a blank paper for the purpose of having a bond written over his signature was not bound, even to a bona fide holder, for a promissory note fraudulently written instead of the bond. *Nance v. Lary*, 5 Ala. 370.

⁹³ *Ross v. Doland*, 29 Ohio St. 473. And where a person signed eight blank bills of exchange, intended for first and second parts of four separate bills, the second parts being marked, "Second of exchange, first unpaid," he is liable to a bona fide holder if all are filled up and negotiated as distinct bills for different amounts. *Bank of Pittsburgh v. Neal*, 22 How. 96. As to negli-

a name was written on a blank piece of paper for a different purpose,—e. g. to show its spelling,—and the paper was carried off against the will of the signer, and filled up with a promissory note, it will not bind the signer for want of a valid delivery.⁹⁴ There must in every such case be circumstances from which an intention to make a bill or note can be implied.

Omissions not Blanks.

§ 182. This power, moreover, only extends to cases where a blank has been left in the instrument, and does not include any authority to make additions.⁹⁵ Thus, a place of payment cannot be inserted

gence in leaving blank space by which amount may be increased, see § 187. *infra*.

⁹⁴ 1 Pars. Bills & N. 114; *Cline v. Guthrie*, 42 Ind. 227. So, too, where the name was written to identify a signature, the note fraudulently written over it was held to be a mere forgery. *Caulkins v. Whisler*, 29 Iowa, 495. So, too, where the signature is procured by fraudulent misrepresentation of the character of the paper signed, the signer not being guilty of negligence. *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477; *Walker v. Ebert*, 29 Wis. 194. But see *Breckenridge v. Lewis*, 84 Me. 349. 24 Atl. 864, where a bona fide holder was allowed to recover on a note fraudulently written over a blank signature which had been given to an agent to enable him to withdraw money from a savings bank.

⁹⁵ 1 Daniel, Neg. Inst. 147; *McGrath v. Clark*, 56 N. Y. 34. So, *Coburn v. Webb*, 56 Ind. 100, where "after maturity" was added to the interest clause without authority. *Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134. So, the addition of "bearing ten per cent. interest after maturity," *Ivory v. Michael*, 33 Mo. 398; *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274; or simply of the words "with interest," *Waterman v. Vose*, 43 Me. 504; *Farmers' Nat. Bank v. Thomas*, 79 Hun, 595, 29 N. Y. Supp. 837; *Kountz v. Hart*, 17 Ind. 329. See, too, *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Morehead v. Bank*, 5 W. Va. 74. So, an addition of the words "or his order" in a space inadvertently left after the payee's name is a material alteration. *Bruce v. Westcott*, 3 Barb. (N. Y.) 374. So, in *Ives v. Bank*, 2 Allen (Mass.) 236, the following note was held to express a time of payment, and the insertion of the words in brackets were held to be an addition which avoided the note: "Brooklyn, Sept. 20. [Three months] after date I prom. to pay Dec. 23," etc. But where an addition similar to that in *Ivory v. Mitchell*, *supra*, was subsequently erased in a public manner, it was held not to avoid the note. *Shepard v. Whetstone*, 51 Iowa, 457, 1 N. W. 753.

where none has been named nor any blank left for it.⁹⁶ And the words "with interest at," in a printed form, constitute no blank, and authorize no insertion of a rate of interest.⁹⁷ In like manner, a blank implies no authority to make an erasure;⁹⁸ or to fill in an unusual provision, such as a waiver of appraisement.⁹⁹ But, as we have seen, the instrument written in the blank may be made either negotiable or nonnegotiable. And, if made negotiable in disregard of a verbal agreement to the contrary, it will still bind the maker in the hands of a bona fide holder for value.¹⁰⁰ And where, as in

⁹⁶ *Morehead v. Bank*, 5 W. Va. 74. And such addition is prima facie an alteration. *Simpson v. Stackhouse*, 9 Pa. St. 186; and is a material alteration, *McCoy v. Lockwood*, 71 Ind. 319. But after the printed words, "Payable at," a place of payment may be inserted. *Marshall v. Drescher*, 68 Ind. 359. So, before and after the word "at," as against a bona fide holder. *Cason v. Bank*, 97 Ky. 487, 31 S. W. 40. But see, contra, that the word "at" in a printed note does not constitute a blank to be filled, *Cronkhite v. Nebeker*, 81 Ind. 319.

⁹⁷ *Holmes v. Trumper*, 22 Mich. 427. So, a clause reading, "with — per cent. attorney's commissions if collected," does not authorize any insertion, without a special agreement therefor, and leaves the note nonnegotiable. *Johnston v. Speer*, 92 Pa. St. 227. So, "with interest at the rate of 1¼" (the latter words being disregarded). *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369.

⁹⁸ 1 Daniel, Neg. Inst. 147; *Mahaiwe Bank v. Douglass*, 31 Conn. 170. And where the drawer fills up the amount in several parts of a bill marked "first," "second," etc., and delivers them with blanks for date, drawee, and payee, an alteration into distinct bills by erasure of the words "first," "second," and insertion of the word "only," made by the acceptor, avoids them, so that an accommodation indorser cannot recover against the drawer without proving his authority for the alteration. *Fontaine v. Gunter*, 31 Ala. 258. A bona fide holder may, however, strike out indorsements. *Moore v. Maple*, 25 Ill. 341. But he cannot strike out an indorser's name, and insert it in a blank acceptance, without discharging a co-indorser who had signed the instrument before the alteration. *Mahone v. Bank*, 17 Ga. 111.

⁹⁹ *Holland v. Hatch*, 11 Ind. 497. In Ohio, however, the same addition was held to be an immaterial alteration, and rejected as surplusage leaving the bill valid. *Holland v. Hatch*, 15 Ohio St. 464. See, too, *McCoy v. Lockwood*, 71 Ind. 319. But filling a blank note up as a *joint and several* obligation is no ground of defense. *Bank of Limestone v. Penick*, 5 T. B. Mon. (Ky.) 25. One who signs a blank paper, however, as surety, does not thereby authorize the principal to write a note above it, and add his own signature, and add seals to both signatures, and is not bound by such instrument. *Smith v. Carder*, 33 Ark. 709.

¹⁰⁰ *Orrick v. Colston*, 7 Grat. (Va.) 189; *Douglass v. Scott*, 8 Leigh (Va.) 43; *Spitler v. James*, 32 Ind. 202. So, *Gillaspie v. Kelley*, 41 Ind. 158, filling in

Ohio, a seal is immaterial, and the blank is properly filled, but an unauthorized seal is added, this exceeding of authority will not vitiate the instrument.¹⁰¹ It may be added that the presumption of authority to fill a blank extends to the case of a partnership note made by one member of a firm.¹⁰²

When Blank must be Filled.

§ 183. It is laid down as a general rule that a blank must be filled within a reasonable time, what is reasonable being a question of fact for the jury to determine.¹⁰³ The blank may be filled after the instrument has been transferred by indorsement;¹⁰⁴ or even after its maturity;¹⁰⁵ or after the drawer has become insolvent;¹⁰⁶ or at the time of the trial.¹⁰⁷ In fact, title vests by a blank indorsement, even though it be not filled up before judgment

the name of bank left blank for place of payment, and thereby making the note negotiable. But adding words, where no blank is left for them, which make a note payable at a certain bank, and thereby render it negotiable, constitutes a material alteration. *Morehead v. Bank*, 5 W. Va. 74.

¹⁰¹ *Fullerton v. Sturges*, 4 Ohio St. 530. But in Alabama the unauthorized addition of a seal to the signature on a blank piece of paper, and the filling up and delivery of it as a bond, do not render the maker liable. *Manning v. Norwood*, 1 Ala. 429. So, too, in Arkansas. *Smith v. Carder*, 33 Ark. 709.

¹⁰² *Chemung Canal Bank v. Bradner*, 44 N. Y. 680.

¹⁰³ *Temple v. Pullen*, 8 Exch. 389; *Benj. Chalm. Dig.* 24. But in *Montague v. Perkins*, 22 Law J. C. P. 187, filling the blank after 12 years was held to bind the acceptor in blank.

¹⁰⁴ *Armstrong v. Harshman*, 61 Ind. 52.

¹⁰⁵ *Farmers' & Mechanics' Bank v. Horsey*, 2 Houst. (Del.) 385.

¹⁰⁶ *Fetters v. Bank*, 34 Ind. 251. But in *Temple v. Pullen*, 8 Exch. 389, where a blank signature on a note stamp was given before, but not filled up until after, bankruptcy, it was held to constitute a cause of action arising after the bankruptcy, and not discharged thereby. In *Ex parte Bartlett*, 3 De Gex & J. 378, however, a blank acceptance was admitted to proof against a bankrupt, although the bill had been drawn after the bankruptcy. And see, too, *Abrahams v. Skinner*, 12 Adol. & E. 763.

¹⁰⁷ *Croskey v. Skinner*, 44 Ill. 321. Or, if the plaintiff shows himself at the trial entitled to fill such blank, the actual filling up may be dispensed with. *Weston v. Myers*, 33 Ill. 424. So, a blank indorsement may be filled at the trial. *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 388; *Whiteford v. Burekmyer*, 1 Gill (Md.) 127.

rendered.¹⁰⁸ It is said, however, that a bill of exchange with blank for payee's name is no bill until filled up, and it must therefore be filled before recovery can be had on the instrument.¹⁰⁹ But, when once filled up, it relates back to the time of its delivery. Thus, a bill delivered in Bavaria with blanks which were afterwards filled up in London is a foreign, and not an inland, bill.¹¹⁰

Authority to fill a blank left by the maker ends in general with the maker's life.¹¹¹ The rule is, however, different in the case of a

¹⁰⁸ *Rees v. Bank*, 5 Rand. (Va.) 326.

¹⁰⁹ *Greenhow v. Boyle*, 7 Blackf. (Ind.) 56. See, however, *Weston v. Myers*, 33 Ill. 424; *Wood v. Wellington*, 30 N. Y. 218.

¹¹⁰ *Barker v. Sterne*, 9 Exch. 684; *Snaith v. Mingay*, 1 Maule & S. 87. But see *Temple v. Pullen*, supra; *Goldsmid v. Hampton*, 5 C. B. (N. S.) 94; also, *Abrahams v. Skinner*, 12 Adol. & E. 763, where the blank bill was stamped in a manner sufficient at the time the acceptance was signed, and insufficient at the time it was filled up, and this was held to be bad; *Lord Denman, C. J.*, saying of *Snaith v. Mingay*: "That case has not, that we are aware of, been questioned, nor do we intend to dispute its authority. At the same time we cannot but say that the doctrine of relation, which is in no case to be favored, appears to us to be fraught with peculiar difficulties when applied to bills of exchange. The difficulty in the present case may be said to be owing to an unusual circumstance,—the change of stamp; but under the most ordinary circumstances it is calculated to introduce very embarrassing questions, highly unfavorable to the free and easy negotiation of these instruments, if any doctrine of law prevails which makes the requisite amount of stamp, or the period of maturity, uncertain. Leaving, however, that decision untouched, it appears to us that there is a substantial distinction between a blank drawing and a blank acceptance, as regards the doctrine of relation. The party who, with the intention of drawing a bill, writes his name at the bottom of the paper, does a part of the act of drawing; and when another person, by his authority, at a subsequent period fills in, above, the sum and date and the time of currency, he does but complete the act which the party had begun. When completed, it is all one act; and there is nothing unreasonable, in the absence of evidence of any contrary intention, in holding that the act shall date from the time when the most important part of the bill was written. But the drawing and acceptance of a bill are two distinct acts. The latter is not essential to the completeness of the instrument. It may never be done at all, and when done there is no necessity for their being concurrent in point of time, no reason for considering them so in legal effect, and of course none for holding that acceptance should draw back to itself, by relation, the time of drawing the bill, where in fact it has preceded it."

¹¹¹ *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Canal & C. St. R. Co. v. Succession of Armstrong*, 27 La. Ann. 433. At least, where the blank bill or

blank acceptance coupled with an interest.¹¹² And a blank date may be filled after the death of one of the makers of a partnership note.¹¹³ So, too, the amount of a partnership note left blank may be filled after the dissolution of the firm, the payee not having had notice of that fact.¹¹⁴

Blanks in Sealed Bonds and Notes.

§ 184. It has been generally held, both in this country and in England, that a blank left in a sealed instrument, which at common law was not negotiable, could not be filled after delivery under any such authority as we have seen to be implied by law in the case of commercial paper.¹¹⁵ And this is still the rule wherever the old legal distinctions between sealed and unsealed instruments are maintained. The case of *Texira v. Evans*, in which the contrary was held, has been overruled in England, and very generally disapproved in this country.¹¹⁶ It has been held, however, that a co-obligor acceptance was given for accommodation only. *Hatch v. Searles*, 2 Smale & G. 147.

¹¹² *Hatch v. Searles*, 2 Smale & G. 147.

¹¹³ *Usher v. Dauncey*, 4 Camp. 97. Or after the maker, for whose accommodation the note was indorsed, has become non compos. *Estate of Bechtel*, 133 Pa. St. 367, 19 Atl. 412.

¹¹⁴ *Chemung Canal Bank v. Bradner*, 44 N. Y. 680.

¹¹⁵ 1 Daniel, Neg. Inst. 148; *Hibblewhite v. M'Morine*, 6 Mees. & W. 200; *Enthoven v. Hoyle*, 13 C. B. 373; *Squire v. Whitton*, 1 H. L. Cas. 333; *Ledwich v. McKim*, 53 N. Y. 307; *Spencer v. Buchanan*, *Wright (Ohio)* 583; *Rhea v. Gibson*, 10 Grat. (Va.) 215; *Preston v. Hull*, 23 Grat. (Va.) 602; *Clarke v. Janesville*, 1 Biss. 98, Fed. Cas. No. 2,854; *Penn v. Hamlett*, 27 Grat. (Va.) 337; *Van Amringe v. Morton*, 4 Whart. (Pa.) 382; *Barden v. Southerland*, 70 N. C. 528; *Mosby v. State*, 4 Sneed (Tenn.) 324. As to ratification of the filling of a blank for payee's name in a sealed note, see *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9.

¹¹⁶ *Texira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 228, since overruled in *Hibblewhite v. M'Morine*, 6 Mees. & W. 200; *Davidson v. Cooper*, 11 Mees. & W. 778. But it has been held that a blank in a bond upon a claim of property under execution may be filled after delivery, if so intended, *State v. Dean*, 40 Mo. 464. And a surety may be held on a bond filled in after delivery with his acquiescence, *Bartlett v. Board*, 59 Ill. 364; and so, in general, without acquiescence on his part, *State v. Pepper*, 31 Ind. 76; *Smith v. Crooker*, 5 Mass. 538. And blanks left in a sealed warrant of attorney filled out according to the maker's intention have been held binding upon him. *Vliet v. Camp*,

may sign a sealed bond left blank for that purpose without discharge of the other obligors, who had consented thereto.¹¹⁷

An exception to the ordinary rules in regard to sealed instruments is made in favor of "coupon bonds" and other corporation bonds, negotiable in form, and plainly intended for transfer by delivery or indorsement. These bonds, as has been remarked in an earlier part of this work, have many, if not all, of the characteristics of unsealed commercial paper. In such instruments a blank may be filled in the same manner and under the same restrictions as in a bill of exchange or promissory note.¹¹⁸

13 Wis. 198. In the case of *U. S. v. Nelson*, 2 Brock. 64, Fed. Cas. No. 15,862, it was held that sureties signing an official bond, or the printed form of one, with names and penalty in blank, could not be understood to have authorized the filling of the blanks, and were consequently not bound thereby; Marshall, C. J., saying in this case: "I say, with much doubt, and with a strong belief that this judgment will be reversed, that the law on this verdict is, in my judgment, with the defendants."

¹¹⁷ *Speake v. U. S.*, 9 Cranch, 28.

¹¹⁸ 1 Daniel, Neg. Inst. 154; *White v. Railroad Co.*, 21 How. 575; *Chapin v. Railroad Co.*, 8 Gray (Mass.) 575; *Gourdin v. Commander*, 6 Rich. Law (S. C.) 497; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170; *Brainerd v. Railroad Co.*, 25 N. Y. 496; *Hubbard v. Railroad Co.*, 36 Barb. (N. Y.) 286; *Inhabitants of South Berwick v. Huntress*, 53 Me. 89; *Dutchess County Ins. Co. v. Hachfield*, 1 Hun (N. Y.) 675; *Boyd v. Kennedy*, 38 N. J. Law, 146. In this case *Depue, J.*, says: "The reason assigned in *Hibblewhite v. M'Morine*, 6 Mees. & W. 200, for overruling *Texira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 228, and re-establishing the technical rule of the common law, that the authority of an agent to fill a blank in an instrument under seal, and thus make it the valid deed of his principal, must be conferred by deed, was that the contrary doctrine would make a deed transferable and negotiable, like a bill of exchange or exchequer bill, which the law did not permit. This decision was prompted by considerations of a public policy, which, it was supposed, forbld that obligations under seal should be put on the same footing as ordinary commercial paper, in their negotiability. A different opinion of the requirements of public policy is entertained by the courts of this state, and generally throughout the United States. * * * Such securities, by common usage, sanctioned by the courts, have obtained the qualities and attributes of negotiable paper, in respect to their transfer. Under such circumstances, the reason on which *Hibblewhite v. M'Morine* is based is not only inapplicable, but is furthermore inconsistent with the qualities with which such paper has become invested."

Blank—Signature—Name of Party.

§ 185. The rule of implied authority in the holder to fill blanks in a bill of exchange or note applies with equal force to almost all parts of the instrument.¹¹⁹ Even the *signature* of the drawer may be added after a blank acceptance;¹²⁰ or of a co-obligor to a note signed in blank.¹²¹ And if a surety sign a renewal note, with the understanding that it is to be signed by the other sureties on the original note, and leave a blank for the signatures of such sureties, and different sureties afterwards sign in such blank, a bona fide holder may recover against all, even after altering the names in the note to correspond with the signatures.¹²² So, if the payee named in a note indorse and deliver it before it is signed, authority to insert the name of a maker by way of signature will be implied, although a different signature may be obtained than the one intended by the indorser.¹²³

It is a rule of commercial paper that the *names* of the parties or

¹¹⁹ E. g. to the pronoun "I" or "we" in the maker's promise. *Brown v. Bank*, 115 Ind. 572, 18 N. E. 56; *Packer v. Roberts*, 140 Ill. 9, 29 N. E. 668.

¹²⁰ *Moiese v. Knapp*, 30 Ga. 942. Even where payable to the drawer's order, and after he has negotiated it by indorsement. *Hopps v. Savage*, 69 Md. 513, 16 Atl. 133. In such case a bona fide holder may insert his own name as drawer. *Harvey v. Cane*, 24 Wkly. Rep. 400; 34 Law T. (N. S.) 64. And it was held, as we have seen, that this might even be done 12 years after the blank acceptance was signed. *Montague v. Perkins*, 22 Law J. C. P. 187. But, without a drawer's signature, such instrument is not a bill of exchange, *Stoessiger v. Railway Co.*, 3 El. & Bl. 549; and cannot be declared on as such, *McCall v. Taylor*, 19 C. B. (N. S.) 301. But such blank for drawer may be filled even after the acceptor's death. *Carter v. White*, 25 Ch. Div. 666, affirming 20 Ch. Div. 225. "It is not by an authority but by a contract between the acceptor and the intended drawer that the drawer has a right to fill up the instrument," *Fry*, L. J., 25 Ch. Div. 672.

¹²¹ *Bank of Commonwealth v. McChord*, 4 Dana (Ky.) 191. So, where the promise was joint and several in form. *Snyder v. Van Doren*, 46 Wis. 602, 1 N. W. 285.

¹²² *Jones v. Insurance Co.*, 1 Metc. (Ky.) 58.

¹²³ *Whitmore v. Nickerson*, 125 Mass. 496. In this case the note was made payable to A., and indorsed by him before it was signed, and afterwards delivered by him to B. for the signature of his firm, but signed and negotiated by B. in his individual name without A.'s knowledge or authority. A. was nevertheless holden by reason of his implied authority to B.

other sufficient designation of them must appear upon it. If, however, a bill of exchange fail to name the *drawee* or leave a blank for his name, the omission will be supplied by the acceptance.¹²⁴ It has been held in England that a bill or note with the *payee's* name blank is incomplete, and cannot sustain an indictment for forgery.¹²⁵ The contrary doctrine has, however, been held in Indiana.¹²⁶ If the name of the payee be left blank, the instrument is in general equivalent to one that is made payable to the bearer.¹²⁷ In such case the bill or note is not complete until the blank is filled up, but takes effect then from its date, as if there had been no blank.¹²⁸ Leaving such blank for the name of the payee gives to any bona fide holder for value an implied authority to fill the blank with his own name, or with that of a third person.¹²⁹ And, when

¹²⁴ *Wheeler v. Webster*, 1 E. D. Smith (N. Y.) 1.

¹²⁵ *Rex v. Randall*, Russ. & R. 195.

¹²⁶ *Harding v. State*, 54 Ind. 359.

¹²⁷ 1 *Daniel*, Neg. Inst. 151; *Wood v. Wellington*, 30 N. Y. 218; *Cruchley v. Clarence*, 2 Maule & S. 91; *Dunham v. Clogg*, 30 Md. 284; *Dinsmore v. Duncan*, 57 N. Y. 573; *Steel v. Rathbun*, 42 Fed. 390. And it was held that, as title passed by delivery, trover would not lie against a banker to whom such bill had been fraudulently delivered by the agent holding it for sale. *Wookey v. Pole*, 4 Barn. & Ald. 6. A bill to "—— order," not filled up, is, in effect, to the drawer's order, and constitutes a valid bill, under the bills of exchange act, when indorsed by the drawer. *Chamberlain v. Young* [1893] 2 Q. B. 206.

¹²⁸ 1 *Daniel*, Neg. Inst. 152; 1 *Edw. Bills & N.* § 141; *Greenhow v. Boyle*, 7 Blackf. (Ind.) 56. But the actual filling in of payee's name in a duebill was held unnecessary in *Weston v. Myers*, 33 Ill. 424; especially where the maker had also indorsed the note, *Usry v. Saulsbury*, 62 Ga. 179. So, too, in the indorsement of a note, "Pay to ——," etc. *Wood v. Wellington*, 30 N. Y. 218. So, in a note payable "to —— or bearer." *Rich v. Starbuck*, 51 Ind. 90. As to such instruments taking effect by relation back, see § 183n.

¹²⁹ *Bytes*, Bills, 85; 1 *Daniel*, Neg. Inst. 151; 1 *Edw. Bills & N.* § 91; 1 *Pars. Bills & N.* 33; *Story*, Bills, § 56; *Story*, Prom. Notes, § 26; *Cruchley v. Clarence*, 2 Maule & S. 90; *Crutchly v. Mann*, 5 Taunt. 529; *Rich v. Starbuck*, 51 Ind. 87; *Dinsmore v. Duncan*, 57 N. Y. 573; *Witte v. Williams*, 8 S. C. 290; *Dunham v. Clogg*, 30 Md. 284; *Boyd v. McCann*, 10 Md. 118; *Sittig v. Birkestack*, 38 Md. 158; *Hardy v. Norton*, 66 Barb. (N. Y.) 527; *Weston v. Myers*, 33 Ill. 424; *Aiken v. Cathcart*, 3 Rich. Law (S. C.) 133; *Farmers' & Merchants' Bank v. Horsey*, 2 Houst. (Del.) 385; *Townsend v. France*, Id. 441; *Brummel v. Euders*, 18 Grat. (Va.) 873; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170; *Elliott v. Chesnut*, 30 Md. 562; *Greenhow*

so filled, the maker will be bound by it, notwithstanding an agreement between the original and immediate parties for the insertion of some other name as payee,¹³⁰ or for filling the amount blank with a smaller sum.¹³¹ Such a blank may be filled after the note has been transferred by an indorsement in blank.¹³² But, where a note has been indorsed before its delivery by another person than the one to whom the promise was originally made, a subsequent holder, even though a bona fide holder for value, cannot fill with his own name a blank left for the payee's name, and thereby make the first indorser a guarantor.¹³³

Although the holder is thus, in general, permitted to insert his own name as payee in the blank left for the payee's name, he does not become thereby one of the immediate and original parties.¹³⁴ and has not the liabilities of such a party. For instance, in a case where the note has been bought at a usurious rate of interest by a holder who fills the blank with his own name, the maker is not entitled to set up the defense of usury against him.¹³⁵ The omission of the payee's name occurs most frequently in blank indorsements. The holder under such blank indorsement or under an assignment in blank may write his own name or that of a third person in the

v. Boyle, 7 Blackf. (Ind.) 56; *Seay v. Bank*, 3 Sneed (Tenn.) 558; *Bank of Kentucky v. Garey*, 6 B. Mon. (Ky.) 626; *Schooler v. Tilden*, 71 Mo. 580. But, with an alteration of the date, the instrument so filled and altered is not binding upon the maker, in the absence of express authority from him, *Bland v. O'Hagan*, 64 N. C. 471. Nor can the payee's name, left blank in a nonnegotiable sealed note, be filled in by the holder. *Barden v. Southerland*, 70 N. C. 528.

¹³⁰ 1 Daniel, Neg. Inst. 147; *Wilson v. Kinsey*, 49 Ind. 35; *Huntington v. Bank*, 3 Ala. 186; *Witte v. Williams*, S S. C. 290. A note payable to "A. B. or —," with a collateral mortgage, may be explained by the latter so as to show "bearer" intended, enabling the assignee of the mortgage to sue on the note. *Elliott v. Deason*, 64 Ga. 63.

¹³¹ *Roberson v. Blevins* (Kan. Sup.) 45 Pac. 63.

¹³² *Armstrong v. Harshman*, 61 Ind. 52.

¹³³ *Riddle v. Stevens*, 32 Conn. 378.

¹³⁴ But he is a "subsequent holder," within the meaning of the act of congress, and as such unable to sue in the federal courts. *Steel v. Rathbun*, 42 Fed. 390.

¹³⁵ *Brummel v. Enders*, 18 Grat. (Va.) 873. But the burden of proof of such fact is upon the holder, as also the burden of proving himself a bona fide holder for value before maturity. *Nelson v. Cowing*, 6 Hill. (N. Y.) 336.

blank.¹³⁶ And he may afterwards erase the name of the third person, and insert his own.¹³⁷

Blank Date—Time and Place of Payment—Rate of Interest.

§ 186. In like manner, a blank left for the *date* may be filled by the holder;¹³⁸ and this may be done even after the death of one of the makers of a partnership note, as we have seen.¹³⁹ But it has been questioned whether this power of filling a blank date extends to antedating. And a note or bill antedated by any holder is void in the hands of subsequent holders with notice.¹⁴⁰ It is nevertheless valid in the hands of a bona fide holder for value without any such notice.¹⁴¹

A partial omission of a date, where no blank was intended, will be

¹³⁶ Brainerd v. Railroad Co., 25 N. Y. 496; Condon v. Pearce, 43 Md. 83; Canfield v. McIlwaine, 32 Md. 94; Whiteford v. Burckmyer, 1 Gill (Md.) 127; Chesley v. Taylor, 3 Gill (Md.) 251; Mitchell v. Mitchell, 11 Gill & J. (Md.) 388; Jones v. Berryhill, 25 Iowa, 289; Moore v. Maple, 25 Ill. 341; Wilder v. De Wolf, 24 Ill. 190; Palmer v. Marshall, 60 Ill. 289; Beattie v. Browne, 64 Ill. 360; Moore v. Pendleton, 16 Ind. 481; Croskey v. Skinner, 44 Ill. 321; Lyon v. Ewings, 17 Wis. 63; Hubbard v. Williamson, 26 N. C. 266; Weirick v. Bank, 16 Ohio St. 297; Pace v. Welmending, 12 Bush (Ky.) 141. And see Gen. St. Ky. 1866, c. 22, § 13. And when so filled it passes both the note and its collaterals. Farwell v. Meyer, 36 Ill. 510. And the indorsee may also add the date in filling in the indorsement as above. Maxwell v. Vansant, 46 Ill. 58.

¹³⁷ Jones v. Berryhill, 25 Iowa, 289.

¹³⁸ 1 Daniel, Neg. Inst. 92, 148; 1 Edw. Bills & N. § 88; Story, Prom. Notes, § 11, note 1; 1 Pars. Notes & B. 115 (but see, also, 2 Pars. Notes & B. 552, 565); Michigan Bank v. Eldred, 9 Wall. 544; Page v. Morrell, *42 N. Y. 117, 3 Abb. Dec. 433; Witte v. Williams, 8 S. C. 290; Mitchell v. Culver, 7 Cow. (N. Y.) 336; Androscoggin Bank v. Kimball, 10 Cush. (Mass.) 373; Fullerton v. Sturges, 4 Ohio St. 529; Shultz v. Payne, 7 La. Ann. 222; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11. And in filling out an indorsement to the holder the date may be added. Maxwell v. Vansant, 46 Ill. 58.

¹³⁹ Usher v. Dauncey, 4 Camp. 97.

¹⁴⁰ 1 Pars. Notes & B. 115; Emmons v. Meeker, 55 Ind. 321; Goodman v. Simonds, 19 Mo. 106. But a note may be antedated by agreement, the holder filling the blank date accordingly. Mitchell v. Culver, 7 Cow. (N. Y.) 336.

¹⁴¹ Page v. Morrell, *42 N. Y. 117, 3 Abb. Dec. (N. Y.) 433; Mitchell v. Culver, 7 Cow. (N. Y.) 336; Mechanics' & Farmers' Bank v. Schuyler, Id. 337 note.

supplied in all cases of manifest mistake; e. g. in a case where the year was written "one thousand forty" by mistake for 1840.¹⁴² It may happen, however, where no date is expressed, that none was intended. It is therefore sometimes said that a blank date is, at most, only *prima facie* evidence of an authority to fill it with any date.¹⁴³

The *time of payment* as well as the date may be left blank, and afterwards filled in by the holder.¹⁴⁴ And, if such blank is filled in a way different from that authorized by the maker, he will still be bound at suit of an innocent holder.¹⁴⁵ In like manner, a mere omission by mistake in the time of payment will be supplied; e. g. "in the (year) of our Lord," etc.;¹⁴⁶ or, "on the first day of March, eighteen (hundred and) sixty-eight."¹⁴⁷

The *place of payment* may also be left blank, and afterwards filled by the holder,¹⁴⁸ although it has been held that this could not be

¹⁴² Evans' Adm'r v. Steel, 2 Ala. 114.

¹⁴³ Stout v. Cloud, 5 Litt. (Ky.) 205. And even a *prima facie* authority has been denied in *English v. Breneman*, 5 Ark. 377, 9 Ark. 122; but it is said in *Page v. Morrell*, *42 N. Y. 117, that this case is "not supported by authority."

¹⁴⁴ McGrath v. Clark, 56 N. Y. 34; Witte v. Williams, 8 S. C. 290; Fullerton v. Sturges, 4 Ohio St. 529; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11. So, by supplying the omission of the word "date" in a note made payable "four months after," *Pearson v. Stoddard*, 9 Gray (Mass.) 199; or the word "months" in a note payable "twenty-four after date," *Conner v. Routh*, 7 How. (Miss.) 176; *Nichols v. Frothingham*, 45 Me. 220. So, by supplying a reasonable time of payment in the case of a blank acceptance. *Rogers v. Poston*, 1 Mete. (Ky.) 643.

¹⁴⁵ Waldron v. Young, 9 Heisk. (Tenn.) 777; Witte v. Williams, 8 S. C. 290; *Elliott v. Levings*, 54 Ill. 213; *Johns v. Harrison*, 20 Ind. 317.

¹⁴⁶ *Hunt v. Adams*, 6 Mass. 519. So, a note payable "in one after date" may be identified with that described in a collateral mortgage as "payable in one year." *Stowe v. Merrill*, 77 Me. 550, 1 Atl. 684. So, the omission of the word "months." *Loomis v. Freer*, 4 Ill. App. 547; *M'Lean v. Nichlen*, 3 Vict. Law R. 107. But parol evidence was rejected to show the intention, and clear up the meaning of a note payable "in one from the first of October in cattle or in grain the first of January following." *Wainwright v. Straw*, 15 Vt. 215.

¹⁴⁷ *Massie v. Belford*, 68 Ill. 290.

¹⁴⁸ *Redlich v. Doll*, 54 N. Y. 234; McGrath v. Clark, 56 N. Y. 34; *Kitchen v. Place*, 41 Barb. (N. Y.) 465; *Waggoner v. Millington*, 8 Hun (N. Y.) 142; *Marshall v. Drescher*, 68 Ind. 359; *Shepard v. Whetstone*, 51 Iowa, 457, 1 N. W. 753. So, a note may be intrusted with such blank by one maker to his co maker, and filled in by him before delivery. *Canon v. Grigsby*, 116 Ill.

done in a sealed bond which had been stolen before the blank was filled.¹⁴⁹ And, where no blank has been left for that purpose, there can be no implied authority to insert a place of payment.¹⁵⁰ But it has been held that a blank acceptance authorizes the holder to write over the acceptor's signature a special acceptance payable at a particular place, and that this act will not avail to discharge an accommodation indorser.¹⁵¹

The *rate of interest* also may be left blank and filled in by the holder,¹⁵² although the payee can recover in such case no higher rate than that agreed on by the maker.¹⁵³ As in other parts of a bill or note, a mere omission or mistake will be supplied to complete the interest clause; e. g. an omission of the word "interest" in a note payable "with ten per cent."¹⁵⁴

151, 5 N. E. 362. The filling of a bank name in a note payable "at the ——— bank," etc., brings the note within the statute of Indiana requiring notes to be payable at a certain bank in order to be governed by the *lex mercatoria*. *Gillaspie v. Kelley*, 41 Ind. 158. But a space after the printed words, "payable at," is not such a blank, and to fill it with the name of such a bank is an alteration. *Cronkhite v. Nebeker*, 81 Ind. 319. So, where payable at "——— National Bank," it is an alteration to erase the word "National," and fill in the name of a state bank. *Adair v. Egland*, 58 Iowa, 314, 12 N. W. 277.

149 *Ledwich v. McKim*, 53 N. Y. 307. And, where the amount payable on a railroad bond depends by its terms on the place of payment to be indorsed on the bond by the president of the company, a printed indorsement for that purpose, signed, but left blank, cannot be filled by the holder, and the bond is nonnegotiable for want of certainty in that respect. *Parsons v. Jackson*, 99 U. S. 434.

150 *Simpson v. Stackhouse*, 9 Pa. St. 186; *Morehead v. Bank*, 5 W. Va. 74.

151 *Todd v. Bank*, 3 Bush (Ky.) 626. But such words added without the acceptor's authority discharge him. *Burchfield v. Moore*, 25 Eng. Law & Eq. 123; *Taylor v. Mosely*, 6 Car. & P. 273; *Macintosh v. Haydon*, Ryan & M. 362; *Dresbrow v. Weatherley*, 6 Car. & P. 758; *Cowie v. Halsall*, 4 Barn. & Ald. 197.

152 *Visher v. Webster*, 8 Cal. 109; *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. 589. But such blank cannot be filled above the legal rate, and to fill it for a higher rate is an alteration, *Hoopes v. Collingwood*, 10 Colo. 107, 13 Pac. 909; nor with a special (though lawful) rate of interest after maturity. *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274.

153 *Fisher v. Dennis*, 6 Cal. 577. And see *Little Rock Trust Co. v. Martin*, 57 Ark. 277, 21 S. W. 468.

154 *Thompson v. Hoagland*, 65 Ill. 310. Or "at ten per cen." *Gramer v. Joder*, Id. 314. So the omission of the word "per" will be cured in the phrase "with ten [per] cent. interest from date," *Williams v. Baker*, 67 Ill. 238; and

Blank Amount—Authority Exceeded.

§ 187. Disputes as to blanks filled after execution have arisen most frequently in relation to the *amount* provided by the instrument to be paid. As in other cases, the execution of a bill or note for a blank amount implies an unlimited authority to the holder to fill the blank with any amount.¹⁵⁵ A mere omission by mistake of the word "dollars," "pounds," etc., will be, of course, supplied as in other similar cases.¹⁵⁶ The authority to fill a blank amount is generally limited, in England, by the amount of the stamp on the paper. It may also be limited by marginal figures on the paper, in which case the figures must not be exceeded.¹⁵⁷ And, if the

"interest from ——" will be construed from date, *Miller v. Cavanaugh* (Ky.) 35 S. W. 920.

¹⁵⁵ *Chit. Bills*, 38; 1 *Edw. Bills & N.* § 91; 1 *Pars. Bills & N.* 109; *Griggs v. Howe*, 31 *Barb. (N. Y.)* 100; *Fullerton v. Sturges*, 4 *Ohio St.* 529; *Frazier v. Gains*, 2 *Baxt. (Tenn.)* 92; *Hall v. Bank*, 5 *Dana (Ky.)* 258; *Bank of Limestone v. Penick*, 5 *T. B. Mon. (Ky.)* 25; *Bank of Commonwealth v. Curry*, 2 *Dana (Ky.)* 142; *Frank v. Lillienfeld*, 33 *Grat. (Va.)* 377. And a holder of such paper for moneys to be advanced may fill it to the amount designated by the marginal figures, after making advances beyond that sum. *Carson v. Hill*, 1 *McMul. (S. C.)* 76. And an indorser before delivery will be liable in such case to a payee taking the note in good faith, though the power to fill the blank be exceeded. *Diercks v. Roberts*, 13 *S. C.* 338. But if the amount depends on the filling of a blank for percentage of attorney's commissions, to be specially agreed on, it cannot be filled except by a subsequent agreement of the parties. *Johnston v. Speer*, 92 *Pa. St.* 227. See, also, § 105, *supra*.

¹⁵⁶ *Sweetser v. French*, 13 *Metc. (Mass.)* 262; *Corgan v. Frew*, 39 *Ill.* 31; *Williamson v. Smith*, 1 *Cold. (Tenn.)* 1; *Booth v. Wallace*, 2 *Root (Conn.)* 247; *Northrop v. Sanborn*, 22 *Vt.* 433; *Murrill v. Handy*, 17 *Mo.* 406. Especially where the dollar mark (\$) accompanies the correct figures in the margin. *McCoy v. Gilmore*, 7 *Ohio*, 268; *Sweetser v. French*, 13 *Metc. (Mass.)* 262. So, "hund." for "hundred," *Glenn v. Porter*, 72 *Ind.* 525; or "fife" for "five," *Ohm v. Yung*, 63 *Ind.* 432. But this cannot be done in a special bail bond. *Spencer v. Buchanan*, *Wright (Ohio)* 583. And see, *contra*, as to a promissory note, *Brown v. Bebee*, 1 *D. Chip. (Vt.)* 227.

¹⁵⁷ *Boyd v. Brotherson*, 10 *Wend. (N. Y.)* 93; *Norwich Bank v. Hyde*, 13 *Conn.* 279; *Carson v. Hill*, 1 *McMul. (S. C.)* 76. And where the figures in the margin were "\$334." and the note was drawn for "three hundred dollars," it was held that the blank might be filled up to the amount indicated by the figures. *Clute v. Small*, 17 *Wend. (N. Y.)* 238. But see, *contra*, *Saunderson*

amount is made larger in the writing, it will effect the discharge of a surety as an alteration of the instrument.¹⁵⁸ So, tearing off the marginal figures and filling up the blank for a larger sum amounts to a material alteration and discharges the maker.¹⁵⁹

Where negotiable paper has been executed with the amount blank, it is no defense against a bona fide holder for value for the maker to show that his authority has been exceeded in filling such blank, and a greater amount written than was intended.¹⁶⁰ This was also

v. Piper, 5 Bing. N. C. 425. But where the amount is left blank, and the marginal figures are altered to a larger sum, and the blank filled to correspond, the acceptor of the blank bill is liable to a holder without notice. *Garrard v. Lewis*, 10 Q. B. Div. 30; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177. See, also, § 105, note, *supra*.

¹⁵⁸ *Henderson v. Bondurant*, 39 Mo. 369. But in *Schryver v. Hawkes*, 22 Ohio St. 308, it was held that the marginal figures were no part of a note, and that the alteration of them, and the filling up of the blank for a higher amount, would not invalidate the instrument as to a surety. This is certainly the rule where the alteration is made possible by the maker's negligence, e. g. where the amount was left blank, except a marginal memorandum of "\$500," and this was altered to \$5,000 and the blank filled for that amount, the maker was held liable to a bona fide holder for such increased amount, *Woolfolk v. Bank*, 10 Bush (Ky.) 504.

¹⁵⁹ *Hall v. Bank*, 5 Dana (Ky.) 258. So, where advantage was taken of a space left, and the marginal figures raised to correspond. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196.

¹⁶⁰ 1 Daniel, Neg. Inst. 146; 1 Pars. Bills & N. 33, 109; *Collis v. Emett*, 1 H. Bl. 313; *Russel v. Langstaffe*, 2 Doug. 514; *Snaith v. Mingay*, 1 Maule & S. 87; *Leslie v. Hastings*, 1 Moody & R. 119; *Molloy v. Delves*, 7 Bing. 428, 5 Moore & P. 275, and 4 Car. & P. 492; *Barker v. Sterne*, 9 Exch. 684; *Van Duzer v. Howe*, 21 N. Y. 531; *Griggs v. Howe*, 31 Barb. (N. Y.) 100; *Herbert v. Huie*, 1 Ala. 18; *Decatur Bank v. Spence*, 9 Ala. 800; *Hall v. Bank*, 5 Dana (Ky.) 258; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Johns v. Harrison*, 20 Ind. 317; *Gillespie v. Rogers* (Pa.) 39 Atl. 290; *Frazier v. Gains*, 2 Baxt. (Tenn.) 92; *McArthur v. McLeod*, 51 N. C. 475; *Smith v. Lockridge*, 8 Bush (Ky.) 423; *Wilson v. Kinsey*, 49 Ind. 35; *Abbot v. Rose*, 62 Me. 194; *Bank of Commonwealth v. Curry*, 2 Dana (Ky.) 142; *Bank of Limestone v. Penick*, 5 T. B. Mon. (Ky.) 25; *Young v. Ward*, 21 Ill. 223; *Jones v. Insurance Co.*, 1 Metc. (Ky.) 58; *Nichol v. Bate*, 10 Yeig. (Tenn.) 429; *Waldron v. Young*, 9 Heisk. (Tenn.) 777; *Joseph v. Bank*, 17 Kan. 256; *Huntington v. Bank*, 3 Ala. 186. And an accommodation indorser before delivery will be liable in like manner to a payee having no notice of the extent of his agreement with the maker, and taking the note for value, *Diercks v. Roberts*, 13 S. C. 338. So, a surety to a payee, whose

once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written.¹⁶¹ It has now, however, become the established rule that, if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention, although it may be negligently, will constitute a material alteration, and

name was filled in a blank left for that purpose, and who had no notice of the limit as to amount. *Roberson v. Blevins* (Kan. Sup.) 45 Pac. 63.

¹⁶¹ Pothier, *Contrat du Change*, p. 1, c. 4, § 99; *Young v. Grote*, 4 Bing. 253, where blank checks had been left by a banker with his wife, and the amount filled in by her in such a manner that the clerk with whom she intrusted it was enabled fraudulently to add £300 to the amount written. So, too, *Garrard v. Haddan*, 67 Pa. St. 82; *Isnard v. Torres*, 10 La. Ann. 103. And this principle has been applied to checks in cases arising between banker and customer. *Swan v. North British Australasian Co.*, 2 Hurl. & C. 179; *Halifax Union v. Wheelwright*, L. R. 10 Exch. 183. But see a review of these cases in *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196. And see remarks on *Young v. Grote* in *Robarts v. Tucker*, 16 Q. B. 560; *Bank of Ireland v. Evans Charities*, 5 H. L. Cas. 389, 410; *Orr v. Bank*, 1 Macq. 513; *British Linen Co. v. Insurance Co.*, 4 Macq. 107; *Ex parte Swan*, 7 C. B. (N. S.) 400; *Arnold v. Bank*, 1 C. P. Div. 578. In *Scholfield v. Earl of Londesborough* [1896] App. Cas. 514, affirming [1894] 2 Q. B. 660, [1895] 1 Q. B. 536, the doctrine of *Young v. Grote*, supra, was declared by Lord Esher, M. R. ([1895] 1 Q. B. 543), to be "the fount of bad argument"; distinction being made between an acceptor and the drawer of a check. So Halsbury, L. C., in the house of lords (page 522): "The truth is that the whole doctrine that facilitating forgery, or giving opportunity for forgery, or so acting that a forgery is a possible result, affects the validity of the instrument forged, may be traced, in English law, at all events, to the case of *Young v. Grote*, and probably beyond, to certain doctrines of the civil law, which to my mind form no part of the law merchant, so far as it exists in English jurisprudence." This was the acceptance of a bill for £500 drawn on a stamp sufficient for a large amount, and altered to £3,500 by writing in a blank space before the "Five." Both in the chancery appeals and the house of lords distinction was made between this case and that of the drawer of a check (*Young v. Grote*), Lord Watson ([1896] App. Cas. 537) saying: "The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange." And see § 1770, *infra*.

operate to discharge the maker.¹⁶² And a holder, having notice that the maker's authority has been exceeded, cannot recover on the instrument.¹⁶³ In Mississippi, however, such holder is allowed to recover the amount actually authorized by the maker.¹⁶⁴ And, in general, if the holder knows that the instrument was executed in blank, but not that the maker's authority was exceeded in filling the blank, he has not such notice as will subject him to defenses on that ground.¹⁶⁵ The mere discounting of a note with such a blank raises no presumption against the bona fides of the holder.¹⁶⁶

¹⁶² *Goodman v. Eastman*, 4 N. H. 455; *Worrall v. Gheen*, 39 Pa. St. 388; *Wade v. Withington*, 1 Allen (Mass.) 561; *Greenfield Sav. Bank v. Sowell*, 123 Mass. 196. In this case Gray, C. J., says (page 206) of *Garrard v. Haddan*, 67 Pa. St. 82: "We cannot regard as authoritative the expression of opinion that the maker was liable upon the note as altered, for several reasons: (1) It was purely extrajudicial, for the plaintiff had sued out no writ of error. (2) It relies upon the Scotch decisions which the same court, in *Worrall v. Gheen*, had declined to follow. (3) It avowedly rejects the distinction taken by this court in *Wade v. Withington*, 1 Allen (Mass.) 561, above cited, restricting such liability to cases in which the alteration is made by an agent, clerk, or other person in whom the maker has reposed confidence. (4) It asserts that no such restriction was made in *Putnam v. Sullivan*, 4 Mass. 45, in direct contradiction of the statement of Chief Justice Parsons in that case, quoted in the early part of this opinion. (5) It inaccurately states that *Worrall v. Gheen* 'was a case of a perceptible alteration,' whereas that case, as already mentioned, expressly found that 'the fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in ordinary business'; and according to the opinion in *Phelan v. Moss*, 67 Pa. St. 59, delivered on the same day as that in *Garrard v. Haddan*, the only material question was whether the indorsee took it in good faith." On the other hand, *Worrall v. Gheen* is not followed so far as it permitted a recovery of the original amount, as it was before the alteration. *Neff v. Horner*, 63 Pa. St. 327; *Draper v. Wood*, 112 Mass. 315; *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *Wade v. Withington*, 1 Allen (Mass.) 561.

¹⁶³ *Davidson v. Lanier*, 4 Wall. 447; *Clower v. Wynn*, 59 Ga. 246; *Johns v. Harrison*, 20 Ind. 317; *Smith v. Lockridge*, 8 Bush (Ky.) 423; *McCoy v. Gilmore*, 7 Ohio, 268; *Grant v. Brotherton's Adm'r*, 7 Mo. 458; *Murrill v. Handy*, 17 Mo. 406; *Coolbroth v. Purinton*, 29 Me. 469; *Booth v. Wallace*, 2 Root (Conn.) 247.

¹⁶⁴ *Hemphill v. Bank*, 6 Smedes & M. 44; *Johnson v. Blasdale*, 1 Smedes & M. 17; *Goss v. Whitehead*, 33 Miss. 213.

¹⁶⁵ *Huntington v. Bank*, 3 Ala. 186. But it was held in *Awde v. Dixon*,

¹⁶⁶ *Chemung Canal Bank v. Bradner*, 44 N. Y. 680.

Blank Indorsments.

§ 188. Commercial paper may be indorsed in blank, at least by the law of England and of most of the United States. The meaning of such contract by blank indorsement is fixed by the mercantile law, and the implied authority is to write such a contract, and no other. Thus, the holder may write over the indorser's signature a promise to pay the note according to its tenor.¹⁶⁷ Such indorser is at common law only an indorser, and, as such, is entitled to due notice of protest of the bill or note. And this has been expressly provided by statute in Massachusetts.¹⁶⁸ The indorsee cannot change this liability by writing over the indorser's signature a contract of guaranty.¹⁶⁹ It seems, however, that his doing so will not make the indorsement void as a transfer of the paper.¹⁷⁰ Nor will

6 Exch. 869, that one who signed a note with the payee's name in blank, and delivered it to another to be delivered when it had been signed by a third person, was not liable to another who took it in ignorance of such agreement, which had not been carried out, but with payee's name still blank; Parke, B., saying: "It is a fallacy to say that the plaintiff is a bona fide holder for value. He has taken a piece of blank paper, not a promissory note."

¹⁶⁷ Sweetser v. French, 13 Mete. (Mass.) 262.

¹⁶⁸ Cook v. Googins, 126 Mass. 410; Pub. Laws 1874, c. 404. An indorser in blank within two days after the first delivery of a note has been held in Massachusetts as an original promisor. Moies v. Bird, 11 Mass. 436. But such original promise cannot be inferred from a blank indorsement nine months after date. Tenney v. Prince, 4 Pick. (Mass.) 386.

¹⁶⁹ Seabury v. Hungerford, 2 Hill (N. Y.) 80; Hall v. Newcomb, 7 Hill (N. Y.) 416, overruling Nelson v. Dubois, 13 Johns. (N. Y.) 175; Beattie v. Browne, 64 Ill. 360; Schnell v. Mill Co., 89 Ill. 581; Howe v. Merrill, 5 Cush. (Mass.) 80; De Pauw v. Bank, 126 Ind. 553, 25 N. E. 705, and 26 N. E. 151. But see, contra, as between the original parties, Worden v. Salter, 90 Ill. 160, Sheldon, J., dissenting; Clayes v. White, 65 Ill. 357; Chandler v. Westfall, 30 Tex. 475; Fuller v. Scott, 8 Kan. 25. See, also, Tenney v. Prince, 4 Pick. (Mass.) 386; Moies v. Bird, 11 Mass. 436. And where the indorsement was made after the maturity of a note, and for the purpose of guarantying it, the holder may write a guaranty over the indorser's signature. Rivers v. Thomas, 1 Lea (Tenn.) 649.

¹⁷⁰ Croskey v. Skinner, 44 Ill. 321; Beattie v. Browne, 64 Ill. 360; Hance v. Miller, 21 Ill. 636,—but in this case it was held that the insertion of the guaranty itself was not prima facie unauthorized.

an additional agreement as to other matters affect the indorsee's right to fill a blank indorsement with his name or that of a third person.¹⁷¹ What is the effect and meaning of the contract made by a blank indorsement, and how far the intention of the parties may be shown by parol evidence for the purpose of explaining or modifying such contracts, are matters to be discussed in a later part of this work.

American and Foreign Statutes.

§ 189. The common law has not been changed by American statute in respect to blanks. It has in part become statute law in a few of the states.¹⁷² On the other hand, it seems that the many foreign statutes, referred to in other parts of this work, requiring commercial paper to be dated, and to express amount, names, time, and place of payment, etc., amount to a prohibition of blanks in the several particulars required to be expressed.¹⁷³ Blanks as to the payee's name are provided for by statute in the Argentine Republic and in Lower Canada.¹⁷⁴ Blank indorsements are prohibited by statute in most of the countries that follow the Spanish Commercial Code¹⁷⁵ or the Code Napoleon.¹⁷⁶ In some other countries they are

¹⁷¹ Leland v. Parriott, 35 Iowa, 454.

¹⁷² In CALIFORNIA "one, who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form." Civ. Code, § 3125. In WYOMING (Rev. St. c. 70, § 35) and NORTH DAKOTA (Rev. Code, § 4886) the same provision is made. In KENTUCKY the holder of a promissory note payable to the maker's own order, and indorsed by the maker in blank, may fill the blank indorsement with a fresh promise to pay. Ky. St. § 480. In COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 14), MARYLAND and NEW YORK (§ 33), the Negotiable Instrument Law makes a statute of the law merchant.

¹⁷³ In RUSSIA blanks on stamped paper are expressly forbidden. Exch. Law, art. 542.

¹⁷⁴ If the payee's name is left blank any bona fide holder may insert his own, in the ARGENTINE REPUBLIC (Code Com. art. 776), or may fill it with the name of another in LOWER CANADA (Civ. Code, § 2282).

¹⁷⁵ Blank indorsements are forbidden in SPAIN (Code Com. art. 471); COLOMBIA (Code Com. art. 428); COSTA RICA (Code Com. art. 418);

¹⁷⁶ See note 176 on following page.

permitted, sometimes restricting the efficacy of a blank indorsement to a mere power of attorney to collect the bill.¹⁷⁷

ECUADOR (see Spanish Code); MEXICO (Code Com. art. 364); PERU (Code Com. art. 429).

¹⁷⁶ The Code Napoleon requires all indorsements to state the name of the indorsee. Section 137. This law applies to BELGIUM, FRANCE, GREECE, HAYTI, and TURKEY. So, too, in ITALY. Code Com. art. 223. ,

¹⁷⁷ Indorsement in blank is permitted by statute in BRAZIL (Code Com. art. 362); CHILI (Code Com. art. 661), in which case, and notwithstanding want of date, the indorsement implies consideration, and effects a transfer; DENMARK (Exch. Law, § 2); SWITZERLAND (Oblig. R. 730). So, too, in RUSSIA, but such indorsements cannot prove themselves. Exch. Law, art. 560. Regular indorsements must contain name of indorsee, and time and place of indorsement. Id. 559. In HUNGARY a blank indorsement is a mere power of attorney for collection (Exch. Law, § 34); but, when once filled up the indorser cannot set up in defense that it was blank when delivered (Id. § 35). In PORTUGAL a blank indorsement without date is a mere power to collect. Code Com. art. 357. This is also the case in VENEZUELA, unless it be proved to have been intended for a transfer of the instrument. Code Com. art. 36.

IV. MEMORANDA AND CONTEMPORANEOUS AGREEMENTS.

- § 190. *Memoranda on Back, Margin, etc.*
 191. — Expressing a Condition.
 192. — Relating to Time of Payment.
 193. — Relating to Place of Payment.
 194. — Relating to Amount—Marginal Figures.
 195. — Relating to Currency—Consideration—Interest.
 196. — Relating to Collaterals.
 197. *Contemporaneous Agreements.*
 199. — How far Admissible.

Memoranda on Back, Margin, etc.

§ 190. It often becomes an important question whether a memorandum made upon the margin, back, bottom, or other part of a note or bill is part of the instrument. It is said by Mr. Justice Byles, in his work on Bills, that such a memorandum made before the completion of a bill by delivery is sometimes a part of it, and sometimes not.¹⁷⁸ If, however, such memorandum was made at or before the execution of the instrument, it is generally held to be a part of it,¹⁷⁹ unless, indeed, it is a mere memorandum placed on the paper by way of earmark.¹⁸⁰

¹⁷⁸ Byles, Bills, 155. See, too, Chit. Bills, 162.

¹⁷⁹ 1 Daniel, Neg. Inst. 156; 2 Pars. Bills & N. 539; Dinsmore v. Duncan, 57 N. Y. 573; Benedict v. Cowden, 49 N. Y. 396; Heywood v. Perrin, 10 Pick. (Mass.) 228; Shaw v. Society, 8 Mete. (Mass.) 223; Fletcher v. Blodgett, 16 Vt. 26; Falkenburg v. Clark, 11 R. I. 278; Wilson v. Tucker, 10 R. I. 578; Farmers' Bank v. Ewing, 78 Ky. 264; Cushing v. Field, 70 Me. 50; Turnbull v. Thomas, 1 Hughes, 172, Fed. Cas. No. 14,243; Woodward v. Mathews, 15 Ind. 339; Corgan v. Frew, 39 Ill. 31; Johnson v. Heagan, 23 Me. 329; Polo Mfg. Co. v. Parr, 8 Neb. 379; Krouskop v. Shontz, 51 Wis. 204, 8 N. W. 241; Morris v. Cain's Ex'rs, 39 La. Ann. 712, 1 South. 797, and 2 South. 418; Seymour v. Farquhar, 93 Ala. 292, 8 South. 466.

¹⁸⁰ Byles, Bills, 101; Chit. Bills, 163; 1 Daniel, Neg. Inst. 159; Brill v. Crick, 1 Mees. & W. 232. A receipt for part payment, and a memorandum of protest made, are not part of a note, and need not be included in a copy contained in the pleadings. Buhl v. Trowbridge, 42 Mich. 44, 3 N. W. 245. And such a memorandum as the number of the note, or of the insurance policy for which it was given, is a mere earmark, which will not affect its negotiability. Bresee v. Crumpton (N. C.) 28 S. E. 351.

The circumstances of the making of such a memorandum are a question of fact for the jury to determine;¹⁸¹ and parol evidence is admissible as to such facts, although the memorandum is prima facie contemporaneous with the instrument, and forms part of it.¹⁸² But this has been held to be otherwise in the case of a memorandum on the back of a note, until proof was furnished of its being contemporaneous with the execution of the note.¹⁸³ And, if the memorandum was made after the execution of the instrument, it forms no part of it.¹⁸⁴

Memoranda Expressing a Condition.

§ 191. The memorandum is none the less a part of the note because its effect is to render its payment contingent, provided it be contemporaneous with the note.¹⁸⁵ This is true of a condition written below the note on the same paper, and its alteration avoids the instrument.¹⁸⁶ In like manner, a memorandum on the back of a note, "On condition that, if any dispute shall arise respecting the fir, the note to be void," is part of the note, and renders it contingent and nonnegotiable.¹⁸⁷ So, a memorandum on the end of a note providing that "this note is subject to a contract made November, 1874."¹⁸⁸ So, a memorandum under the signature that the note is not to be paid if a certain machine be not delivered forms part of the note.¹⁸⁹ Likewise a memorandum rendering the payment dependent on a certain contingency;¹⁹⁰ or a memorandum be-

¹⁸¹ Tuckerman v. Hartwell, 3 Me. 147.

¹⁸² Fletcher v. Blodgett, 16 Vt. 26; Van Zandt v. Hopkins, 151 Ill. 248, 37 N. E. 845.

¹⁸³ Bay v. Shrader, 50 Miss. 326.

¹⁸⁴ Byles, Bills, 101; Stone v. Metcalf, 1 Starkie, 53, 4 Camp. 217; 33 & 34 Viet. c. 97, § 7.

¹⁸⁵ Byles, Bills, 100; 2 Pars. Bills & N. 517, 539; Story, Prom. Notes, 24; Hughes v. Fisher, 10 Colo. 383, 15 Pac. 702. At least, between the original parties, 1 Edw. Bills & N. § 161.

¹⁸⁶ Gerrish v. Glines, 56 N. H. 9.

¹⁸⁷ Hartley v. Wilkinson, 4 Maule & S. 25, 4 Camp. 127.

¹⁸⁸ Cushing v. Field, 70 Me. 50.

¹⁸⁹ Wait v. Pomeroy, 20 Mich. 425. So, in like position, a memorandum that the note shall be considered paid "when B. sells \$50 worth" of certain machines. State v. Stratton, 27 Iowa, 420.

¹⁹⁰ Henry v. Colman, 5 Vt. 402.

low the signature that the note is not to be sued until a certain time.¹⁹¹

In like manner, a statement printed on the margin of a note to the effect that it was given for a patent, and was not to be paid until a certain specified profit was obtained, is part of the note; but an alteration made by cutting it off was held to be no defense to the maker, at suit of a bona fide holder, by reason of the maker's negligence in the matter.¹⁹² Again, where one of the makers of a note added to his signature the words "surety ninety days from date," these words were held to form part of the note.¹⁹³ But an agreement by the payee not to sell the note, indorsed on it, has been held not to be a part of the note, and not to affect an indorsee's right to recover on it.¹⁹⁴ So, a memorandum on the back of a note expressing the payee's *desire* that indulgence should be given to the maker is not a part of the note, and does not constitute a condition.¹⁹⁵

Memoranda as to Time of Payment.

§ 192. Memoranda qualifying a note or bill relate frequently to the time limited for its payment. Such a memorandum as to when the note falls due may correct an erroneous date;¹⁹⁶ or may render the time of payment contingent,—e. g. a memorandum on the back of the note, "when a dividend on said estate shall be declared," is construed as part of it.¹⁹⁷ So, a like memorandum "not to compel payment, but to receive when convenient."¹⁹⁸ And the mere word "renewed" indorsed on a note has been held to have similar effect as part of the note.¹⁹⁹ But an indorsement of the words "to be

¹⁹¹ Franklin Sav. Inst. v. Reed, 125 Mass. 365.

¹⁹² Zimmerman v. Rote, 75 Pa. St. 188.

¹⁹³ Ulmer v. Reed, 11 Me. 293.

¹⁹⁴ Leland v. Parriott, 35 Iowa, 454.

¹⁹⁵ Chit. Bills, 163; Stone v. Metcalf. 1 Starkie, 53, 4 Camp. 217; 33 & 34 Viet. c. 97, § 7.

¹⁹⁶ Byles, Bills, 101; Fitch v. Jones, 5 El. & Bl. 238; Fanshawe v. Peet, 2 Hurl. & N. 1.

¹⁹⁷ Effinger v. Richards, 35 Miss. 540. So, a reference in an interest coupon to an option in the principal bond as to the maturity. McClelland v. Railroad Co., 110 N. Y. 469, 18 N. E. 237. And see § 197, *infra*.

¹⁹⁸ Barnard v. Cushing, 4 Metc. (Mass.) 230.

¹⁹⁹ Lime Rock Bank v. Mallett, 34 Me. 547. But a similar indorsement on

extended if desired by the makers," although part of the note, has been rejected as indefinite and immaterial.²⁰⁰

A memorandum at the bottom of a note, "not to be collected until T. takes it up, as the maker has paid said T. for the same," is a part of it, and postpones its payment.²⁰¹ So, a memorandum in the same position to the effect that the maker is "not to be compelled to pay said note before April 1";²⁰² or a memorandum on the back postponing payment "until the old mill is sold for a fair price";²⁰³ or relieving from the payment of the principal as long as the interest is paid;²⁰⁴ or, on the back of a negotiable municipal bond payable in 29 years, making it due on default of interest coupons;²⁰⁵ or, on the back of a note, "to be paid when A. collects a certain note of B.";²⁰⁶ or, at the bottom of a note, "one-half payable in twelve months, the balance in twenty-four months."²⁰⁷ But, where such memorandum is in conflict with the tenor of a note and also with itself,—e. g. the note being dated September 13th, payable four weeks from date, with the memorandum at the bottom, "Due Oct. 12, Oct. 11,"—it was rejected as repugnant, and held to form no part of the note.²⁰⁸

an envelope containing the note, not signed, is no part of the note. *Central Bank v. Willard*, 17 Pick. (Mass.) 151.

²⁰⁰ *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241.

²⁰¹ *Johnson v. Heagan*, 23 Me. 329.

²⁰² *Franklin Sav. Inst. v. Reed*, 125 Mass. 365.

²⁰³ *Blake v. Coleman*, 22 Wis. 396. So *Jacobs v. Mitchell*. 46 Ohio St. 601. 22 N. E. 768.

²⁰⁴ *Oskaloosa College v. Hickok*, 46 Iowa, 237.

²⁰⁵ *Mayor & Council of Griffin v. Bank*, 58 Ga. 584. So, a like provision in a mortgage securing a note payable on its face in five years. *Noell v. Gaines*, 68 Mo. 649; *Parks v. Cooke*, 3 Bush (Ky.) 168.

²⁰⁶ *McCalla v. McCalla*, 48 Ga. 503.

²⁰⁷ *Heywood v. Perrin*, 10 Pick. (Mass.) 228; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165.

²⁰⁸ *Way v. Batchelder*, 129 Mass. 361, Ames, J., saying (page 362): "Such a memorandum is repugnant and self-contradictory, and for that reason it is not to be considered as a part of the contract, or sufficient to contradict the terms used in the body of the note." So, *Fisk v. McNeal*, 23 Neb. 726, 37 N. W. 616.

Memoranda—As to Place of Payment.

§ 193. Such memorandum is also frequently made to designate a place of payment, or indicate a change in the place named in the bill or note. Thus, a memorandum at the bottom of a bill in the words, "Accepted to pay in Boston, A. F. Howe & Co.," was held to indicate the office of A. F. Howe & Co., in Boston, as a place of payment, and was construed as part of the bill.²⁰⁹ So, a marginal memorandum, "Payable at the Bank of America," has been held to form a part of the note, and the addition of such a memorandum after the delivery of the note was held, therefore, to constitute a material alteration of the paper.²¹⁰ Such a memorandum, however, pointing out the place of payment, has been held in England not to be part of the instrument.²¹¹ And this has been held to be the rule in a recent case in Missouri also.²¹²

Memoranda of Amount—Marginal Figures.

§ 194. Marginal figures indicating an amount are frequently used, and, as has been seen, are sometimes required by statute. They avail to explain what is clearly an omission,—e. g. of the word "pounds" or "dollars";²¹³ but are always controlled by the words naming the amount in the body of the instrument, if there is a discrepancy.²¹⁴ Such figures are frequently used in giving a bill or note for a blank amount, their purpose being to limit the holder's authority as to the filling in of the blank. In some cases these figures are held to be a part of the note, and erasing or tearing them off amounts, in such case, to an alteration of the instrument.²¹⁵ In such case, filling the blank with a larger amount constitutes an alter-

²⁰⁹ *Tuckerman v. Hartwell*, 3 Me. 147.

²¹⁰ *Woodworth v. Bank*, 19 Johns. (N. Y.) 391.

²¹¹ *Exon v. Russell*, 4 Maule & S. 505.

²¹² *American Nat. Bank v. Bangs*, 42 Mo. 450.

²¹³ *McCoy v. Gilmore*, 7 Ohio, 268; *Sweetser v. French*, 13 Mete. (Mass.) 262; *Corgan v. Frew*, 39 Ill. 31.

²¹⁴ *Mears v. Graham*, 8 Blackf. (Ind.) 144. For foreign statutes to like effect, see chapter 4, *supra*. In Iowa marginal figures alone are not sufficient to support a recovery at law. *Hollen v. Davis*, 59 Iowa, 444, 13 N. W. 413.

²¹⁵ *Hall v. Bank*, 5 Dana (Ky.) 258.

ation, discharging a surety who had delivered the paper with the marginal figures and the blank.²¹⁶ It has been held, however, that such figures are no part of the note, and that their alteration is not material.²¹⁷

Memoranda—As to Currency and other Means of Payment—Consideration—Interest.

§ 195. The *currency* or other means of payment is sometimes indicated by a memorandum of the sort already described, and such memorandum in general forms part of the instrument. This is true of the words "foreign bills" written at the bottom of a note, destroying its negotiability.²¹⁸ So, of the words "in facilities" written under the signature;²¹⁹ or, "to be paid in notes of the Bank of Kentucky," written across the end;²²⁰ or, "to be paid in wheat at ninety-five cents a bushel," written on the back;²²¹ or, "payable in fulfilled cloth one year from the month of October next," written on the margin.²²² But a memorandum on a check for court deposits referring to the number of the case is not a direction for payment out of a special deposit.²²³

In like manner, the memorandum may indicate the *consideration* of a note or the fund provided for its payment. Thus, a memorandum under the signature, "to be paid from profits of machines when sold," is a part of the note,²²⁴ although it was held, in an early case in New York, that a contemporaneous indorsement showing the consideration of the note formed no part of it.²²⁵ But it is said that where a memorandum of this sort provides for payment in

²¹⁶ Henderson v. Bondurant, 39 Mo. 369.

²¹⁷ Schryver v. Hawkes, 22 Ohio St. 308; Woolfolk v. Bank, 10 Bush (Ky.) 504; Smith v. Smith, 1 R. I. 398.

²¹⁸ Jones v. Fales, 4 Mass. 245.

²¹⁹ Springfield Bank v. Merrick, 14 Mass. 322.

²²⁰ Osborne v. Fulton, 1 Blackf. (Ind.) 234.

²²¹ Polo Mfg. Co. v. Parr, 8 Neb. 379.

²²² Fletcher v. Blodgett, 16 Vt. 26.

²²³ State Nat. Bank v. Reilly, 124 Ill. 464, 14 N. E. 657.

²²⁴ Benedict v. Cowden, 49 N. Y. 396. See, too, § 203, *infra*.

²²⁵ Sanders v. Bacon, 8 Johns. 485. The authority of this case has been questioned, so far as it holds the memorandum to be no part of the note. Benedict v. Cowden, 49 N. Y. 396.

a certain way,—e. g. “in labor, if made within six months,”—the provision expires with the limitation; and, payment not having been made in that manner within the time limited, the provision is not afterwards a part of the note.²²⁶

Another common use of such memorandum is to provide for *interest* or for the periodical payment of interest. Thus, the words “with lawful interest,” written on the corner of a note at the time of its execution, form part of it.²²⁷ And the subsequent addition of a provision for interest to be paid semiannually, written on the face of a note, is a material alteration.²²⁸ But a memorandum written below the signature by the payee, in the words “when due, to draw fifteen per cent.,” has been held to be no part of the note, in the absence of evidence as to when it was made.²²⁹

Memoranda as to Collaterals.

§ 196. Memoranda of this sort to the effect that collateral security has been given have been held to form no part of a bill or note.²³⁰ But in Massachusetts such a memorandum is part of the note,²³¹ although it cannot be construed as a notice to the holder of any agreement between joint makers, or between maker and indorser, for the deposit of such collaterals.²³²

So, too, a marginal memorandum, that the note is “given as collateral security with agreement,” is part of the note, and renders it contingent and nonnegotiable, so that an indorsee cannot bring suit upon it.²³³ On the other hand, in England a similar provision on

²²⁶ *Odiorne v. Sargent*, 6 N. H. 401.

²²⁷ *Warrington v. Early*, 2 El. & Bl. 763. And the writing of such memorandum in the corner of a note constitutes a material alteration. *Id.*

²²⁸ *Dewey v. Reed*, 40 Barb. (N. Y.) 17.

²²⁹ *Knoles v. Hill*, 25 Ill. 288.

²³⁰ *Byles, Bills*, 101; *Wise v. Charlton*, 4 Adol. & E. 786, 6 Nev. & M. 364, and 2 Har. & W. 49; *Fancourt v. Thorne*, 9 Q. B. 312. And do not affect its negotiability. *American Nat. Bank v. Paper Co.*, 19 R. I. 149, 32 Atl. 305. So, the number and series of a bank note. *Note Holders v. Board*, 84 Tenn. 46. See, too, § 202, *infra*.

²³¹ *Shaw v. Society*, 8 Mete. 223.

²³² *Fitchburg Sav. Bank v. Rice*, 124 Mass. 72.

²³³ *Costelo v. Crowell*, 127 Mass. 293; *Haskell v. Lambert*, 16 Gray (Mass.) 592.

the back of the note, "for securing floating advances with lawful interest, commissions, &c.," although part of the instrument, is held to be an agreement requiring an agreement stamp.²³⁴ But in an early case in New York, no longer followed, such a memorandum, indicating that a note was given as security for accommodation acceptances, and was to be void if the drawer paid the bills accepted, was held not to be part of the note; and, although itself conditional, the note in question was held to be a negotiable one.²³⁵ The following memorandum on the back of a paper has also been held to form a part of it, being executed contemporaneously with it: "And the within note is taken for security for all such balances as J. M. may happen to owe T. L., not extending further than the within named sum of two hundred pounds; but this note is to be in force for six months, and no money allowed to be called for sooner in any case."²³⁶

So, too, a printed waiver on the back of a note of presentment, protest, and notice of dishonor.²³⁷ And an indorsement in these words: "This note is held by me for a note of B.," describing it, amounts to a notice to all purchasers that it is held merely as a collateral.²³⁸

Contemporaneous Agreements.

§ 197. Commercial paper is sometimes to be construed as one instrument with contemporaneous agreements executed on separate paper. This is so at least as to the original parties and all parties with notice of such agreement.²³⁹ Thus, a contemporaneous written agreement may be construed with a note so as to defeat it.²⁴⁰

²³⁴ *Cholmeley v. Darley*, 14 Mees. & W. 344.

²³⁵ *Tappan v. Ely*, 15 Wend. 362. So far as *Tappan v. Ely* held such memorandum to be no part of the note, its authority was questioned in *Benedict v. Cowden*, 49 N. Y. 396. In *American Nat. Bank v. Sprague*, 14 R. I. 410, the recital in the note that it was collateral for an acceptance was held to render it uncertain and nonnegotiable.

²³⁶ *Leeds v. Lancashire*, 2 Camp. 205.

²³⁷ *Farmers' Bank v. Ewing*, 78 Ky. 264.

²³⁸ *National Security Bank v. McDonald*, 127 Mass. 82.

²³⁹ 1 Edw. Bills & N. § 164.

²⁴⁰ *Crosman v. Fuller*, 17 Pick. (Mass.) 171; or providing for the application of the funds when received, *Babbitt v. Moore*, 51 N. J. Law, 229, 17

A collateral mortgage, executed contemporaneously with a note, may be construed as one instrument with it;²⁴¹ especially if it be a mortgage executed to secure the note, referring in the body of it to the note as payable according to the tenor, etc.²⁴² And where a note is made payable in four years with interest, not specifying when the interest is to be paid, and a contemporaneous mortgage securing it provides for the payment of interest annually, the two will be construed together, and the interest will be payable on the note annually.²⁴³ So, where several notes maturing at different times are all secured by a contemporaneous trust deed, which by its provisions postpones the maturity of all the notes until the last of them falls due,²⁴⁴ or accelerates the maturity of all on default in any,²⁴⁵ the

Atl. 99; or a duebill for rent "under lease of even date," *Post v. Railway Co.*, 171 Pa. St. 615, 33 Atl. 362. And see, in general, *Davis v. Brown*, 94 U. S. 423; *Davidson v. Bodley*, 27 La. Ann. 149. So, an agreement as to consideration yet to be earned, *Montgomery v. Hunt* (Ga.) 27 S. E. 701; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79; *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218; or constituting a condition for the payment of the note. *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148; or providing for its surrender on return of the consideration, *American Gas & Ventilating Mach. Co. v. Wood* (Me.) 38 Atl. 548. And the holder cannot in such case repudiate the agreement as invalid, and maintain suit on the note. *O'Brien v. McDonald*, 144 N. Y. 716, 39 N. E. 858, affirming 78 Hun, 420, 29 N. Y. Supp. 191.

²⁴¹ *Noell v. Gaines*, 68 Mo. 649; *Parks v. Cooke*, 3 Bush, 168; *Muzzy v. Knight*, 8 Kan. 456; *First Nat. Bank of Sturgis v. Peck*, Id. 661; *Richardson v. Thomas*, 28 Ark. 387; *Winchell v. Coney*, 54 Conn. 24, 5 Atl. 354; *Cabbell v. Knote*, 2 Kan. App. 68, 43 Pac. 309; *Seieroe v. Bank*, 50 Neb. 612, 70 N. W. 220. Even so far as to determine the negotiability of the bonds secured. *Lockrow v. Cline*, 4 Kan. App. 716, 46 Pac. 720.

²⁴² *Dobbins v. Parker*, 46 Iowa, 357; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510. And such mortgage may be treated as a duplicate note, on which an action will lie after the statute of limitations has barred the note. *Grinnell v. Baxter*, 17 Pick. (Mass.) 386.

²⁴³ *Meyer v. Graeber*, 19 Kan. 165.

²⁴⁴ *Brownlee v. Arnold*, 60 Mo. 79. So, a note and a collateral power to enter judgment for A. (the payee of the note) "and Bro." *Holmes v. Parker*, 125 Ill. 478, 17 N. E. 759.

²⁴⁵ *Chambers v. Marks*, 93 Ala. 412, 9 South. 74; *Batchelder v. Water Co.*, 131 N. Y. 42, 29 N. E. 801. But see, contra, *McClelland v. Bishop*, 42 Ohio

instruments will be construed together. So, an agreement in a contemporaneous collateral mortgage as to payment of taxes on the mortgaged property,²⁴⁶ or exempting from liability all other property of the maker of the note, forms one contract with the note.²⁴⁷ So, a note made to "A. or ——" may be explained by a collateral mortgage to be intended for A. *or bearer*.²⁴⁸

§ 198. In like manner, a note given for an insurance premium will be construed with a contemporaneous receipt showing that fact,²⁴⁹ or with a like receipt providing for the surrender of the note on a certain contingency.²⁵⁰ And the maker of a note, at suit of an indorsee taking it after maturity, may avail himself of a contemporaneous agreement rendering the payment of the note conditional.²⁵¹ So, when a note is made "subject to certain conditions contained in a written agreement of this date," the note and agreement will be construed as one contract.²⁵² So, a note for property purchased and a contemporaneous agreement that the title shall not pass until the note is paid.²⁵³ So, a contemporaneous stipulation under seal for the conditional payment of the note out of the proceeds of a certain mine;²⁵⁴ or a note payable one day after date, with a contemporaneous writing providing for payment in five years;²⁵⁵ or a contemporaneous verbal-agreement for the payment

St. 113 (as to time for demand and notice against indorser); *White v. Miller*, 52 Minn. 367, 54 N. W. 736 (as to time for suit).

²⁴⁶ *Donaldson v. Grant*, 15 Utah, 231, 49 Pac. 779.

²⁴⁷ *Richardson v. Thomas*, 28 Ark. 387.

²⁴⁸ *Elliott v. Deason*, 64 Ga. 63.

²⁴⁹ *Lawrence v. Griswold*, 30 Mich. 410.

²⁵⁰ *Hunt v. Livermore*, 5 Pick. (Mass.) 395.

²⁵¹ *Munro v. King*, 3 Colo. 238; *Rogers v. Broadnax*, 24 Tex. 538.

²⁵² *Titlow v. Hubbard*, 63 Ind. 6. And if an agreement requires the payer to look to certain securities only for payment, and waives all rights at law, it will bar a suit on the note. *Reed v. Cassatt*, 153 Pa. St. 156, 25 Atl. 1074; or "in accordance with" a letter referred to in the note, *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419, 49 Pac. 524; or reciting a collateral mortgage, "and governed by the conditions thereof," *Seieroe v. Bank*, 50 Neb. 612, 70 N. W. 220.

²⁵³ *Third Nat. Bank of Syracuse v. Armstrong*, 25 Minn. 531.

²⁵⁴ *Goodwin v. Nickerson*, 51 Cal. 166.

²⁵⁵ And in such case the statute of limitations will not begin to run until the expiration of the five years. *Round v. Donnel*, 5 Kan. 54.

of a note in work,²⁵⁶ or in hides,²⁵⁷ or in rent.²⁵⁸ So, a contemporaneous agreement by a married woman charging her separate estate.²⁵⁹

Contemporaneous Agreements—When Admissible.

§ 199. In like manner, where a note is made by one partner to another, it may be shown by a contemporaneous agreement to have been given to secure the payee against half the loss of the partnership capital, and recovery by him will be thereby limited to the amount of loss sustained.²⁶⁰ But such contemporaneous agreement, to constitute one contract with the note or bill, must be between the same parties. Thus, a note by a contractor to A., payable on the completion of a building, will not be affected by a contemporaneous agreement between the contractor *and the county* for payment on its completion "according to the plan and specification on file"; and the fact that the building was completed on another plan constitutes, therefore, no defense to the note.²⁶¹

A contemporaneous agreement cannot be used to contradict and so defeat a note; e. g. by showing that the maker was not to be held liable,²⁶² or a note payable to the administrator of A. was not to be paid, but was to be applied in satisfaction of a debt of A. to the maker.²⁶³ But a contemporaneous verbal agreement is admissible to show a failure of consideration between original parties or parties with notice.²⁶⁴ In Colorado, however, a contemporaneous agreement set up in defense to a note or bill must be alleged to be in writing.²⁶⁵

²⁵⁶ Singer Mfg. Co. v. Haines, 36 Mich. 385; Weeks v. Medler, 20 Kan. 57.

²⁵⁷ Hill v. Huntress, 43 N. H. 480. So, an indorsement "to be paid in wheat." Polo Mfg. Co. v. Parr, 8 Neb. 379.

²⁵⁸ Bradley v. Marshall, 54 Ill. 173.

²⁵⁹ Sherwood v. Archer, 10 Hun (N. Y.) 73. So, too, Treadwell v. Archer, 76 N. Y. 196, reversing 10 Hun (N. Y.) 73, on other grounds.

²⁶⁰ Rogers v. Smith, 47 N. Y. 324.

²⁶¹ Levally v. Harmon, 20 Iowa, 533.

²⁶² Lunsford v. Malsby (Ga.) 28 S. E. 496.

²⁶³ McDonald v. Elfes, 61 Ind. 279. So, a contemporaneous letter is not admissible to change the note by showing that it was payable only out of a particular fund. Gorrell v. Insurance Co., 11 C. C. A. 240, 63 Fed. 371.

²⁶⁴ Smith v. Carter, 25 Wis. 283.

²⁶⁵ Peddie v. Donnelly, 1 Colo. 421.

A contemporaneous agreement for the discontinuance of a certain suit on payment of costs, although construed with a note, does not amount to a condition precedent to the payment of it.²⁶⁶ Neither does a contemporaneous warrant of attorney, although construed with a note, avail as an extension of the statute of limitations on the note.²⁶⁷

²⁶⁶ Bruce v. Carter, 72 N. Y. 616.

²⁶⁷ Walrod v. Manson, 23 Wis. 393.

V. ADDITIONAL STIPULATIONS.

§ 200. Stipulations for Interest—Exchange.

- 201. — As to Charging Account, Returning Certificate, Waiving Protest, etc.
- 202. — As to Collaterals.
- 203. — Consideration.
- 204. — Manner of Payment.
- 205. — Attorney's Fees.
- 207. Warrant to Confess Judgment.
- 208. Other Agreements.

Provisions for Interest—Exchange.

§ 200. All definitions of commercial paper include the requirement that it shall be for the payment of money only. Instruments providing for such payment *and other objects* may be valid as agreements, but, in the absence of statutes to that effect, are not to be construed as negotiable and commercial instruments. Some additions, however, do not change the character of the paper by providing for any other act than the payment of money, and additions of this sort do not affect its negotiability or commercial character.

The most common addition of this kind is a clause providing for the payment of lawful *interest*. An instrument containing such clause may still be a valid bill of exchange.²⁶⁸ In Austria such a clause does destroy the negotiable character of a bill, note, indorsement, or other commercial contract;²⁶⁹ while in Germany the clause itself is of no avail, and the bill or note is not affected by it.²⁷⁰

Another common addition, not in general affecting the negotiability of a bill of exchange, is a provision for *exchange* between the place of drawing and the place of payment. Such a provision is

²⁶⁸ Warrington v. Early, 2 Bl. & Bl. 763. So, by Negotiable Instrument Law in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 2), NEW YORK and MARYLAND (§ 21).

So, with interest compounded after maturity. Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603. But see, as to provision for interest at increased rate, if not paid at maturity, § 104, *supra*; § 1713, *infra*.

²⁶⁹ AUSTRIA (Orde. No. 2).

²⁷⁰ GERMANY (Nuremb. Nov. No. 4).

valid,²⁷¹ if it is not used as a subterfuge to evade the usury laws;²⁷² but, if so used, it will be void.²⁷³

Common Phrases as to Charging, Waiver, Return of Certificate, etc.

§ 201. Another ordinary and immaterial addition to a bill of exchange is a request to *charge* the same to the account of the drawer or of some other person. Such request will not affect the negotiability of the bill.²⁷⁴ And a statement that the drawer will credit the payment in a particular way or on a particular account is likewise immaterial.²⁷⁵

In certificates of deposit the sum of money named is frequently

²⁷¹ Negotiable Instrument Law in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 2), MARYLAND and NEW YORK (§ 21). So, too, *Johnson v. Frisbie*, 15 Mich. 286; *Smith v. Kendall*, 9 Mich. 241; *Leggett v. Jones*, 10 Wis. 34; *Sperry v. Horr*, 32 Iowa, 184; *Grutacap v. Woulluisse*, 2 McLean, 581, Fed. Cas. No. 5,854. The contrary was, however, held in *Read v. McNulty*, 12 Rich. Law (S. C.) 445; *Lowe v. Bliss*, 24 Ill. 168; *Russell v. Russell*, 1 MacArthur (D. C.) 263; *Hughitt v. Johnson*, 28 Fed. 865; *Windsor Sav. Bank v. McMahon*, 38 Fed. 283; and as to notes drawn "with exchange" and waiver of exemption laws, in *Hughitt v. Johnson*, 28 Fed. 865; or "with exchange and costs of collection" in *Nicely v. Bank*, 15 Ind. App. 563, 44 N. E. 572; and, under statute of South Dakota, *Second Nat. Bank v. Basuier*, 12 C. C. A. 517, 65 Fed. 58. "The real question is * * * whether they are notes or bills of exchange at all." *Mitchell, J.*, in *Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968. And such clause does not, in general, affect the negotiability of the paper. *Culbertson v. Nelson*, 93 Iowa, 187, 61 N. W. 554; *Id.*, 27 Lawy. Rep. Ann. 222, and note. But see, contra, as making the amount to be paid uncertain, *Nicely v. Bank*, 18 Ind. App. 30, 47 N. E. 476; *Carroll County Sav. Bank v. Strother*, 28 S. C. 505, 6 S. E. 313.

²⁷² *Churchman v. Martin*, 54 Ind. 380.

²⁷³ *Cornell v. Barnes*, 26 Wis. 473.

²⁷⁴ *Mehlberg v. Tisher*, 24 Wis. 607; *Crofton v. Crofton*, 33 Ch. Div. 612; *Planters' Bank v. Evans*, 36 Tex. 592; *Petillon v. Lorden*, 86 Ill. 361; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351. So, a check drawn "for account of A." *Ridgely Nat. Bank v. Patton*, 109 Ill. 479. But an order for payment out of a particular fund, "and this shall be your warrant for so doing and good as my receipt for said money," has been interpreted as a mere nonnegotiable receipt, as shown on its face. *Harriman v. Sanborn*, 43 N. H. 128. See, too, § 107, *supra*.

²⁷⁵ *Early v. McCart*, 2 Dana (Ky.) 414.

made payable on *return of this certificate*, and their negotiability is not affected by this provision.²⁷⁶ But it would be if the provision also included the return of the maker's guaranty or of some other paper.²⁷⁷

Where a maker, after the usual words of promise in his note, added the words "which I am truly thankful for and shall never be forgotten by me," the instrument was held to be a negotiable note notwithstanding this addition.²⁷⁸ In like manner, the expression "*ne varietur*," common in Louisiana notes, does not affect their negotiability.²⁷⁹ Other phrases frequently made use of in bills of exchange, without any effect upon the negotiability of the paper, are the following: "In case of need, apply to Messrs. A. B., at C.;" "Return without protest;" "As per advice." So, expressions fixing a limit to the amount of exchange or expenses assumed.²⁸⁰ There are also some statutory provisions on this subject.²⁸¹

²⁷⁶ *Frank v. Wessels*, 64 N. Y. 155, overruling *Patterson v. Poindexter*, 6 Watts & S. (Pa.) 227; *Cate v. Patterson*, 25 Mich. 191. So, where an order on a savings bank deposit required the bank book to "accompany this order." *White v. Cushing*, 88 Me. 339, 34 Atl. 164; *Iron City Nat. Bank v. McCord*, 139 Pa. St. 52, 21 Atl. 143.

²⁷⁷ *Smilie v. Stevens*, 39 Vt. 315.

²⁷⁸ *Ellis v. Mason*, 2 Hill. 295, note, 1 Eng. Jur. 380.

²⁷⁹ *Fleckner v. Bank*, 8 Wheat. 338; *Bank of Kentucky v. Goodale*, 20 La. Ann. 50; *Maskell v. Haifleigh*, 8 La. Ann. 457; *Nott v. Watson*, 11 La. Ann. 664.

²⁸⁰ *Chit. Bills*, 186, 189. So, a waiver of relief from appraisement and exemption laws will not destroy the negotiability of a note. *Lyon v. Martin*, 31 Kan. 411, 2 Pac. 790.

²⁸¹ In CALIFORNIA a nonnegotiable option to perform some act in lieu of payment may be added without prejudice to the negotiability of an instrument. Civ. Code, § 3090. So, too, "a negotiable instrument may contain a pledge of collateral security with authority to dispose thereof" (Id. § 3092), but "must not contain any other contract than such as is specified" above (Id. § 3093). In NORTH DAKOTA (Rev. Codes, §§ 4856, 4858, 4859), and WYOMING (Rev. St. c. 70, §§ 5, 7, 8) the same provisions have been enacted, with provision, also, for attorney's fees in WYOMING. In PENNSYLVANIA the statute provides that all bills of exchange, notes, drafts, etc., made or indorsed in Pennsylvania, payable elsewhere, "with the current rate of exchange in Philadelphia or such other place within this commonwealth where the same may bear date, or in current funds or such like qualifications," shall be negotiable. P. L. 1849, p. 427, § 11; *Purd. Dig.* p. 1732, § 2. By the negotiable instrument law of 1897 provision may be made for interest, ex-

But *waiver* of exemption laws contained in a note,²⁸² or waiver of the statutory diligence in suit and of notice of protest,²⁸³ has been held to render the note nonnegotiable.

Phrases Referring to Collaterals.

§ 202. Another addition frequently occurring in bills and notes, and not affecting their negotiability, is the mention or recital of collateral security.²⁸⁴ So, in like manner, a recital of collateral with a power of attorney authorizing its sale on nonpayment of the note secured has been held not to affect its negotiability.²⁸⁵ And even a promise coupled with such provisions and an agreement to pay any deficiency arising after such sale has been held to leave the note still negotiable.²⁸⁶ In Texas a recital of a collateral security

change, and fees and costs in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 2), NEW YORK and MARYLAND (§ 21).

²⁸² *Hughitt v. Johnson*, 28 Fed. 865. But see, contra, *Lyon v. Martin*, 31 Kan. 411, 2 Pac. 790. And see §§ 207, 208, *infra*.

²⁸³ *Hegeler v. Comstock*, 1 S. Dak. 138, 45 N. W. 331. The note in this case contained also a provision for extension without notice, and all of these were within the law that "a negotiable instrument must not contain any other contract," etc. Comp. Laws, § 4462.

²⁸⁴ *Byles*, Bills, 11; 2 Pars. Notes & B. 147; *Wise v. Charlton*, 4 Adol. & E. 786; *Fancourt v. Thorne*, 9 Q. B. 312; *Branning v. Markham*, 12 Allen (Mass.) 454; *Collins v. Bradbury*, 64 Me. 37, where the note was said to be for a colt, which was "holden for the payment of the amount"; *Duncan v. Louisville*, 13 Bush (Ky.) 378; *Heard v. Bank*, 8 Neb. 10; *Valley Nat. Bank v. Crowell*, 148 Pa. St. 284, 23 Atl. 1068; *Rathburn v. Jones*, 47 S. C. 206, 25 S. E. 214; *New York Security & Trust Co. v. Storm*, 81 Hun, 33, 30 N. Y. Supp. 605; *Guilford v. Railway Co.*, 48 Minn. 560, 51 N. W. 658; *De Hass v. Roberts*, 59 Fed. 853; *Potts v. Coal Co.*, 6 Phila. 249; *Knipper v. Chase*, 7 Iowa, 145; *Towne v. Rice*, 122 Mass. 67; *De Hass v. Dibert*, 17 C. C. A. 79, 70 Fed. 227, providing, also, that it be governed by Kansas law. But it will not be negotiable if the collateral referred to renders uncertain the amount, e. g. by requiring payment of taxes, *Brooke v. Struthers* (Mich.) 68 N. W. 272; or the time of payment, e. g. by accelerating maturity of note on insufficient sale of collateral, *Continental Nat. Bank v. McGeoch*, 73 Wis. 332, 41 N. W. 409. As to the recital in a note that it was "given as collateral security," see § 196, *supra*.

²⁸⁵ *Arnold v. Railroad Co.*, 5 Duer (N. Y.) 207; *Towne v. Rice*, 122 Mass. 67; *Haynes v. Beckman*, 6 La. Ann. 224.

²⁸⁶ *Arnold v. Railroad Co.*, 5 Duer (N. Y.) 207; *First Nat. Bank of Charleston v. Gray*, 18 S. C. 282.

on real estate appears to entitle the note containing it to a decree of foreclosure like a mortgage.²⁸⁷ But it has been held that a stipulation contained in a bill of exchange, for the delivery of cotton to the acceptors, was intended for their security only, and did not inure to the benefit of subsequent holders.²⁸⁸

Additional Clauses Relating to Consideration.

§ 203. The recital in a note or bill of the consideration supporting it is another common addition not affecting its negotiability.²⁸⁹ Where the consideration is in the nature of an executory agreement,—e. g. a promise to pay A. a certain sum for a suit of clothes ordered by B.,—the instrument is not a promissory note.²⁹⁰

On the other hand, the recital of an executed consideration, however full, will not destroy the character of the paper as a note. Thus, a promise “in consideration of his foregoing and forbearing an action for damages, ascertained by consent to amount to that sum, by reason of injuries sustained by his wife in respect of my non-

²⁸⁷ *Slade v. Young*, 32 Tex. 668.

²⁸⁸ *Ware v. Bank*, 59 Ga. 840.

²⁸⁹ *Collins v. Bradbury*, 64 Me. 37; *Kirk v. Insurance Co.*, 39 Wis. 138; *Crofton v. Crofton*, 33 Ch. Div. 612; *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855; *Preston v. Whitney*, 23 Mich. 260; *Union Ins. Co. v. Greenleaf*, 64 Me. 123; *Wallace v. Dyson*, 1 Speer (S. C.) 127; *Hillstrom v. Anderson*, 46 Minn. 382, 49 N. W. 187; *Wright v. Traver*, 73 Mich. 493, 41 N. W. 517; *Clanin v. Machine Co.*, 118 Ind. 372, 21 N. E. 35; *Hubert v. Grady*, 59 Tex. 502; *Lewis v. Harper*, 73 Ga. 564; unless it is conditional or qualifies the promise, *Siegel v. Bank*, 131 Ill. 569, 23 N. E. 417; e. g. where “given in consideration of, and subject to,” a certain contract, *McComas v. Haas*, 107 Ind. 512, 8 N. E. 579; *Doherty v. Perry*, 38 Ind. 15. And a note for \$40 “profits” has been construed to refer to profits growing out of some past transaction, and to be negotiable. *Matthews v. Crosby*, 56 N. H. 21. See, too, § 195, *supra*.

²⁹⁰ *Jarvis v. Wilkins*, 7 Mees. & W. 410. But where a note provided that the contents were “to be appropriated to the payment of A.’s mortgage to B.,” and the mortgage was afterwards paid in another manner, the note was held to be negotiable. *Treat v. Cooper*, 22 Me. 203. So, where an order for a safe contained a promise to pay for it a certain amount at a certain time, it was held to be a note, within the Revised Statutes of Maine. *Morris v. Lynde*, 73 Me. 88.

repair of a footway," may still be a good promissory note.²⁹¹ So, a recital in a bill of exchange, "which is due me for the wagon bought last spring," leaves it still a bill of exchange.²⁹² So, in a premium note for insurance, the words "on policy No. 33" will not affect its negotiability,²⁹³ although the policy provided for a set-off of the note against any loss that might occur.²⁹⁴ So, too, the statement in a note that it is given "towards the right of way and grading of said railroad" is immaterial;²⁹⁵ or in consideration of a judgment to be assigned;²⁹⁶ or even the statement, "which, when paid, will be in full of a judgment," etc.²⁹⁷ So, a clause stating that the note is given "to satisfy an attachment against A. B., whose receipt will be good against said duebill."²⁹⁸ So, a statement to the following effect: "Being in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is fully paid."²⁹⁹

Some of these cases, however, appear to overstep the line of a mere recital of consideration. On the other hand, it has been held that

²⁹¹ *Shenton v. James*, 5 Q. B. 199. So, a note reciting that it was given as a "part payment on the plantation, as per agreement of February 14th, '74," has been held to be negotiable. *Bank of Sherman v. Apperson*, 4 Fed. 25.

²⁹² *Wells v. Brigham*, 6 Cush. (Mass.) 6.

²⁹³ *Bresee v. Crumpton* (N. C.) 28 S. E. 351.

²⁹⁴ *Taylor v. Curry*, 109 Mass. 36.

²⁹⁵ *Wright v. Irwin*, 33 Mich. 32.

²⁹⁶ *Sanders v. Bacon*, 8 Johns. (N. Y.) 379.

²⁹⁷ *Ellett v. Britton*, 6 Tex. 229.

²⁹⁸ *Bowie's Adm'x v. Foster*, Minor (Ala.) 264.

²⁹⁹ *Mott v. Bank*, 22 Hun (N. Y.) 354; *Chicago Ry. Equipment Co. v. Bank*, 136 U. S. 268, 10 Sup. Ct. 999; *Howard v. Simpkins*, 70 Ga. 322; *Fleetwood v. Machine Co.*, 95 Ind. 491; *Nichols v. Ruggles*, 76 Me. 25; *Burnley v. Tufts*, 66 Miss. 48, 5 South. 627; *First Nat. Bank v. Slaughter*, 98 Ala. 602, 14 South. 545; *Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100. See, too, § 93, *supra*. But other cases hold such a note to be nonnegotiable. *Bannister v. Rouse*, 44 Mich. 428, 6 N. W. 870; *Wright v. Traver*, 73 Mich. 493, 41 N. W. 517; *Sloan v. McCarty*, 134 Mass. 245; *Edwards v. Ramsey*, 30 Minn. 91, 14 N. W. 272; *First Nat. Bank v. Alton*, 60 Conn. 402, 22 Atl. 1010, the note also providing for payments to go as rental if the horse purchased died before final payment. In the words of Mr. Justice Harlan (136 U. S. 283, 10 Sup. Ct. 1003): "The agreement that the title should remain in the payee until the notes were paid * * * is a short form of chattel mortgage. * * * It does not qualify the promise to pay at the time fixed, any more than would be done

an agreement for the purchase of a saw gin, "for which I promise to pay," etc., is plainly not a promissory note.³⁰⁰ And in Louisiana a bill of exchange containing the words "according to a donation made to the parish, the same to be in accordance with a resolution of the police jury," was held to be conditional, and therefore not negotiable.³⁰¹

Agreements as to Manner of Payment.

§ 204. The following agreements, though seeming to add somewhat to the simple contract made by the note, have been held not to render it conditional nor to affect its negotiability in any way; e. g. a note for the payment of money "or in goods on demand."³⁰² So, too, a note containing an alternative "to issue stock for it" on its surrender.³⁰³ But a note for the payment of money, concluding with the clause "for which I am to receive stock of said company," has been held to be an agreement, and not a negotiable note.³⁰⁴ On the other hand, a note for money, with the provision that "it may be paid by release of payee from indorsement" of another note, has been held to be negotiable.³⁰⁵

A note payable in installments, with a provision that the whole shall become due on default in any installment, is none the less a negotiable note,³⁰⁶ although the contrary has been held as to the effect, on a negotiable railroad bond, of a clause reserving to the

by an agreement embodied in a separate instrument in the form of a mortgage." In Iowa a negotiable note may even embody a chattel mortgage. *Bank of Carroll v. Taylor*, 67 Iowa, 572, 25 N. W. 810. But in Maine, if the note contains an agreement that the thing purchased shall remain the property of the payee until the note is paid, it should be recorded as a chattel mortgage. *Nichols v. Ruggles*, supra; *Cunningham v. Trevitt*, 82 Me. 145, 19 Atl. 110; *Hill v. Nutter*, 82 Me. 199, 19 Atl. 170; *Monaghan v. Longfellow* 82 Me. 419, 19 Atl. 857; *Holt v. Knowlton*, 86 Me. 456, 29 Atl. 1113.

³⁰⁰ *Hodges v. Hall*, 5 Ga. 163.

³⁰¹ *Jenkins v. Caddo*, 7 La. Ann. 559.

³⁰² *Hosstatter v. Wilson*, 36 Barb. (N. Y.) 307.

³⁰³ *Hodges v. Shuler*, 22 N. Y. 114; *Hotchkiss v. Banks*, 21 Wall. 354.

³⁰⁴ *Considerant v. Brisbane*, 6 Duer (N. Y.) 686, 14 How. Prac. (N. Y.) 487.

³⁰⁵ *Pool v. McCrary*, 1 Kelly (Ga.) 319.

³⁰⁶ *Carlton v. Kenealy*, 12 Mees. & W. 139; *Miller v. Biddle*, 13 Law T. (N. S.) 334; *Markey v. Corey* (Mich.) 66 N. W. 493; *De Hass v. Roberts*, 59 Fed. 853.

maker the right to pay the sum mentioned before maturity with 20 per cent. discount.³⁰⁷ So, too, a condition postponing the payment of a note until the happening of a certain contingency has been held to render the note a mere agreement;³⁰⁸ or stipulating for extension of time at the holder's option.³⁰⁹ Of the same force is a stipulation in a note for its payment to a third person, if so indorsed on the note held by him.³¹⁰

Stipulation for Attorney's Fees.

§ 205. The effect of a stipulation for attorney's fees or costs of suit contained in a note has been the subject of much consideration, more especially in our Western states. As an agreement, and irrespective of usury laws and other statutory prohibitions, such a stipulation is in itself valid.³¹¹ And the fees so stipulated for may be recovered by the holder of the note, although not the original

³⁰⁷ *Chouteau v. Allen*, 70 Mo. 290.

³⁰⁸ *Blake v. Coleman*, 22 Wis. 396. So, if the maturity is at the option of the holder on breach of conditions contained in a collateral trust deed. *Chapman v. Steiner*, 5 Kan. App. 326, 48 Pac. 607.

³⁰⁹ *Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331; *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224.

³¹⁰ *Bunker v. Athearn*, 35 Me. 364.

³¹¹ *Harris Mfg. Co. v. Anfinson*, 31 Minn. 182, 17 N. W. 274; *Barton v. Bank*, 122 Ill. 354, 13 N. E. 503; *Bowie v. Hall*, 69 Md. 433, 16 Atl. 64; *Vipond v. Townsend*, 88 Wis. 285, 60 N. W. 430; *Harvey v. Baldwin*, 124 Ind. 59, 24 N. E. 347, and 26 N. E. 222; *Duggan v. Champlin* (Miss.) 23 South. 179; *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291; *Peyser v. Cole*, 11 Or. 39, 4 Pac. 529 (if reasonable); *Benn v. Kutzschan*, 24 Or. 28, 32 Pac. 763 (if reasonable); *Pirie v. Conrad* (Wis.) 72 N. W. 370 (if reasonable); *First Nat. Bank v. Larsen*, 60 Wis. 206, 19 N. W. 67 (but amount designated is not conclusive); *Brahan v. Bank*, 72 Miss. 266, 16 South. 203; *Meacham v. Pinson*, 60 Miss. 217; *Brown v. Barber*, 59 Ind. 533; *First Nat. Bank v. Breese*, 39 Iowa, 640; *Garver v. Pontious*, 66 Ind. 191; *Mathews v. Norman*, 42 Ind. 176; *Sinker v. Fletcher*, 61 Ind. 276; *Smiley v. Meir*, 47 Ind. 559; *Maynard v. Mier*, 85 Ind. 317; *Miner v. Bank*, 53 Tex. 559. A statute was passed in INDIANA (1 Rev. St. p. 149) declaring conditional stipulations for attorney's fees in promissory notes to be void. It does not apply to unconditional agreements. *Garver v. Pontious*, *supra*. Such stipulations should be specially pleaded, and are not recoverable under the common counts. *Altman v. Fowler*, 70 Mich. 57, 37 N. W. 708; *Prescott v. Grady*, 91 Cal. 521, 27 Pac. 755.

payee.³¹² And where a stipulation of this sort is contained in a bill of exchange, it has been held to be embraced in the liability assumed by the acceptor.³¹³ The fees provided for must, however, be proved, if the amount be not specified in the note.³¹⁴ And, where "reasonable attorney's fees" are provided for, it is error to render judgment for such fees without any evidence determining their amount.³¹⁵ An agreement in a note to pay attorney's fees for its collection is not conditional, unless made dependent on some contingency other than mere collection.³¹⁶

In some states, however, such a stipulation is held to be against public policy and void as a mere makeshift to evade the laws against usury.³¹⁷ And fees of this sort, although expressly stipulated for, cannot be recovered on a usurious note.³¹⁸ In Nebraska such stipulations are now prohibited by statute,³¹⁹ and are therefore void and of no effect on the negotiability of the paper.³²⁰ This is also true in South Dakota.³²¹

³¹² *Johnson v. Crossland*, 34 Ind. 334. Such stipulation passes with the note on its transfer. *Bank of British North America v. Ellis*, 2 Fed. 44; *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495.

³¹³ *Smith v. Bank*, 29 Ind. 158.

³¹⁴ *Wyant v. Pottorff*, 37 Ind. 512.

³¹⁵ *First Nat. Bank v. Krance*, 50 Iowa, 235; *Prescott v. Grady*, 91 Cal. 521, 27 Pac. 755.

³¹⁶ *Tuley v. McClung*, 67 Ind. 10.

³¹⁷ *Myer v. Hart*, 40 Mich. 517; *State v. Taylor*, 10 Ohio, 378; *Boozer v. Anderson*, 42 Ark. 167. So, in case of a like stipulation contained in a warrant of attorney. *Shelton v. Gill*, 11 Ohio, 417. And such stipulation in a note has been held void, as not authorized by law, *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857; or as providing, without consideration, for a penalty or forfeiture, *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662; *Tinsley v. Hoskins*, 111 N. C. 340, 16 S. E. 325; *Williams v. Rich* (N. C.) 23 S. E. 257; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Bullock v. Taylor*, 39 Mich. 137. So, if unreasonable in amount. *Commercial Nat. Bank v. Davidson*, 18 Or. 57, 22 Pac. 517; *Levens v. Briggs*, 21 Or. 333, 28 Pac. 15. But the original loan has been held to be a sufficient consideration, and the provision not a mere penalty. *Barton v. Bank*, 122 Ill. 354, 13 N. E. 503.

³¹⁸ *Miller v. Gardner*, 49 Iowa, 234; Code, § 2080.

³¹⁹ Act 1879; *Security Co. v. Eyer*, 36 Neb. 507, 54 N. W. 838.

³²⁰ *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37.

³²¹ Laws 1889, c. 16, § 1; *Chandler v. Kennedy* (S. D.) 65 N. W. 439; *National Bank of Commerce v. Feeney* (S. D.) 70 N. W. 874. But see, as to effect on negotiability, *Johnson v. Schar* (S. D.) 70 N. W. 838.

It may be said in general that such a stipulation for fees does not affect the negotiability of the note containing it,³²² even though the stipulation be restricted to the case of suit being brought on the instrument.³²³ And a stipulation for fees, "if suit be instituted," is binding upon the indorser of the note as well as the maker.³²⁴ Where a note provides for the payment of fees in case of suit, making a claim against the estate of the deceased maker, if the claim be contested, is sufficient to entitle the holder to recover fees.³²⁵

So, if the stipulation be in conditional form, "should this note be collected by legal process," it is still valid.³²⁶ But it has been held, in Illinois, that where the stipulation is only to pay fees, if the note be not paid when due, and be sued upon, the fees cannot be recovered in the original suit brought on the note, because not due by its terms *until* the suit is brought.³²⁷

³²² 1 Daniel, Neg. Inst. 66; 2 Pars. Notes & B. 147; First Nat. Bank of Montgomery v. Slaughter, 98 Ala. 602, 14 South. 545; Trader v. Chidester, 41 Ark. 242; Stapleton v. Banking Co., 95 Ga. 802, 23 S. E. 81; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495; Mumford v. Tolman, 157 Ill. 258, 41 N. E. 617; Witty v. Insurance Co., 123 Ind. 411, 24 N. E. 141; Smith v. Silvers, 32 Ind. 321; Stoneman v. Pyle, 35 Ind. 103; Proctor v. Baldwin, 82 Ind. 370; Maynard v. Mier, 85 Ind. 317; Nicely v. Bank, 18 Ind. App. 30, 47 N. E. 476; Shenandoah Nat. Bank v. Marsh, 89 Iowa, 273, 56 N. W. 458; Sperry v. Horr, 32 Iowa, 184; Seaton v. Scovill, 18 Kan. 433; Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603; Dietrich v. Bayhi, 23 La. Ann. 767; Clifton v. Bank (Miss.) 23 South. 394; Bank of Commerce of Owensboro v. Fuqua, 11 Mont. 285, 28 Pac. 291; Roberts v. Snow, 27 Neb. 425, 43 N. W. 241; Heard v. Bank, 8 Neb. 10; Kemp v. Klaus, Id. 24; Wilson Sewing-Mach. Co. v. Moreno, 7 Fed. 806; Oppenheimer v. Bank, 97 Tenn. 19, 36 S. W. 705; Wright v. Morgan (Tex. Civ. App.) 37 S. W. 627; Salisbury v. Stewart, 15 Utah, 308, 49 Pac. 777; Second Nat. Bank of Colfax v. Anglin, 6 Wash. 403, 33 Pac. 1056; Adams v. Addington, 16 Fed. 89; Schlesinger v. Arline, 31 Fed. 648; Farmers' Nat. Bank of Valparaiso v. Sutton Mfg. Co., 52 Fed. 191. So, of costs of collection only. Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498. So, in Oregon, attorney's fees, if reasonable in amount. Benn v. Kutz, 24 Or. 28, 32 Pac. 763.

³²³ Gaar v. Banking Co., 11 Bush (Ky.) 180; Nickerson v. Sheldon, 33 Ill. 372; Stoneman v. Pyle, 35 Ind. 103; Howenstein v. Barnes, 9 Cent. Law J. 48, 5 Dill. 482, and Fed. Cas. No. 6,786; Peyser v. Cole, 11 Or. 39, 4 Pac. 520.

³²⁴ Hubbard v. Harrison, 38 Ind. 323.

³²⁵ Davidson v. Vorse, 52 Iowa, 384, 3 N. W. 477.

³²⁶ McGill v. Griffin, 32 Iowa, 445.

³²⁷ Easter v. Boyd, 79 Ill. 325.

§ 206. In opposition to the authorities already cited, it has been held that a stipulation for fees if the note be sued on destroys its negotiability,³²⁸ and that such provisions are contingent, and cannot find place in a negotiable instrument.³²⁹ Such stipulations have also been held to be against public policy, and void.³³⁰ So, likewise, in Michigan, an agreement contained in a note for a gross sum for attorney's fees if not paid at maturity and for express charges.³³¹ An agreement contained in a note for attorney's fees, "together with

³²⁸ Chase v. Whitmore, 68 Cal. 545, 9 Pac. 942; First Nat. Bank of San Diego v. Falkenhan, 94 Cal. 141, 29 Pac. 866; Haber v. Brown, 101 Cal. 445, 35 Pac. 1035; Kendall v. Parker, 103 Cal. 319, 37 Pac. 401; Adams v. Seaman, 82 Cal. 636, 23 Pac. 53; First Nat. Bank of San Diego v. Babcock, 94 Cal. 96, 29 Pac. 415; Garretson v. Purdy, 3 Dak. 178, 14 N. W. 100; First Nat. Bank of Decorah v. Laughlin, 4 N. D. 391, 61 N. H. 473; Maryland Fertilizing & Mfg. Co. v. Newman, 60 Md. 584; Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74; Altman v. Fowler, 70 Mich. 57, 37 N. W. 708; Cayuga Co. Nat. Bank v. Purdy, 56 Mich. 6, 22 N. W. 93; Edwards v. Ramsey, 30 Minn. 91, 14 N. W. 272; Hardin v. Olson, 14 Fed. 705; Jones v. Radatz, 27 Minn. 240, 6 N. W. 800; First Nat. Bank of Carthage v. Marlow, 71 Mo. 618; First Nat Bank of Trenton v. Gay, 71 Mo. 627; First Nat. Bank of Carthage v. Jacobs, 73 Mo. 35; McCoy v. Green, 83 Mo. 626; Johnston v. Speer, 92 Pa. St. 227; Carroll Co. Sav. Bank v. Strother, 28 S. C. 505, 6 S. E. 313; Sylvester-Bleckley Co. v. Alewine, 48 S. C. 308, 26 S. E. 609; First Nat. Bank of Stillwater v. Larsen, 60 Wis. 206, 19 N. W. 67. So, as being uncertain in amount, Peterson v. Bank, 78 Wis. 113, 47 N. W. 368; even where a certain percentage is designated, First Nat. Bank of Stillwater v. Larsen, *supra*; Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100. So, as to notes "with exchange and costs of collection." Second Nat. Bank of Aurora v. Brasuier, 12 C. C. A. 517, 65 Fed. 58; Nicely v. Bank, 15 Ind. App. 563, 44 N. E. 572. And for such provision coupled with other agreements, see § 208, *infra*.

³²⁹ Second Nat. Bank v. Brasuier, 12 C. C. A. 517, 65 Fed. 58. "If collected by attorney." First Nat. Bank of Trenton v. Gay, 63 Mo. 33. "If not paid when due." Woods v. North, 84 Pa. St. 407. Especially if uncertain in amount and other respects, as well as contingent. Hardin v. Olson, 14 Fed. 705.

³³⁰ Witherspoon v. Musselman, 14 Bush (Ky.) 214; Balfour v. Davis, 14 Or. 47, 12 Pac. 89; Kimball v. Moir, 15 Or. 42, 15 Pac. 669.

³³¹ Bullock v. Taylor, 39 Mich. 137. As to the stipulation for fees, Judge Cooley says (page 141): "It is opposed to the policy of our laws concerning attorney's fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression. It would be idle to limit interest to a certain rate, if, under another name, forfeitures may be imposed to an amount without limit. The provision in these notes is as much void as it

all taxes and charges in the nature thereof that may be levied on this note," renders uncertain the amount to be paid, and destroys the negotiability of the note.³³² So, it has been held in Missouri that a note containing a stipulation for specified attorney's fee if the note be not paid when due, and also a warrant to enter judgment on the note, is not a negotiable note.³³³ This has also been held in a recent case in Pennsylvania.³³⁴

Warrant to Confess Judgment.

§ 207. What effect a warrant to confess judgment contained in a note will have upon its negotiability is still, perhaps, an unsettled question,³³⁵ although it has been held in Ohio that the note remains negotiable, but that its negotiability does not extend to the warrant or power of attorney contained in it.³³⁶ So, it has been held that a waiver of right of appeal, and of all valuation, appraisement, stay, and exemption laws, did not affect the negotiability of the note containing it.³³⁷ And the same has been held of a power contained in a note to issue execution in case of nonpayment.³³⁸ On the other hand, a warrant for judgment contained in a note has been held to destroy its negotiability;³³⁹ and so, also, a like warrant with release

would have been had it called the sum imposed by its true name, of 'penalty' or 'forfeiture.'"

³³² *Farquhar v. Insurance Co.*, 18 Alb. Law J. 330, 13 Phila. 473, and Fed. Cas. No. 4,676; *First Nat. Bank of New Windsor v. Bynum*, 84 N. C. 24. Especially where left blank as to percentage, e. g. "with — per cent. attorney's fees if collected." *Johnston v. Speer*, 92 Pa. St. 227.

³³³ *First Nat. Bank v. Marlow*, 71 Mo. 618; *First Nat. Bank v. Gay*, 63 Mo. 33; *Samstag v. Conley*, 64 Mo. 476; *Storr v. Wakefield*, 71 Mo. 622; *First Nat. Bank v. Gay*, Id. 627.

³³⁴ *Sweeney v. Thickstun*, 77 Pa. St. 131.

³³⁵ *Cushman v. Welsh*, 19 Ohio St. 536.

³³⁶ *Osborn v. Hawley*, 19 Ohio, 130. So, to the effect that the note is negotiable. *Gilmore v. Hirst* (Kan. Sup.) 44 Pac. 603.

³³⁷ *Zimmerman v. Anderson*, 67 Pa. St. 421; *Zimmerman v. Rote*, 75 Pa. St. 188. And see § 201, *supra*.

³³⁸ *Fort v. Delee*, 22 La. Ann. 181.

³³⁹ *Sweeney v. Thickstun*, 77 Pa. St. 131; *Conrad-Seipp Brewing Co. v. McKittrick*, 86 Mich. 191, 48 N. W. 1086. So, where the power was to enter judgment "at any time hereafter," and the note matured in 90 days. *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68.

of errors and waiver of stay and exemption laws.³⁴⁰ In Missouri, too, a note containing a stipulation for attorney's fees and a warrant to enter judgment in case of default is held not to be negotiable,³⁴¹ as also a stipulation for attorney's fees with a waiver of all exemptions.³⁴²

Other Agreements.

§ 208. If the additional clause provides, as has been said, for some object quite distinct from the payment of money, it destroys the character of the instrument as a bill or note.³⁴³ Thus, if the in-

³⁴⁰ *Overton v. Tyler*, 3 Pa. St. 346.

³⁴¹ *First Nat. Bank v. Marlow*, 71 Mo. 618.

³⁴² *Samstag v. Conley*, 64 Mo. 476.

³⁴³ *Goldman v. Blum*, 58 Tex. 630. So, a contract to pay money, with a stipulation as to possession and title of personal property, and payment of attorney's fees, has been held not to be a negotiable note, *Johnston Harvester Co. v. Clark*, 30 Minn. 308, 15 N. W. 252; or, for attorney's fees, "without any relief from valuation or appraisement laws," *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. 21; or with waiver of exemption laws, *Hughitt v. Johnson*, 28 Fed. 865; or, for attorney's fees, and possession of property until note paid, with a provision reserving to the payee the right of declaring the note due at any time when he should deem himself insecure, and the power to take possession of the property in such case, *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Edwards v. Ramsey*, 30 Minn. 91, 14 N. W. 272; or for attorney's fees, and right of payee to declare the note due at any time he might deem it insecure, *First Nat. Bank v. Bynum*, 84 N. C. 24; or including the power to take the property and sell it when the holder should deem himself insecure, *Smith v. Marland*, 59 Iowa, 645, 13 N. W. 852; or with agreement for further security or sale of collateral if depreciated before maturity, *Lincoln Nat. Bank v. Perry*, 14 C. C. A. 273, 6 Fed. 887; or with power of sale if not paid at maturity, *South Bend Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574; or containing an agreement on the payee's part, the maker agreeing to pay in *services*, *McClellan v. Coffin*, 93 Ind. 456. So, a note for the payment of a certain sum, "and all other debts which A. B. is security for," *Borum v. Reed*, 73 Mo. 461; or "with all taxes and charges in the nature thereof that may be laid upon the note, or upon the indenture of mortgage accompanying it," *Farquhar v. Insurance Co.*, 13 Phila. (Pa.) 473; *Walker v. Thompson* (Mich.) 66 N. W. 584; *Donaldson v. Grant* (Utah) 49 Pac. 779; or containing a provision as to the title of certain land, and its future disposition, *Killam v. Schoeps*, 26 Kan. 310; or extending the time of payment if an agent "does not sell enough in one year," *Miller v. Poage*, 56 Iowa, 96, 8 N. W. 799; or providing

strument be for the payment of money, and also for the delivery of a horse and a wharf, it is not a note.³⁴⁴ Or if it be to pay money, and to insure the payee's colts, it is not a note;³⁴⁵ or, to pay a certain sum of money "and all fines according to the rule";³⁴⁶ or, a certain sum "and the demands of the Sick Club";³⁴⁷ or, to pay a certain sum of money "and take up our note given to W. & H. for that amount";³⁴⁸ or, to pay money, and, on the payee's part, to build a fence.³⁴⁹ So, it is said that a promise to pay a certain sum of money "and all other sums that may be due him" is uncertain in amount, and therefore not a note.³⁵⁰ And the same has been held even of a promise to pay a specified amount "and such sums as may arise as additional premiums on said policy."³⁵¹ But, in England,

for extension unless the maker "can make it convenient, and for other security to be taken in payment when the maker can realize the same in proper shape," *Humphrey v. Beckwith*, 48 Mich. 151, 12 N. W. 28; or for founding college scholarships, which are to be available on the payment of the annual interest, *Ingham v. Dudley*, 60 Iowa, 14, 14 N. W. 82; or subject to an agreement which is recited, *McComas v. Haas*, 107 Ind. 512, 8 N. E. 579; or providing for renewal "as often as required, without notice or prejudice," *Coffin v. Spencer*, 39 Fed. 262; or that an extension to one party shall be without prejudice as against the others, *Kirkwood v. Smith* [1896] 1 Q. B. 582; or accelerating maturity if goods are removed, *First Nat. Bank v. Carson*, 60 Mich. 433, 27 N. W. 589; or reference in coupon to bond providing for change in maturity by majority of bondholders, *McClelland v. Railroad Co.*, 110 N. Y. 469, 18 N. E. 237. See, too, § 104, *supra*. On the other hand, a collateral agreement not inconsistent with the note has been held not to destroy its negotiability. *Ewing v. Clark*, 76 Mo. 545. And this has been held of a note given for an insurance policy with a clause avoiding the policy on nonpayment of the note, *Pendleton v. Insurance Co.*, 7 Fed. 169; and, under the Indiana statute, of a note providing for attorney's fees, waiver of demand, and renewal, *Witty v. Insurance Co.*, 123 Ind. 411, 24 N. E. 141. So, a mere recital that the maker owns certain property, *Hudson v. Emmons* (Mich.) 65 N. W. 542.

³⁴⁴ *Martin v. Chauntry*, Strange, 1271.

³⁴⁵ *Austin v. Burns*, 16 Barb. (N. Y.) 643.

³⁴⁶ *Ayrey v. Fearnside*, 4 Mees. & W. 168.

³⁴⁷ *Bolton v. Dugdale*, 4 Barn. & Adol. 619.

³⁴⁸ *Cook v. Satterlee*, 6 Cow. (N. Y.) 108.

³⁴⁹ *Fletcher v. Thompson*, 55 N. H. 308.

³⁵⁰ *Smith v. Nightingale*, 2 Starkie, 375. See, also, *Firbank v. Bell*, 1 Barn. & Ald. 36.

³⁵¹ *Lime Rock Ins. Co. v. Hewett*, 60 Me. 407.

an instrument providing for the payment of a certain sum of money, "first deducting thereout any interest or money which S. may owe me on any account," was held to be a promissory note under the statute of Anne.³⁵²

Where a note was given in payment for the hire of negroes, and contained a provision for clothing them, which was a matter required, and therefore implied, by law, this provision was held, in the Carolinas, to render a note nonnegotiable.³⁵³ But the contrary conclusion was reached as to a similar note in Tennessee.³⁵⁴ In Alabama, such a note, containing the further provision to return the negro to the payee at the end of the term of hiring, could be declared on as a note;³⁵⁵ but this agreement was not assignable with the note.³⁵⁶

As to the effect of additional stipulations provided by a contemporaneous writing distinct from the note itself, the reader is referred to subdivision IV. of this chapter. Such an agreement warranting the quality of goods sold has no effect on the negotiability of a note given for the goods.³⁵⁷ So, a separate memorandum providing for an application of the proceeds of certain sales affects neither the negotiability of the note nor the bona fide character of the holder.³⁵⁸

³⁵² *Barlow v. Broadhurst*, 4 Moore, 471. But see, contra, as to provision for a reduction, if paid before maturity, *Edwards v. Ramsey*, 30 Minn. 91, 14 N. W. 272.

³⁵³ *Wallace v. Dyson*, 1 Speer, 127; *Knight v. Railroad*, 46 N. C. 357; *Barnes v. Gorman*, 9 Rich. Law, 297. But a note for fertilizers, containing an agreement to sell them and account for proceeds, has been held to be a valid note, *Dowie v. Joyner*, 25 S. C. 123.

³⁵⁴ *Baxter v. Stewart*, 4 Sneed, 213.

³⁵⁵ *Gaines v. Shelton*, 47 Ala. 413.

³⁵⁶ *Winston v. Metcalf*, 7 Ala. 837. And such provision in a sealed covenant has been held to destroy its assignability. *Boyd v. Rumsey*, 5 J. J. Marsh. (Ky.) 42.

³⁵⁷ *Cook v. Weirman*, 51 Iowa, 561, 2 N. W. 386.

³⁵⁸ *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603.

CHAPTER VII.

FORM—COMPLETION OF CONTRACT—INLAND BILLS.

I. STAMPS.

II. DELIVERY.

III. INLAND AND FOREIGN BILLS.

IV. PARTS OR SETS OF PARTS.

I. STAMPS.

§ 209. English and American Stamp Acts.

210. Constructions of U. S. Statutes.

211. When Stamp may be Affixed—Presumptions.

212. Cancellation—Fraudulent Omission.

213. Clause Avoiding for Want of Stamp Unconstitutional.

214. Admissibility in Evidence—Pleading.

215. Action on Original Consideration.

English and American Stamp Acts.

§ 209. Almost all countries require by statute certain stamps upon bills of exchange and notes. No courts, however, charge themselves with the enforcement of foreign stamp laws. This is the rule, at least, in England and in the United States.¹ It is also the rule of practice in state courts as to stamp laws of other states of the Union, if any.²

The English stamp acts now in force apply to bills of exchange, promissory notes, and checks, and the amount of stamp required depends, in general, upon the amount for which the instrument is made.³

¹ Edw. Stamp Act, 14; *Holman v. Johnson*, Cowp. 341; *James v. Catherwood*, 3 Dowl. & R. 190; *Ludlow v. Van Rensselaer*, 1 Johns. (N. Y.) 94. "As we do not sit here," said Livingston, J., in the latter case, "to enforce the revenue laws of other countries. it is perfectly immaterial, in a suit before us, whether or not the note was stamped according to the laws of France."

² *Fant v. Miller*, 17 Grat. (Va.) 47, as to Maryland stamp act. This act rendered the unstamped paper inadmissible in evidence, but not void.

³ Prior to October 11th, the stamp required by the English statute (55 Geo.

The first stamp act in the United States was passed in July, 1797, and required a stamp of 10 cents upon promissory notes between \$20

III.) for bills and notes varied in amount according to the length of time the paper had to run. This was changed by act of 17 & 18 Vict. c. 83, and the amount of stamp is now regulated, as it was by the United States internal revenue act, by the amount for which the bill or note is drawn. By the act of 1870 (33 & 34 Vict. c. 97), all bills of exchange and promissory notes, other than bank notes, "drawn or expressed to be payable, or actually paid or indorsed, or in any manner negotiated in the United Kingdom," are subjected to a stamp duty by the following schedule:

Payable on demand.....	1d.
Under £5.....	1d.
Exceeds £5 and does not exceed £10.....	2d.
" 10 " " 25.....	3d.
" 25 " " 50.....	6d.
" 50 " " 75.....	9d.
" 75 " " 100..	1s.

Every £100 or fraction thereof..... 1s.

Under bills of exchange are included, by the act, drafts, orders, checks, and letters of credit as well as orders for payment in installments, or out of a particular fund (section 48), but only one of a set need be stamped (section 55). Under promissory notes is included any document or writing for the payment of money (section 49), even though made payable out of a particular fund or on a contingency. By the act of 1871 (34 & 35 Vict. c. 74), demand notes, referred to in the schedule to the act of 1870, are made to include all bills of exchange and promissory notes payable at sight or on presentation. The act of 1870 exempts from stamp duty Bank of England bills or notes; bankers' drafts issued solely for purpose of clearing accounts between bankers in the United Kingdom; letters by bankers in the United Kingdom directing payment of money, not to bearer or order, and not sent to the payee or any one on his behalf; letters of credit authorizing drafts to be drawn out of the United Kingdom, payable in it; interest coupons attached to and issued with the security; and certain official drafts, orders, and warrants. By the act of 17 & 18 Vict. c. 83, rates were imposed according to the following classification: (1) Inland bills of exchange, drafts, or orders for the payment to the bearer or to order, at any time otherwise than on demand, of any sum of money. (2) Promissory notes for the payment in any other manner than to the bearer on demand of any sum of money not exceeding £100. (3) Promissory notes for the payment either to the bearer on demand, or in any other manner than to the bearer on demand, of any sum of money exceeding £100. 1 Jac. Fish. Dig. p. 1107. The act of 48 Geo. III. c. 149, and 55 Geo. III. c. 184, also contained provisions including bills, drafts, or orders payable out of a particular fund. A postdated check, not included in the statutory enumeration, has been held to be admissible in evidence with a penny stamp. Bull

and \$100, unless they were made payable within 60 days. Without such stamp they were not admissible in evidence. This act was held in the state of New York to apply to its supreme court.⁴ It was repealed in 1802, and from that time until the 1st of July, 1862, there was no stamp required upon commercial paper by any act of congress.

On the 1st of July, 1862, an act was passed requiring all bank checks, drafts, or orders above \$20, inland bills of exchange, drafts, and notes, excepting bank notes, over \$20, and foreign bills of exchange or letters of credit, to be stamped. The stamp upon bank checks, drafts, or orders over \$20 was two cents; upon inland bills of exchange, drafts, and notes over \$20, from five cents upward, varying according to the amount of money to be paid; and on foreign bills and letters of credit, in sets of three, on each set three cents and upward, varying according to the amount of the bill or letter.⁵ By section 95 of this act, a penalty was incurred by the omission of the stamp, and it was further provided that the instrument, if not stamped, "shall be deemed invalid and of no effect." This provision was, from time to time, extended, so as not to apply to commercial paper made before June 1, 1863. By the act of December 25, 1862, provision was also made for stamping such instruments in open court; and by act of March 3, 1863,⁶ it was provided that such instruments should not be admitted or used in evidence until they were properly stamped.

The United States stamp acts provided that no instrument wanting the requisite stamp should "be admitted or used in evidence in any court until a legal stamp, denoting the amount of tax, was affixed thereto, as prescribed by law," and this was enforced by a penalty. And it was further provided that the unstamped instrument should "be deemed invalid and of no effect," with the provision, how-

v. O'Sullivan, L. R. 6 Q. B. 209. A bill drawn in the Isle of Man prior to 1870, and not presented or negotiated in the United Kingdom, has been held to be a foreign bill, and as such not within the stamp act of 17 & 18 Vict. Griffin v. Weatherby, L. R. 3 Q. B. 753. The amounts above designated need not take accruing interest into account. Israel v. Benjamin, 3 Camp. 40.

⁴ Edeck v. Ranuer, 2 Johns. (N. Y.) 423. This case assumed, rather than decided, the applicability of the statute to the state court.

⁵ Stat. U. S. 1862, c. 119 (12 Stat. 432).

⁶ Stat. U. S. 1863, c. 74, § 16 (12 Stat. 724).

ever, for having such instrument stamped by the United States collector of the district.⁷ They also provided that such revenue stamp should be canceled by the initials of the party, with the date, or in such other way as might be prescribed by the commissioner of internal revenue.⁸

All of these provisions were repealed by the act of October 1, 1872, except as to checks. A revenue stamp of two cents was still required upon every "bank check, draft, order or voucher for the payment of money drawn upon any bank, banker or trust company, at sight or on demand," until May 15, 1883.⁹ This provision did not include official drafts or vouchers of federal or municipal governments.¹⁰

The act of congress of June 13, 1898, taking effect July 1, 1898, provides for revenue stamps as follows: On bank checks, drafts, and certificates, two cents; on inland bills and promissory notes, two cents per \$100; on foreign bills, four cents per \$100, or, if drawn in sets, for each part, two cents per \$100.

Constructions of United States Statutes.

§ 210. There have been numerous cases before the federal and state courts in America, construing the stamp acts since 1862. It has been held that a United States revenue stamp was in no case necessary on an instrument executed before October, 1862.¹¹ But the stamp act of 1870 was held to apply to a note already made at that time.¹² The United States stamp acts did not apply to a bill or note made during the war within the lines of the Confederate States.¹³ And this was held to be the case in Texas even as late as January, 1865.¹⁴

⁷ Rev. St. U. S. (Ed. 1878) §§ 3421, 3422.

⁸ Rev. St. U. S. §§ 3423, 3424.

⁹ Rev. St. U. S. § 3418. In 1883 the act which still required stamps on checks was repealed, to take effect on May 15, 1883. Laws U. S. 1883, c. 121 (22 Stat. 488).

¹⁰ Rev. St. U. S. § 3420.

¹¹ Bayly v. McKnight, 19 La. Ann. 321.

¹² Pugh v. McCormick, 14 Wall. 361. But, as to the acts of 1864 and 1865, see Garland v. Lane, 46 N. H. 245; Whigham v. Pickett, 43 Ala. 140.

¹³ Susong v. Williams, 1 Heisk. (Tenn.) 625; McElvain v. Mudd, 44 Ala. 48.

¹⁴ Van Alstyne v. Sorley, 32 Tex. 518.

The indorsement of a note or bill did not, under these statutes, require a stamp.¹⁵ Nor did the certification of a check.¹⁶ And a duebill reading, "Due A. B. on corn, five hundred and twenty-five dollars (\$525)," has been held not to require a stamp.¹⁷ This is true, too, of a mere admission of a balance due on an account, which, as has been already seen, is not equivalent to a promissory note.¹⁸ Again, where a note was altered by changing its date, it was held not to need a new stamp on that account, as a new note.¹⁹ And where a contemporaneous note and agreement are made to operate as one instrument, the stamp on the note alone has been held sufficient.²⁰ A revenue stamp was necessary to a small draft by the agent or treasurer of a corporation for wages, but such draft might be stamped as a check, and not as a note.²¹

It was not, however, necessary upon a bond required by law in insolvency cases, this not being a voluntary instrument.²² Where a note, originally stamped according to law, had been barred by the discharge of the maker as an insolvent, his subsequent promise, by an unstamped letter, to pay the note, was held to be sufficient; this not being a new contract, but merely evidence of the original promise.²³ Under the scaling acts in the Southern States, a note made for a large amount in Confederate currency, but valued at much less, and stamped as a note for a smaller amount, was admissible in evidence, the jury being left to estimate the value of the note.²⁴

When Stamp may be Affixed—Presumptions.

§ 211. Where an instrument appears properly stamped, it is a presumption of law that the stamp was affixed at the time of its delivery.²⁵ So, it is presumed, in the absence of proof to the con-

¹⁵ *Pugh v. McCormick*, 14 Wall. 361.

¹⁶ *Merchants' Bank v. State Bank*, 10 Wall. 604.

¹⁷ *Jacquin v. Warren*, 40 Ill. 459.

¹⁸ *Jones v. Jones*, 38 Cal. 584.

¹⁹ *Prather v. Zulauf*, 38 Ind. 155.

²⁰ *Bowker v. Goodwin*, 7 Nev. 135.

²¹ *U. S. v. Isham*, 17 Wall. 496.

²² *McGovern v. Hoesback*, 53 Pa. St. 177.

²³ *Cook v. Shearman*, 103 Mass. 21.

²⁴ *Kile v. Johnson*, 48 Ga. 189.

²⁵ *Union Agricultural & Stock Ass'n v. Neill*, 31 Iowa, 95; *Iowa & M. R.*

trary, in an action upon a lost bill of exchange, that it was properly stamped, especially if the bill be detained in the defendant's possession after notice given to produce it.²⁶

Where, however, a note was stamped by the holder after its delivery, it was still valid, in the absence of fraudulent intent.²⁷ And if left unstamped through the maker's ignorance, and afterwards stamped by the payee, the maker could not object to such stamping,²⁸ even though he had been requested to cancel such stamp and had refused.²⁹ Indeed, a bill or note may be stamped after issue joined in a suit upon it, and this will constitute no defense against a bona fide holder for value.³⁰ And, if a note was stamped after its delivery without authority of the maker, it was still valid at suit of a bona fide holder.³¹ And this is so in the hands of a bona fide holder for value, even where the note had been delivered without a stamp, under an agreement that it should not be used until stamped by the maker, and had, notwithstanding this agreement, been fraudulently stamped and negotiated by the payee.³² Where, however, it is not in the hands of a bona fide holder for value, notice to the holder of the original want of stamp, and of the absence of authority from the maker to affix the stamp, will constitute a good defense.³³ Whether a stamp has been used in fraud of the United States revenue a second time is a question of fact for the jury.³⁴

As has been already remarked, a note left unstamped might be stamped in open court at the time of trial, if the original omission was without fraud.³⁵ This is true, also, where the omission was

Co. v. Perkins, 28 Iowa, 281. Or at the time of its transfer, if that is what the law requires, *Bradlaugh v. De Rin*, L. R. 3 C. P. 286; and by the proper person, *Iowa & M. R. Co. v. Perkins*, supra.

²⁶ *Marine Inv. Co. v. Havaside*, L. R. 5 H. L. 625.

²⁷ *Willey v. Robinson*, 13 Allen (Mass.) 128.

²⁸ *Green v. Lowry*, 38 Ga. 548.

²⁹ *Day v. Baker*, 36 Mo. 125.

³⁰ *Blackwell v. Denie*, 23 Iowa, 63; *Robinson v. Lair*, 31 Iowa, 9; *Sperry v. Horr*, 32 Iowa, 184. And the want of a stamp will not affect the bona fides of the holder. *Burson v. Huntington*, 21 Mich. 415.

³¹ *Blackwell v. Denie*, 23 Iowa, 63; *Latham v. Smith*, 45 Ill. 25.

³² *Anderson v. Starkweather*, 28 Iowa, 409.

³³ *First Nat. Bank of Centreville v. Dougherty*, 29 Iowa, 260.

³⁴ *Rockwell v. Hunt*, 40 Conn. 328.

³⁵ *Morris v. McMorris*, 44 Miss. 441; *Waterbury v. McMillan*, 46 Miss. 635.

designed, but without fraud, the note having been given merely as a memorandum.³⁶ The act of June 30, 1864, providing for stamping in court, was held to be applicable, and the act of March 3, 1865, requiring a stamp to be affixed by the collector, was held to be inapplicable, to a note made in 1863.³⁷ It has been held, however, that a note made after June 30, 1864, could not be stamped in open court.³⁸ When an instrument has been thus stamped, it is thereby rendered valid from its date.³⁹ And such stamping under the statute by an attorney in court has been held sufficient without any cancellation of the stamp.⁴⁰ So, if a stamp has been affixed by the United States collector, it renders the instrument valid, as if it had been originally duly stamped.⁴¹ And such stamping by the collector is not an alteration, and cures the defect arising from a want of stamp, although the omission may have been originally with design to defraud the government.⁴²

Cancellation—Fraudulent Omission.

§ 212. The cancellation of a stamp has been held sufficient where it was merely so defaced as to be incapable of further use.⁴³ And a cancellation by the initials of one only of several joint makers has been held sufficient.⁴⁴ Whether a cancellation of a stamp by the maker's initials was authorized by him is a question for the jury.⁴⁵ It has also been held to be a sufficient cancellation if the payee's

³⁶ *Redlich v. Doll*, 54 N. Y. 234.

³⁷ *Garland v. Lane*, 46 N. H. 245.

³⁸ *Whigham v. Pickett*, 43 Ala. 140. But in *Tobey v. Chipman*, 13 Allen (Mass.) 123, it was held to apply to a note dated August 1, 1864, so as to cure the defect of an omission of stamp made without fraud. See, too, Stat. U. S. 1866, c. 184 (14 Stat. 98).

³⁹ *Dorris v. Grace*, 24 Ark. 326.

⁴⁰ *Blunt v. Bates*, 40 Ala. 470. As to whether the attorney of the payee can be obliged to testify whether the note was stamped before delivery, see *Wheatley v. Williams*, 1 Mees. & W. 533.

⁴¹ *Aldrich v. Hagan*, 50 N. H. 60; *Gibson v. Hibbard*, 13 Mich. 214; *Long v. Spencer*, 78 Pa. St. 303.

⁴² *Crews v. Bank*, 31 Grat. (Va.) 348.

⁴³ *Taylor v. Duncan*, 33 Tex. 440.

⁴⁴ *Spear v. Alexander*, 42 Ala. 572.

⁴⁵ *Rees v. Jackson*, 64 Pa. St. 486.

initials are used instead of the maker's.⁴⁶ And if stamped in court, and the stamp canceled without any initials, this has been held sufficient.⁴⁷ Indeed, if the cancellation of a stamp has been omitted altogether, this omission furnishes no defense on the maker's part, as such omission could only be the maker's own wrong.⁴⁸

Fraud is never to be presumed in case of the omission of a stamp, but must be clearly proved.⁴⁹ Indeed, it has been held that, in case of such omission, there is a presumption of good faith on the maker's part,⁵⁰ although the omission has been said to be *prima facie* intentional.⁵¹ It is only fraudulent omissions that render an instrument void or inadmissible in evidence.

Clause Avoiding for Want of Stamp Unconstitutional.

§ 213. The United States revenue act has been held to be unconstitutional so far as it rendered a bill of exchange void for want of a stamp,⁵² and so far as it rendered an unstamped deed void.⁵³

But, as has been said, the omission of a stamp did not render the instrument void under the act of congress, unless it was fraudulent in its purpose.⁵⁴ This is true both as to the clause avoiding the in-

⁴⁶ *Schultz v. Herndon*, 32 Tex. 390.

⁴⁷ *Foster v. Holley's Adm'rs*, 49 Ala. 593.

⁴⁸ *Mogelin v. Westhoff*, 33 Tex. 788; *Desmond v. Norris*, 10 Allen (Mass.) 250. Nor does it affect its admissibility in evidence, *Jacobs v. Cunningham*, 32 Tex. 774; *Schultz v. Herndon*, Id. 390.

⁴⁹ *Moore v. Quirk*, 105 Mass. 49; *Craig v. Dimock*, 47 Ill. 308; *Morris v. McMorris*, 44 Miss. 441; *Waterbury v. McMillan*, 46 Miss. 635.

⁵⁰ *Baker v. Baker*, 6 Lans. (N. Y.) 509; *Grant v. Insurance Co.*, 29 Wis. 125; *New Haven & N. Co. v. Quintard*, 6 Abb. Prac. (N. S.) 128; *Ricord v. Jones*, 33 Iowa, 26; *Weltner v. Riggs*, 3 W. Va. 445.

⁵¹ *Howe v. Carpenter*, 53 Barb. (N. Y.) 382.

⁵² *Hunter v. Cobb*, 1 Bush (Ky.) 239; *Craig v. Dimock*, 47 Ill. 308; *Burson v. Huntington*, 21 Mich. 415.

⁵³ *Moore v. Moore*, 47 N. Y. 467.

⁵⁴ *Dudley v. Wells*, 55 Me. 145; *Cabbott v. Radford*, 17 Minn. 320 (Gil. 296); *Whigham v. Pickett*, 43 Ala. 140; *State v. Hill*, 30 Wis. 416; *Atkins v. Plympton*, 44 Vt. 21. Even, it seems, though it was intentional. *Patterson v. Gile*, 1 Colo. 200. Indeed, an omission without fraud affects neither the validity of an instrument, nor its admissibility in evidence. *Bowen v. Byrne*, 55 Ill. 467; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *Hanford v. Obrecht*, 49 Ill. 146; *Maynard v. Johnson*, 2 Nev. 16.

strument and as to the penal clause.⁵⁵ It is plain, therefore, that the omission of a stamp by the maker's agent, and against his direction, inadvertently, would have no effect to avoid the instrument.⁵⁶ It has been held that an omission of a stamp invalidates the instrument, even without fraudulent intent.⁵⁷ This is not supported, however, by the weight of authority.

On an indictment for forgery, the fact that the instrument was not stamped has been held to constitute no defense in England.⁵⁸ The same principle appears to have been held in the United States, an indictment for such forgery being held sufficient without any allegation that the instrument was stamped. This conclusion seems to have been derived from the rule that the unstamped instrument would be void only by reason of a fraudulent omission of the stamp.⁵⁹ The contrary was held, however, in Texas, on the ground that the crime of forgery could not be complete until the instrument was stamped.⁶⁰

Admissibility in Evidence—Pleading.

§ 214. Where there has been no fraud in the omission of the stamp, the instrument has been held to be admissible in evidence without it.⁶¹ Likewise, on proof of omission by mistake,⁶² or even

⁵⁵ *Green v. Holway*, 101 Mass. 243; *Baker v. Baker*, 6 Lans. (N. Y.) 509; *Frink v. Thompson*, 4 Lans. (N. Y.) 489; *Works v. Hershey*, 35 Iowa, 340; *Ricord v. Jones*, 33 Iowa, 26; *Weltner v. Riggs*, 3 W. Va. 445. This is true, also, as to other contracts. *Vorebeck v. Roe*, 50 Barb. (N. Y.) 302; *Morgan v. Graham*, 35 Iowa, 213; *Mitchell v. Home Ins. Co.*, 32 Iowa, 421.

⁵⁶ *Vaughan v. O'Brien*, 57 Barb. (N. Y.) 491.

⁵⁷ *Hugus v. Strickler*, 19 Iowa, 414. This was not the case of a bill or note. See, too, *Wayman v. Torreyson*, 4 Nev. 124, where the administrator of the maker was not allowed, after the maker's death, to affix a stamp.

⁵⁸ *Hawkeswood's Case*, 2 East, P. C. 955; *Teague's Case*, Id. 979.

⁵⁹ *State v. Hill*, 30 Wis. 416. This case overrules *John v. State*, 23 Wis. 504.

⁶⁰ *Horton v. State*, 32 Tex. 79.

⁶¹ *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Perryman v. Greenville*, Id. 507; *Emery v. Hobson*, 63 Me. 33; *Black v. Woodrow*, 39 Md. 194; *Bowen v. Byrne*, 55 Ill. 467; *Cralg v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243.

⁶² *Beebe v. Hutton*, 47 Barb. (N. Y.) 187.

without any such proof, unless fraud was affirmatively shown.⁶³ It has been held, on the other hand, that an unstamped note could not be admitted in evidence, even in a state court, until it was properly stamped;⁶⁴ and that the contents of an unstamped agreement, which has been lost, could not be proved at all.⁶⁵

But it seems unnecessary to set out the stamp or the fact that the instrument was stamped in the pleadings, and the failure to make this appear in a declaration is not ground for demurrer,⁶⁶ even though the declaration purport to set forth a copy of the note and make no mention of a stamp upon it.⁶⁷ So, the mere omission of a stamp cannot be pleaded in defense, unless the plea also show that the instrument cannot be made good by stamping it before trial.⁶⁸ The stamp is no part of a bill or note, and need not appear in the case after verdict rendered.⁶⁹ And the omission of a stamp, in like manner, on appeal papers is immaterial, except in case of fraud.⁷⁰

The want of a stamp has been held to render the unstamped instrument inadmissible in evidence, even in a state court,⁷¹ until it has been properly stamped by the collector.⁷² On the other hand, the act of congress has been generally held, so far as relates to evidence, to apply only to the United States courts.⁷³ And, so far as it

⁶³ *Timp v. Dockham*, 29 Wis. 440.

⁶⁴ *Plessinger v. Depuy*, 25 Ind. 419.

⁶⁵ *Turner v. State*, 48 Ala. 549.

⁶⁶ *Cabbott v. Radford*, 17 Minn. 320 (Gil. 296).

⁶⁷ *Trull v. Moulton*, 12 Allen (Mass.) 396; *Campbell v. Wilcox*, 10 Wall. 421.

⁶⁸ *Byles, Bills*, 119; *Bradley v. Bardsley*, 15 Law J. Exch. 115, 3 Dowl. & L. 476, and 14 Mees. & W. 873. See, however, *Lazarus v. Cowie*, 3 Q. B. 465; *Tattersall v. Fearnley*, 17 C. B. 368.

⁶⁹ *Owsley v. Greenwood*, 18 Minn. 429 (Gil. 386).

⁷⁰ *Harper v. Clark*, 17 Ohio St. 190.

⁷¹ *Chartiers & R. Turnpike Co. v. McNamara*, 72 Pa. St. 281; *Tripp v. Bishop*, 56 Pa. St. 424; *Jones' Appeal*, 62 Pa. St. 324; *City of Muscatine v. Sterneman*, 30 Iowa, 526; *Musselman v. Mauk*, 18 Iowa, 239; *Botkins v. Spurgeon*, 20 Iowa, 598; *Doud v. Wright*, 22 Iowa, 337; *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa, 117; *McLearn v. Skelton*, 18 La. Ann. 514.

⁷² *Corrie v. Estate of Billiu*, 23 La. Ann. 250.

⁷³ *Carpenter v. Snelling*, 97 Mass. 452; *Lynch v. Morse*, Id. 458; *People v. Gates*, 43 N. Y. 40; *Griffin v. Ranney*, 35 Conn. 239; *Green v. Holway*, 101

required a stamp upon the process of a state court, it was held at an early day to be unconstitutional.⁷⁴

Action on Original Consideration.

§ 215. Where the omission of a stamp is set up in defense by the maker at suit of the payee of a note, recovery may be had on the original consideration.⁷⁵ And, in an action on the original consideration, an unstamped note given for it is admissible in evidence for the purpose of showing the date of the transaction at least.⁷⁶ It is also to be observed that the want of a stamp upon an instrument at the time of its delivery furnishes no evidence to rebut the presumption that the transfer to the holder was for valuable consideration.⁷⁷

It has been held in England that an instrument may be admitted in evidence without a stamp for collateral purposes, such as to negative an allegation of payment;⁷⁸ or to refresh the memory of a witness;⁷⁹ or to corroborate a witness;⁸⁰ or to prove fraud⁸¹ or usury;⁸² or to prove an agreement illegal;⁸³ or to show that a former agreement has been rescinded.⁸⁴ But it is not admissible in order to show the payee's assent to the cancellation of an original

Mass. 243; *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633; *Bowen v. Byrne*, 55 Ill. 467; *Rockwell v. Hunt*, 40 Conn. 328; *Sammons v. Holloway*, 21 Mich. 162; *Burson v. Huntington*, Id. 415; *Weltner v. Riggs*, 3 W. Va. 445; *Forcheimer v. Holly*, 14 Fla. 239. So, too, in other contracts. *United States Exp. Co. v. Haines*, 48 Ill. 248; *Clemens v. Conrad*, 19 Mich. 170; *Davis v. Richardson*, 45 Miss. 499.

⁷⁴ *Warren v. Paul*, 22 Ind. 276; *Fifield v. Close*, 15 Mich. 505.

⁷⁵ *Wilson v. Carey*, 40 Vt. 179; *Humphreys v. Wilson*, 43 Miss. 328.

⁷⁶ *Israel v. Redding*, 40 Ill. 362.

⁷⁷ *Long v. Spencer*, 78 Pa. St. 303.

⁷⁸ *Smart v. Nokes*, 6 Man. & G. 911.

⁷⁹ *Maugham v. Hubbard*, 8 Barn. & C. 14.

⁸⁰ *Dover v. Maestaer*, 5 Esp. 92.

⁸¹ *Byles, Bills*, 117; *Gregory v. Fraser*, 3 Camp. 454. See, too, *Holmes v. Sixsmith*, 7 Exch. 802; *Watson v. Poulson*, 15 Jur. 1111; *Keable v. Payne*, 8 Adol. & E. 555; *Reg. v. Gompertz*, 9 Q. B. 824.

⁸² *Nash v. Duncomb*, 1 Moody & R. 104.

⁸³ *Coppock v. Bower*, 4 Mees. & W. 361.

⁸⁴ *Reed v. Deere*, 7 Barn. & C. 261. And see *Swears v. Wells*, 1 Esp. 317.

acceptance;⁸⁵ or to take a promise out of the statute of limitations;⁸⁶ or to prove an admission of a party to the suit.⁸⁷

The American decisions above referred to have now no application to commercial instruments drawn in, or governed by, the laws of the United States. For a fuller statement of the English cases interpreting the English stampacts the reader is referred to the learned and exhaustive chapter of Mr. Justice Byles on this subject.⁸⁸

⁸⁵ *Sweeting v. Halse*, 9 Barn. & C. 365, 4 Man. & R. 287.

⁸⁶ *Jones v. Ryder*, 4 Mees. & W. 32. And see *Holmes v. Mackrell*, 3 C. B. (N. S.) 789.

⁸⁷ *Byles, Bills*, 117. Or as a payment. *Wilson v. Vysar*, 4 Taunt. 288; *Jardine v. Payne*, 1 Barn. & Adol. 663. And, where payment was made by an unstamped bill, the indorser was held not to be entitled to formal notice of its subsequent dishonor. *Cundy v. Marriott*, Id. 696.

⁸⁸ *Byles, Bills*, 104 et seq.

II. DELIVERY.

§ 216. Necessity for Delivery.

217. Pleading—Evidence—Presumption.

218. Delivery—By Mail—In Sealed Envelope.

219. — Constructive.

220. — Intention Necessary—Mistake—Fraud.

221. — After Death or Dissolution of Firm.

222. — To Agent.

224. — Instrument Takes Effect from.

225. — On Sunday.

227. — On Condition—In Escrow.

230. — Want of—As a Defense.

231. — Parol Evidence.

Delivery Necessary.

§ 216. Commercial paper, like other written contracts, takes effect and is completed only by delivery.⁸⁹ This is true, not only of the principal contract on the face of the note or bill, but also of the indorsement.⁹⁰ Thus, a note may be indorsed by the payee without effecting a transfer so long as it remains in his hands.⁹¹ And

⁸⁹ 1 Daniel, Neg. Inst. 73; 1 Pars. Notes & B. 48; *Brind v. Hampshire*, 1 Mees. & W. 365; *Marston v. Allen*, 8 Mees. & W. 494; *Lansing v. Gaine*, 2 Johns. (N. Y.) 300; *Marvin v. McCullum*, 20 Johns. (N. Y.) 288; *Powell v. Waters*, 8 Cow. (N. Y.) 687; *Howe v. Ould*, 28 Grat. (Va.) 1; *Carter v. McClintock*, 29 Mo. 464; *Lawrence v. Bassett*, 5 Allen (Mass.) 141; *Curtis v. Gorman*, 19 Ill. 141; *Thomas v. Watkins*, 16 Wis. 549; *Chamberlain v. Hopps*, 8 Vt. 94; *Prather v. Zulauf*, 38 Ind. 155; *Jones v. Deyer*, 16 Ala. 221. If delivered by one maker, the authority of his co-maker is presumed. *Beman v. Wessels*, 53 Mich. 549, 19 N. W. 179. But, if drawn and delivered by an agent while his principal was dying, his authority must appear. *In re James*, 146 N. Y. 78, 40 N. E. 876.

⁹⁰ *Lysaght v. Bryant*, 9 C. B. 46; *Adams v. Jones*, 12 Adol. & E. 455; *Rex v. Lambton*, 5 Price, 428; *Clark v. Boyd*, 2 Ohio. 56; *Brind v. Hampshire*, supra; *Ex parte Cote*, 9 Ch. App. 27; *Dann v. Norris*, 24 Conn. 333; *Richards v. Darst*, 51 Ill. 140; *Mott v. Wright*, 4 Biss. 53, Fed. Cas. No. 9,883; *May v. Cassiday*, 7 Ark. 376.

⁹¹ *Mendenhall v. Baylies*, 47 Ind. 575; *Wulschner v. Sells*, 87 Ind. 71. And if a note is made payable to A. for a debt due to her father, B., and at his request, and is taken by her, without his knowledge, from his private papers, there is no valid transfer or delivery to A., although her father's

the indorsement should be made to the indorsee as such.⁹² Mere signature by a stranger as indorser, in the payee's presence, after the note is executed and delivered to the payee, does not, of itself, amount to a redelivery, and involves no liability on the indorser's part without a fresh consideration.⁹³

It is likewise true that delivery is necessary to the complete acceptance of a bill, and an acceptance written upon a bill may be canceled before its delivery and remain of no effect.⁹⁴ So, writing an acceptance on an incomplete bill is of no effect until the bill is completed and delivered.⁹⁵ It is said, however, that an acceptance may take effect without delivery if the acceptor detains the bill in his possession for an unreasonable length of time.⁹⁶ And this is sometimes provided by statute.⁹⁷ But the certification of a check by a bank only takes effect when the certified check is redelivered to the holder, and if it is so delivered after notice to the bank of defense on the drawer's part, and the bank subsequently pays, it will do so at its own peril.⁹⁸

indorsement might not have been necessary to a note drawn in such form. *Hatton v. Jones*, 78 Ind. 466. So, too, *Fanning v. Russell*, 94 Ill. 386, where a note of like tenor was taken from the father's papers after his death; and *Foglesong v. Wickard*, 75 Ind. 258, where the note was made payable to the father, and indorsed by him with the intention of a gift, but never completed by delivery, and it was taken by the daughter, after his death, from his papers.

⁹² *Adams v. Jones*, 12 Adol. & E. 455; *Brind v. Hampshire*, 1 Mees. & W. 365; *Marston v. Allen*, 8 Mees. & W. 494.

⁹³ *Williams' Adm'r v. Williams*, 67 Mo. 661.

⁹⁴ *Cox v. Troy*, 1 Dowl. & R. 38, 5 Barn. & Ald. 474, overruling *Thorn-ton v. Dick*, 4 Esp. 270. See, to like effect, *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526. But in *Smith v. McClure*, 5 East, 477, the acceptance of a bill was held to be perfect without redelivery by the acceptor to the payee. And see *Story, Bills*, § 203, notes; *Chit. Bills*, 198. But an acceptance written on an order, but never delivered, is no payment of the debt for which the order was drawn. *Dunavan v. Flynn*, 118 Mass. 537.

⁹⁵ *Ex parte Hayward*, 6 Ch. App. 546.

⁹⁶ *Smith v. McClure*, 5 East, 477.

⁹⁷ See § 620, *infra*.

⁹⁸ *Freund v. Bank*, 3 Hun (N. Y.) 689.

Pleading—Evidence—Presumption.

§ 217. Delivery need not be specially averred in the declaration upon a note or bill. The word "promised" or "made" sufficiently implies delivery in pleading.⁹⁹

Delivery is, in general, presumed from possession of the bill or note.¹⁰⁰ And even where a note originally payable to "A. or bearer" is in the possession of C. indorsed by B., delivery to B. will be presumed from C.'s possession.¹⁰¹ So, where a note was found among the papers of a deceased payee, its proper delivery is to be presumed.¹⁰² But if found among papers of a deceased person who is a stranger to it, and whose representatives make no claim to it, no delivery to the payee will be presumed, and delivery, actual or constructive, must be shown.¹⁰³

Where a note or bill is so drawn or indorsed as to be payable to bearer, and transferable by delivery, the want of delivery will constitute no defense to the paper in the hands of a bona fide holder.¹⁰⁴ So, where a check, indorsed in blank by the payee, is canceled by tearing into two pieces, and is afterwards put together and trans-

⁹⁹ *Churchill v. Gardner*, 7 Term R. 596; *Binney v. Plumley*, 5 Vt. 500. So, the allegation that defendant "indorsed" implies delivery. *Chester & T. Coal & R. Co. v. Lickiss*, 72 Ill. 521. So, the word "executed." *Nicholson v. Combs*, 90 Ind. 515.

¹⁰⁰ 1 Daniel, Neg. Inst. 76; 1 Pars. Notes & B. 50; *Woodford v. Dorwin*, 3 Vt. 82; *Kidder v. Horrobin*, 72 N. Y. 159. On proof of the maker's handwriting. *Pate v. Brown*, 85 N. C. 166. And a delivery not refused or repudiated is presumed to have been accepted. *De Vaughn v. Haugabook*, 73 Ga. 809. But see *Lloyd v. Sandilands*, Gow, 15, where possession of a check by the payee was held not to be evidence of its delivery to him *by the maker*.

¹⁰¹ *Cox v. Adams*, 2 Ga. 158.

¹⁰² *Holliday v. Lewis*, 14 Hun (N. Y.) 478. But a note payable "to A., if she called for it before she deceased; if not, to be paid to B. by her order." has been held to be B.'s property, and recoverable as such from A.'s executor, although found among A.'s papers at her death. *Blanchard v. Sheldon*, 43 Vt. 512.

¹⁰³ *Mahon's Adm'r v. Sawyer*, 18 Ind. 73. So, a note intended for a gift, and found among waste papers of the maker after her death, is not presumed to have been delivered. *Blanchard v. Williamson*, 70 Ill. 647.

¹⁰⁴ *Kinyon v. Wohlford*, 17 Minn. 239 (Gil. 215).

ferred to a bona fide holder, the want of proper delivery will constitute no defense.¹⁰⁵ But where a bill was indorsed without delivery, and issued in fraud of the indorser, he may show in his defense that the plaintiff was not a bona fide holder.¹⁰⁶

Delivery by Mail—In Sealed Envelope—Contents Unknown.

§ 218. It is not necessary to a good delivery that it should be actually handed by one person to another. It is a sufficient delivery if the paper be mailed to the payee's address.¹⁰⁷ In France commercial paper mailed in this way is revocable until actually sent off by the post office, and there is therefore no delivery until that occurs.¹⁰⁸ Giving a note to the maker's agent, e. g. to the purser of a Havana steamer, addressed to the payee in New York, to be mailed by the purser on the arrival of the steamer in New York, is not a delivery.¹⁰⁹ Nor is it a sufficient delivery to place a package of bills and notes so addressed in the hands of a servant, to be delivered to the postman next morning.¹¹⁰

¹⁰⁵ *Ingham v. Primrose*, 7 C. B. (N. S.) 82. But in *Scholey v. Ramsbottom*, 2 Camp. 485, a check torn into four pieces, afterwards pasted together, and much soiled, was held to carry notice on its face sufficient to put a purchaser upon inquiry; and the bank, paying the check without inquiry, was held liable for the amount.

¹⁰⁶ *Marston v. Allen*, 8 Mees. & W. 494. So far as this case appears, in the opinion of Alderson, B., to decide that such defense cannot be set up against a bona fide holder, it is disapproved as a mere dictum, in *Burson v. Huntington*, 21 Mich. 415.

¹⁰⁷ *Siehel v. Borch*, 2 Hurl. & C. 956; *Kirkman v. Bank*, 2 Cold. (Tenn.) 397; *Mitchell v. Byrne*, 6 Rich. Law (S. C.) 171; *Canterbury v. Bank*, 91 Wis. 53, 64 N. W. 311. Or, by mail, to a husband for his wife. *Funk v. Lawson*, 12 Bradw. (Ill.) 229.

¹⁰⁸ *Ex parte Cote*, 9 Ch. App. 27. This is the case, also, in England, until the complete paper is mailed. If the paper is cut into two pieces for safety (a common practice in England, at least), and half of it sent by mail, it is revocable, and therefore not delivered until the other half is sent. *Smith v. Mundy*, 29 Law J. Q. B. 172. See, too, *Redmayne v. Burton*, 2 Law T. (N. S.) 324.

¹⁰⁹ *Muller v. Pondir*, 55 N. Y. 325, affirming 6 Lans. (N. Y.) 472.

¹¹⁰ *Rex v. Lambton*, 5 Price, 428. So, putting a bill addressed to the payee in an office letter box, from which it is stolen before it can be mailed, is no delivery. *Arnold v. Bank*, L. R. 1 C. P. 578.

On the question as to what local law governed a note, it was held in England that a note *payable at Norwich*, and mailed to the payee, addressed to that place, was delivered there, and not where it was mailed.¹¹¹ But a bill of exchange, signed and indorsed in Ireland in blank, and transmitted in that form to England, was held to be an Irish contract, not requiring an English stamp.¹¹² On the other hand, an acceptance signed in L., and sent by messenger to the payee in E., was held to have been delivered in E., the messenger in this case being plainly the acceptor's agent.¹¹³ But if a note is drawn in Ohio for an insurance policy to be issued in New York, and the note is sent to New York, and the policy issued there, it will be considered a New York note, delivered there, and not in Ohio.¹¹⁴

Merely leaving a note on the payee's desk, without his knowledge, constitutes no delivery of the paper unless he afterwards receives it.¹¹⁵ But a note may be delivered to the payee without his knowing its contents, e. g. in a sealed envelope; and if for value, and so expressed, this will be a sufficient delivery to support a recovery after the maker's death.¹¹⁶ If, however, it is merely left among the maker's papers in an envelope directed to the payee, and is intended to operate as a legacy without the formalities required in a will, it will not be binding upon the maker's estate.¹¹⁷

¹¹¹ *Wilde v. Sheridan*, 21 Law J. Q. B. 260.

¹¹² *Snaith v. Mingay*, 1 Maule & S. 87. So, a bill signed abroad, and sent to drawer's agent in London. *Barker v. Sterne*, 9 Exch. 683.

¹¹³ *Buckley v. Hann*, 5 Exch. 43.

¹¹⁴ *Hyde v. Goodnow*, 3 N. Y. 266.

¹¹⁵ *Kinne v. Ford*, 52 Barb. (N. Y.) 194; *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641. In this case it was held that a bill left in a letter on the desk of a bank cashier, and lost in a crack of the desk before it reached his hands, was not sufficiently presented.

¹¹⁶ *North v. Case*, 2 Lans. (N. Y.) 264, affirmed as *Worth v. Case*, 42 N. Y. 362. The envelope in this case was indorsed, "Not to be unsealed while I live, and returned to me any time I may wish it." But, see, contra, where the payee handed the note to A., indorsed "to be paid after my death to A." *Logenfiel v. Richter*, 60 Minn. 49, 61 N. W. 826.

¹¹⁷ *Gough v. Findon*, 7 Exch. 48. So, the handing of donor's check to a trustee for delivery to the beneficiary six months after donor's death. *Waynesburg College Appeal*, 111 Pa. St. 130, 3 Atl. 19. Or the registering of bonds by earmarking with the name of an intended beneficiary, without her knowledge and without delivery. In *re Crawford*, 113 N. Y. 560, 21 N. E. 692. So, too, a note found among the maker's papers at his death, payable to his brother,

Constructive Delivery.

§ 219. Delivery may be constructive instead of actual. Thus, an order directing its delivery by the person holding the instrument as collateral or in escrow will amount to the same thing as an actual delivery of the paper.¹¹⁸ So, executing a transfer of a bill or note which is in the hands of a pledgee will amount to a delivery of it at the time of the transfer, subject, of course, to the rights of the pledgee.¹¹⁹ So, an agreement with the maker for the settlement of a note for less than its face is constructively a redelivery of it to him.¹²⁰ But an agreement for the delivery of a certain bill of exchange in pledge, on the arrival of the steamer by which it had been forwarded, constitutes only an equitable delivery, and is subject to all equities existing against the payee who made the agreement, and such a bill may be stopped in transitu by the drawer before its actual delivery under the agreement.¹²¹

It is not necessary, however, to a valid delivery, that the person to whom the paper is delivered should have any beneficial interest in it. Without having any such interest, he may maintain an action if the paper has been lawfully delivered to him as the holder.¹²²

but never delivered to him or brought in any way to his knowledge, has no validity as a note or debt of the maker. *Disher v. Disher*, 1 P. Wms. 204; although the maker said he had made the note and deposited it with the bank for the payee. *Purviance v. Jones*, 120 Ind. 162, 21 N. E. 1099. When the note was left in the maker's desk in an envelope addressed to the payee, and she was told she could have it, the delivery was held to be a question for the jury. *Lerch v. Bard*, 162 Pa. St. 307, 29 Atl. 890.

¹¹⁸ *Howe v. Ould*, 28 Grat. (Va.) 1.

¹¹⁹ *Fisher v. Bradford*, 7 Me. 28. Although the note has not been actually delivered to the transferee until after its maturity. *Grimm v. Warner*, 45 Iowa, 106. And a note has been held to be sufficiently delivered to B., although payable to a deceased payee, A., "if she calls for it," and found among A.'s papers at her death; it being drawn "to be paid to B., by her order," if A. did not call for it. *Blanchard v. Sheldon*, 43 Vt. 512.

¹²⁰ *Stewart v. Hidden*, 13 Minn. 43 (Gil. 29). So, if a note is tendered in accordance with an agreement to transfer it in part payment for goods purchased, and is subsequently burned while still in the hands of the purchaser of the goods, this is a sufficient delivery to sustain an action against the maker. *Des Arts v. Leggett*, 16 N. Y. 582.

¹²¹ *Muller v. Pondir*, 55 N. Y. 325, affirming 6 Lans. (N. Y.) 472.

¹²² *Austin v. Birchard*, 31 Vt. 589. But a nonnegotiable instrument, de-

Intention to Deliver Necessary.

§ 220. Although delivery is generally marked, and accompanied by immediate change of possession, this is not, of itself, sufficient to make a good delivery. An intention to deliver the paper must accompany the act, in order to make a complete and valid delivery. If the paper be handed to the payee for him to look at, and carried off by him against the maker's will, and in spite of his resistance, there is no delivery to him.¹²³

So, if a signature be written on blank paper merely for the purpose of identifying the handwriting or signature, handing such paper to one, who afterwards writes a note over it, is no delivery; and the writing of the note is a forgery, on which the supposed maker is not even liable to a bona fide holder.¹²⁴ So, if a note is executed under duress,¹²⁵ or induced by fraud.¹²⁶ So, if a note be drawn in sport, without any intention to deliver it as a note, and be carried off by the payee, without the knowledge or against the will of the maker, it will not constitute a delivery. But in such case the want of delivery cannot be set up in defense to the note in the hands of a bona fide holder.¹²⁷ So, if a note be drawn and left as a mere memorandum of an arrangement to be made, this will not be a sufficient delivery of it, and the defense will be available in a suit

livered to a bailee for transmission merely, will not give him such apparent title as to render a fraudulent transfer by him effectual. *Midland R. Co. v. Hitchcock*, 37 N. J. Eq. 549.

¹²³ *Carter v. McClintock*, 29 Mo. 464. Or left for inquiry for purpose of discount, and fraudulently converted and recovered in trover by the indorser. *Haas v. Sackett*, 40 Minn. 53, 41 N. W. 237. But it is a sufficient delivery if a note is left subject to inquiry as to desired change of form, but to be accepted in any case. *Bodley v. Higgins*, 73 Ill. 375.

¹²⁴ *Caulkins v. Whisler*, 29 Iowa, 495.

¹²⁵ *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112. See *infra*.

¹²⁶ *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632. In this case the maker was fraudulently made drunk, and the note executed in that state. See *infra* for fraud and duress as defenses.

¹²⁷ *Shipley v. Carroll*, 45 Ill. 285. So of a note indorsed in blank by the payee, and stolen from his desk. *Gould v. Segee*, 5 Duer (N. Y.) 260.

brought by the payee.¹²⁸ And in such a case parol evidence of the whole arrangement or contract is admissible.¹²⁹

Again, if a note be delivered by the maker under the mistaken idea that it is a paper of different character, the mistake being induced by the payee's fraud, and the maker being guilty of no negligence in the matter, he will not be liable for it.¹³⁰ But if in such case the maker was guilty of negligence, e. g. in not reading the paper, he cannot avail himself of the defense against a bona fide holder.¹³¹

Where a note, payable to A. or bearer, is stolen from the maker by B. before it has been delivered to the payee, it will be void, for want of delivery, in the hands of a holder with notice.¹³² So, where a note was left by the maker on his table, and carried off, without his authority and without any negligence on his part, by the payee, it was held that the want of delivery constituted a good defense, even against a bona fide purchaser for value.¹³³ In these cases the paper had had no valid inception. But a negotiable government bond stolen from the owner can be held against him in an action of trover brought against a bona fide holder.¹³⁴

Delivery after Maker's Death—After Dissolution of Firm.

§ 221. As delivery constitutes part of the complete execution of commercial paper, it follows that no delivery can be made after the death of the maker by his executor.¹³⁵ So, if made for the accommodation of the payee, no delivery can be made by him after the

¹²⁸ *Ruggles v. Swanwick*, 6 Minn. 526 (Gil. 365).

¹²⁹ *Hopper v. Eiland*, 21 Ala. 714.

¹³⁰ *Taylor v. Atchison*, 54 Ill. 196.

¹³¹ *Chapman v. Rose*, 56 N. Y. 137.

¹³² *Hall v. Wilson*, 16 Barb. (N. Y.) 548.

¹³³ *Burson v. Huntington*, 21 Mich. 415; *Erickson v. Roehm*, 33 Minn. 53; 21 N. W. 861; *Dodd v. Dunne*, 71 Wis. 578, 37 N. W. 430.

¹³⁴ *Jones v. Nellis*, 41 Ill. 483.

¹³⁵ *Clark v. Sigourney*, 17 Conn. 511. So, delivery by the payee of a note to his sister to deliver to A. B. can only be sustained as a *donatio causa mortis*, since otherwise the authority given by the payee to his agent was revoked by his death. *Sessions v. Moseley*, 4 Cush. (Mass.) 87. See, too, *Waynesburg College Appeal*, 111 Pa. St. 130, 3 Atl. 19.

maker's death.¹³⁶ So, a note drawn payable to the maker's own order cannot be delivered after his death by the heir.¹³⁷ But it has been held in a recent case that a note delivered to A., to deliver after the maker's death to the payee, was sufficiently delivered. A. being regarded in this case as the agent of the payee.¹³⁸

In like manner, a partnership note cannot be delivered after the dissolution of the partnership;¹³⁹ and, if so delivered by either partner, it will not be binding on the firm, although drawn before its dissolution.¹⁴⁰

Delivery—To an Agent.

§ 222. While a negotiable instrument remains in the maker's hands, or in the hands of his agent, to whom it has been given for the purpose of delivery, it is still undelivered and incomplete.¹⁴¹ Thus, if a man draws a note in Italy, and sends it to his agent in England, for delivery there, it will be of no force until delivered by the agent in England.¹⁴² But where a note is indorsed in blank, and delivered to an agent for the purpose of sale, and is fraudulently transferred by him as collateral for a debt of his own, the maker cannot set up want of delivery against a bona fide purchaser for value.¹⁴³ Where, however, a blank paper was indorsed by A., and delivered to B. to obtain his brother's signature, and then deliver to C., and was taken by the brother from B., and delivered to D. in settlement of a precedent debt, such nondelivery constitutes a

¹³⁶ *Perry v. Crammond*, 1 Wash. C. C. 100, Fed. Cas. No. 11,005. In this case it was said by Washington, J., that delivery after the maker's death by the payee "might not be open to objection," if there had been a valid consideration between the maker and the indorsee. In like manner, an accommodation indorsement cannot be used after the indorser's death, and is without effect in the hands of a purchaser with notice. *Smith's Ex'rs v. Wyckoff*, 3 Sandf. Ch. (N. Y.) 77.

¹³⁷ *Bromage v. Lloyd*, 1 Exch. 32.

¹³⁸ *Giddings v. Giddings' Adm'r*, 51 Vt. 227. So, if a note is deposited by one of two makers in escrow, delivery may be made by the depository after the death of the other maker. *Bostwick v. McEvoy*, 62 Cal. 496.

¹³⁹ *Woodford v. Dorwin*, 3 Vt. 82.

¹⁴⁰ *Gale v. Miller*, 54 N. Y. 536, affirming 1 Lans. 451, 44 Barb. 420.

¹⁴¹ *Brind v. Hampshire*, 1 Mees. & W. 365.

¹⁴² *Chapman v. Cottrell*, 13 Wkly. Rep. 843.

¹⁴³ *Morris v. Preston*, 93 Ill. 215.

good defense against D.¹⁴⁴ And where two persons are liable as joint judgment debtors, and a joint note is executed by one and delivered to the other, to be signed by him and negotiated for the purpose of raising money to pay the judgment, and he pays the judgment, but does not negotiate the note, he cannot hold it as a delivered note against his co-debtor.¹⁴⁵

§ 223. A note may, however, be delivered to the agent of the payee or the indorsee,¹⁴⁶ although the principal know nothing of such delivery at the time.¹⁴⁷ So, it may be delivered to an attorney for the use of the indorsee,¹⁴⁸ or to the payee's agent, subject to be changed in form, to be accepted by him if not changed.¹⁴⁹ A good delivery may even be made to an unauthorized agent, and may be ratified subsequently by the principal. His bringing a suit upon the instrument would be a ratification in such case.¹⁵⁰ And it has been held that delivery to a father of a promise to pay a debt due the son is sufficient.¹⁵¹ So, delivery to a trustee is sufficient delivery to the cestui que trust.¹⁵² But where a note is given to an unauthorized agent, e. g. to a city treasurer for payment of city taxes, this is no

¹⁴⁴ *Lenheim v. Wilmarling*, 55 Pa. St. 73. The holder in such case not being held in Pennsylvania to be a holder for value without notice. But see, contra, *Whitmore v. Nickerson*, 125 Mass. 496, where the note was delivered to the maker, to be signed by his firm name, and was signed by his individual name, and sued upon by a subsequent purchaser.

¹⁴⁵ *Thomas v. Watkins*, 16 Wis. 549.

¹⁴⁶ *Elliott v. Deason*, 64 Ga. 63; *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608; *Gordon v. Adams*, 127 Ill. 223, 19 N. E. 557. And his acceptance will be presumed. *Gordon v. Adams*, supra. Even delivery to the president of the bank payee, who advanced the money, and procured discount by the bank two years afterwards, has been held sufficient. *Farmers' Bank v. Couch*, 118 N. C. 436, 24 S. E. 737.

¹⁴⁷ *Lysaght v. Bryant*, 9 C. B. 46.

¹⁴⁸ *Richardson v. Lincoln*, 5 Metc. (Mass.) 201.

¹⁴⁹ *Bodley v. Higgins*, 73 Ill. 375.

¹⁵⁰ *Ancona v. Marks*, 7 Hurl. & N. 686.

¹⁵¹ *Mason v. Hyde*, 41 Vt. 232. So, a note may be received by mail by a husband for his wife. *Funk v. Lawson*, 12 Bradw. (Ill.) 229. But see *Wright v. Smith*, 81 Va. 777.

¹⁵² *Tucker v. Bradley*, 33 Vt. 324. But see *Latter v. White*, L. R. 5 H. L. 578.

sufficient delivery of the instrument, unless it is accepted by the corporation.¹⁵³

Neither can delivery of a bill or note be made to a stranger, e. g. where the paper is taken originally and discounted by another person than the payee named in it.¹⁵⁴ Where, however, a note was made for the purpose of procuring a loan, which was refused by the payee named in it, but made by the plaintiff, he taking the note from the payee, the circumstances of the loan were held to be sufficient evidence to establish a proper delivery.¹⁵⁵

Instrument Takes Effect from Delivery.

§ 224. As a general rule, contracts of a commercial character, like others, take effect from their delivery only,¹⁵⁶ although such delivery take place after the date of the instrument.¹⁵⁷ In the absence, however, of evidence to the contrary, it is presumed that a bill or note was delivered at the time it bears date;¹⁵⁸ and, if ac-

¹⁵³ Crowell v. Osborne, 43 N. J. Law, 335.

¹⁵⁴ First Nat. Bank v. Strang, 72 Ill. 559; Dewey v. Cochran, 49 N. C. 184; Adams Bank v. Jones, 16 Pick. (Mass.) 574; Prescott v. Brinsley, 6 Cush. (Mass.) 233. And suit cannot be brought in the payee's name for the use of such other party. *Id.* See, however, as to actions on notes so delivered, 1 Ames, Bills & N. p. 135; Meeker v. Shanks, 112 Ind. 207, 13 N. E. 712.

¹⁵⁵ Hayden v. Thayer, 5 Allen (Mass.) 162.

¹⁵⁶ 1 Daniel, Neg. Inst. 76; Lansing v. Gaine, 2 Johns. (N. Y.) 300; Woodford v. Dorwin, 3 Vt. 82; Lovejoy v. Whipple, 18 Vt. 379; Hill v. Dunham, 7 Gray (Mass.) 543; Gale v. Miller, 54 N. Y. 536, affirming 1 Lans. (N. Y.) 451, 44 Barb. 420; Baldwin v. Freydendall, 10 Bradw. (Ill.) 106. Spencer v. Carstarphen, 15 Colo. 445, 24 Pac. 882. And this is provided by statute in the ARGENTINE REPUBLIC. Code Com. art. 767. An admission that the note was signed is not an admission of its execution. Hepp v. Huefner, 61 Wis. 148, 20 N. W. 923.

¹⁵⁷ 1 Daniel, Neg. Inst. 76; 1 Pars. Bills & N. 49; Lansing v. Gaine, 2 Johns. (N. Y.) 300. But an accommodation note made before January 1st, but not put into circulation until after, has been held to take effect from its date, with reference to a homestead exemption created in the interim. Ladd v. Dudley, 45 N. H. 61.

¹⁵⁸ 1 Daniel, Neg. Inst. 76; 1 Pars. Bills & N. 49; De la Courtier v. Bellamy, 2 Show. 422; Giles v. Bourne, 6 Maule & S. 73; 2 Chit. 300; Hague v. French, 3 Bos. & P. 173; Anderson v. Weston, 6 Bing. N. C. 296; Baldwin v. Freydendall, *supra*. So, as to a statement of account, Sinclair v. Baggaley, 4 Mees. & W. 312. But it seems that this presumption will not be made in favor of

cepted with no date of acceptance expressed, the acceptance is presumed to have been made before maturity of the bill, and within a reasonable time after its date.¹⁵⁹ So, an indorsement, without date expressed, is presumed to have been made and delivered before the maturity of the instrument.¹⁶⁰ In reckoning, however, the maturity of a note payable a certain time after date, the expressed date, and not the time of delivery, is the point to reckon from.¹⁶¹ But, if there is no date expressed, the maturity of such instrument can only be reckoned from the time of its delivery.¹⁶² In determining what local law governs an instrument, respect is had to its delivery, and not to the place where it was signed,¹⁶³ nor to the place where the loan out of which it grew was made.¹⁶⁴

As we have already seen, in considering the subject of instruments executed in blank, the authority to fill such blanks is only implied from a proper delivery of the instrument, and does not exist where the paper has been stolen from the maker before the blanks were filled.¹⁶⁵

Delivery—On Sunday.

§ 225. The question as to the time when an instrument was delivered often becomes a matter of importance, where the date or delivery falls on a Sunday. Sunday contracts are prohibited by statute in England and in most of the United States.¹⁶⁶ A note or bill

a writing, e. g. a receipt indorsed on a bond taking it out of the operation of the statute of limitations, where the writer had an interest in falsifying the date. *Cremer's Estate*, 5 Watts & S. (Pa.) 331.

¹⁵⁹ *Roberts v. Bethell*, 12 C. B. 778.

¹⁶⁰ *Smith v. Edgeworth*, 3 Allen (Mass.) 233. In this case the presumption was overcome by proof of illegality of consideration. The jury may properly determine from circumstances attending the transfer of a bill the time at which the indorsement was made. *Anderson v. Weston*, 6 Bing. N. C. 296.

¹⁶¹ *Bumpass v. Timms*, 3 Sneed (Tenn.) 459.

¹⁶² *Giles v. Bourne*, 6 Maule & S. 73.

¹⁶³ *Mott v. Wright*, 4 Biss. 53, Fed. Cas. No. 9,883; *Campbell v. Nichols*, 33 N. J. Law, 81; *Freese v. Brownell*, 35 N. J. Law, 285; *Pine v. Smith*, 11 Gray (Mass.) 38; *Wells, Fargo & Co. v. Vansickle*, 64 Fed. 944. And see § 22 et seq., *supra*.

¹⁶⁴ *Read v. Edwards*, 2 Nev. 262.

¹⁶⁵ *Ledwich v. McKim*, 53 N. Y. 307.

¹⁶⁶ The statute of 29 Car. II. c. 7, provides that no person "shall do or exercise any worldly business or work of their ordinary calling upon the Lord's

made and delivered on Sunday is, in general, void.¹⁶⁷ So, an indorsement made and delivered on Sunday,¹⁶⁸ or payment made on Sunday.¹⁶⁹ But an indorser cannot set up that the note was executed by the maker on Sunday.¹⁷⁰ And it has been held that a bill or note made on Sunday cannot be ratified afterwards on a week day, being void by statute.¹⁷¹ But there seems to be no reason for rejecting a complete and valid contract, if merely preceded by a void Sunday agreement.¹⁷² The date being *prima facie* the time of execution, a note dated on Sunday is *prima facie* void.¹⁷³ But where the legal Sunday ends by statute at sunset, it is held that the date of a note on Sunday is no evidence of its execution before sunset, and that it is therefore *prima facie* valid;¹⁷⁴ the time of delivery in such case being a question for the jury to determine.¹⁷⁵ Where a bill is dated and drawn on Sunday, and the acceptance is not dated, it will not be presumed to have been accepted on Sunday," under a penalty. As to whether the acceptance of a bill of exchange falls within such prohibition, see *Begbie v. Levi*, 1 Crompt. & J. 183. For American statutes, see § 520, *infra*.

¹⁶⁷ *Towle v. Larrabee*, 26 Me. 464; *Pattee v. Greely*, 13 Mete. (Mass.) 284; *O'Donnell v. Sweeney*, 5 Ala. 467; *Dodson v. Harris*, 10 Ala. 566; *Bosley v. McAllister*, 13 Ind. 565; *Brimhall v. Van Campen*, 8 Minn. 13 (Gil. 1); *Arbuckle v. Reaume*, 96 Mich. 243, 55 N. W. 808; *Adams v. Hamell* (Mich.) 2 Doug. 73,—although this is said not to be true at common law. And a Sunday note is valid in Washington. Code Proc. 146; *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67. To render the note void, it must have been delivered, and not merely signed, on Sunday. *Conrad v. Kinzie*, 105 Ind. 281, 4 N. E. 863. But if signed by one maker on Saturday, and left with the other to be signed, and not signed and delivered by him until Sunday, the former may be held, and not the latter. *Burns v. Moore*, 76 Ala. 339.

¹⁶⁸ *Saltmarsh v. Tuthill*, 13 Ala. 390.

¹⁶⁹ *Dennis v. Sharman*, 31 Ga. 607.

¹⁷⁰ *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909.

¹⁷¹ *Day v. McAllister*, 15 Gray (Mass.) 433; *Banks v. Werts*, 13 Ind. 203. But see *Winchell v. Carey*, 115 Mass. 560, where the action rested partly on fraudulent representations made on a week day, inducing a Sunday sale, which was afterwards ratified.

¹⁷² *Love v. Wells*, 25 Ind. 503; *Clough v. Davis*, 9 N. H. 500; *Smith v. Case*, 2 Or. 190.

¹⁷³ *Sayre v. Wheeler*, 31 Iowa, 112. But see, *contra*, *Dohoney v. Dohoney*, 7 Bush (Ky.) 217.

¹⁷⁴ *Nason v. Dinsmore*, 34 Me. 391.

¹⁷⁵ *Hill v. Dunham*, 7 Gray (Mass.) 543.

day.¹⁷⁶ And a valid note will not be rendered invalid by being transferred on Sunday.¹⁷⁷

§ 226. Where a bill or note is dated on Sunday, delivery on another day may in all cases be shown.¹⁷⁸ It has been held, however, that an indorsement by way of guaranty, delivered to the maker on a Sunday, is void even where the note was subsequently delivered on a week day by the maker to an innocent payee, the payee not occupying the position of a bona fide purchaser for value.¹⁷⁹ But, where a note made upon Sunday is dated on a week day, it is valid in the hands of a bona fide purchaser for value.¹⁸⁰ And where it was merely signed on Sunday, but delivered on a week day, it follows, from what has been already said, that it is valid,¹⁸¹ even though the delivery was made by an agent who received his authority from the maker on Sunday.¹⁸² A fortiori, where the date and delivery both fall on a week day, the note is valid although signed on Sunday.¹⁸³ In like manner a bill for the sale of goods contracted on Sunday is sufficient, if the goods be delivered on Monday.¹⁸⁴

Delivery—On Condition—Escrow.

§ 227. It frequently happens that the delivery of commercial paper is made upon condition, and is not to take effect until such condition be fulfilled.¹⁸⁵ And such paper is often delivered in escrow,

¹⁷⁶ *Begbie v. Levi*, 1 Crompt. & J. 180.

¹⁷⁷ *Steere v. Trebilcock* (Mich.) 66 N. W. 342.

¹⁷⁸ *Aldridge v. Bank*, 17 Ala. 45.

¹⁷⁹ *Gilbert v. Vachon*, 69 Ind. 372.

¹⁸⁰ *Cranson v. Goss*, 107 Mass. 439; *Clinton Nat. Bank v. Graves*, 48 Iowa, 228; *Harrison v. Powers*, 76 Ga. 218; *Vinton v. Peck*, 14 Mich. 287. So, too, in the case of a bond. *Commonwealth v. Kendig*, 2 Pa. St. 448.

¹⁸¹ *Hilton v. Houghton*, 35 Me. 143; *Fritsch v. Heisen*, 40 Mo. 555; *Lovejoy v. Whipple*, 18 Vt. 379; *King v. Fleming*, 72 Ill. 21; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331. So, too, where it was only discussed on Sunday, but executed on Monday. *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335.

¹⁸² *Flanagan v. Meyer*, 41 Ala. 132; *Beman v. Wessels*, 53 Mich. 549, 19 N. W. 179.

¹⁸³ *King v. Fleming*, 72 Ill. 21.

¹⁸⁴ *Smith v. Bean*, 15 N. H. 577.

¹⁸⁵ 1 Daniel, Neg. Inst. 78; Story, Prom. Notes, § 56, note 4; *Bell v. Ingestre*, 12 Q. B. 317; *Benton v. Martin*, 52 N. Y. 570; *Seymour v. Cowing*, 4 Abb.

and in such case the maker is only liable upon the happening of the contingency.¹⁸⁶ But a note cannot be delivered in escrow to the payee himself;¹⁸⁷ or to the agent of the payee;¹⁸⁸ or by one maker to his co-maker;¹⁸⁹ or with the maker's own agent.¹⁹⁰ Thus, if a note be signed by one person and delivered to the payee to be signed by another before it is further circulated, the want of such other signature will be no defense to a suit by a bona fide holder.¹⁹¹ But where suit is brought by the payee, the conditional delivery to him may be set up in defense,¹⁹² and may be shown by parol evidence.¹⁹³

Dec. (N. Y.) 200; *Miller v. Gambie*, 4 Barb. (N. Y.) 146; *Sweet v. Stevens*, 7 R. I. 375; *Ward v. Churn*, 18 Grat. (Va.) 801.

¹⁸⁶ 1 Daniel, Neg. Inst. 78; 1 Pars. Bills & N. 51; *Couch v. Meeker*, 2 Conn. 302; *Taylor v. Thomas*, 13 Kan. 217; *McLaughlin v. Clausen*, 85 Cal. 322, 24 Pac. 636; *Stringer v. Adams*, 98 Ind. 539. And the violation of the escrow may be set up even against a bona fide holder. *Chipman v. Tucker*, 38 Wis. 43.

¹⁸⁷ *Badcock v. Steadman*, 1 Root (Conn.) 87; *Massmann v. Holscher*, 49 Mo. 87; *Henshaw v. Dutton*, 59 Mo. 139; *Jones v. Shaw*, 67 Mo. 667; *Clanin v. Machine Co.*, 118 Ind. 374, 21 N. E. 35; *Johnson v. Branch*, 11 Humph. (Tenn.) 521. So, *Brown v. Reynolds*, 5 Sneed (Tenn.) 639, where delivery of a note to the payee, to hand to a third person for safe-keeping, was held to be a good escrow; and *Breeden v. Grigg*, 8 Baxt. (Tenn.) 163, where the maker of a note was allowed to prove by parol that he had delivered it to the payee conditionally. So, to prove delivery for a certain purpose, the note being non-negotiable. *Carmody v. Crane* (Mich.) 68 N. W. 268. In cases where a note was signed by a surety, and delivered to the payee to procure a certain other surety, and not to use it until he had done so, the condition was held void in *Johnson v. Branch*, supra, but enforced by injunction in *Majors v. McNeilly*, 7 Heisk. (Tenn.) 294.

¹⁸⁸ *Stewart v. Anderson*, 59 Ind. 375; *Scott v. State Bank*, 9 Ark. 36. But see *Ware v. Smith*, 62 Iowa, 159, 17 N. W. 459.

¹⁸⁹ *Carter v. Moulton*, 51 Kan. 9, 32 Pac. 633. At suit of a payee without notice. *Jordan v. Jordan*, 10 Lea (Tenn.) 124.

¹⁹⁰ *Lehigh C. & I. Co. v. Steel Co.*, 91 Wis. 221, 64 N. W. 746. The maker must part with the control. *Id.*

¹⁹¹ *Bank of Topeka v. Nelson* (Kan. Sup.) 49 Pac. 155; *Davis v. Gray*, 61 Tex. 506; *Micklewait v. Noel*, 69 Iowa, 344, 28 N. W. 630; *Massmann v. Holscher*, 49 Mo. 87. But, when the defense is set up that the delivery was only in escrow, the holder must show himself to be a holder for value, without notice, and before maturity. *Vallett v. Parker*, 6 Wend. (N. Y.) 615. And see § 230, infra.

¹⁹² *Jefferies v. Austin*, 1 Strange, 674; *Ware v. Smith*, 62 Iowa, 159. So, where the condition was for an additional signature. *Majors v. McNeilly*, 7

¹⁹³ See note 193 on following page.

But it cannot be set up against a payee having no notice of the condition.¹⁹⁴ Nor can the principal maker set up, even against a payee with notice, the breach of such condition for sureties, to whom he could have had no recourse.¹⁹⁵

§ 228. In general, where the delivery of commercial paper is conditional, the nonfulfillment of the condition constitutes a good defense to the instrument, e. g. a condition to redeliver the note if another note and account, for which it was given, could not be used;¹⁹⁶ or if the maker wished to withdraw from a college subscription, for which it was given;¹⁹⁷ or a condition that others should sign as co-makers or as co-sureties.¹⁹⁸ So, where a nonnegotiable note is executed by a surety and left with his principal to be delivered upon a certain condition, and it is delivered by the principal in violation of the agreement, the surety will not be bound.¹⁹⁹

Heisk. (Tenn.) 294; *Alexander v. Wilkes*, 11 Lea (Tenn.) 221; *Hurt v. Ford* (Mo.) 36 S. W. 671; *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 64 N. W. 163; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Merchants' Exch. Bank v. Luckow*, 37 Minn. 542, 35 N. W. 434.

¹⁹³ *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995; *Robertson v. Rowell*, 158 Mass. 94, 32 N. E. 898; *Wilson v. Powers*, 131 Mass. 539. So, to the effect that the note was to be held and not take effect until the property (purchased by it conditionally) could be examined. *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816; but not to import a contradictory condition into the note itself, e. g. that the payee was to take care of the note, and not look to the indorser, *Hutchinson v. Brown*, 19 D. C. 136; or was to exhaust certain trust property before looking to the maker, *Moore v. Prussing*, 165 Ill. 319, 46 N. E. 184. And see § 94, *supra*, and §§ 231, 1901, *infra*.

¹⁹⁴ *Brumback v. Bank*, 46 Neb. 540, 65 N. W. 198; *Carter v. Moulton*, 51 Kan. 9, 32 Pac. 633; *Deardorff v. Foresman*, 24 Ind. 481.

¹⁹⁵ *Brumback v. Bank*, *supra*.

¹⁹⁶ *Simonton v. Steele*, 1 Ala. 357. An agreement to return the note on a certain condition may constitute a conditional delivery, *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408; or not, *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164.

¹⁹⁷ *Hillsdale College v. Thomas*, 40 Wis. 661.

¹⁹⁸ *Leaf v. Gibbs*, 4 Car. & P. 466; *Miller v. Gamble*, 4 Barb. (N. Y.) 146. At suit of a mere depositary, *Stricklin v. Cunningham*, 58 Ill. 293; or of the payee taking with notice of the condition, *Easter v. Minard*, 26 Ill. 495. And see § 227, *supra*.

¹⁹⁹ *Daniels v. Gower*, 54 Iowa, 319, 3 N. W. 424, and 6 N. W. 525. So, too, in case of a sealed bond. *People v. Bostwick*, 32 N. Y. 445; *Lovett v. Adams*, 3 Wend. (N. Y.) 380.

So, a note for subscription to stock, put into escrow and delivered in violation of the condition, will not render the maker liable.²⁰⁰ So, a note payable to a contractor for erecting a public building "or bearer," left in escrow to be delivered on performance of the building contract, cannot be subsequently delivered to another contractor, who finished the building at a later time than the original contract specified.²⁰¹ So, if an indorsement is made on condition of the discontinuance of a suit, the nonperformance may be set up in defense.²⁰²

§ 229. But it has been held that a condition that certain old notes, for which the note in suit was given, should be returned, was a condition subsequent, and could not avail as a defense.²⁰³ If the condition is indorsed on the note, avoiding it if a dispute should arise, such indorsement is part of the note, and renders it nonnegotiable.²⁰⁴

Where a bill is indorsed and delivered on condition that certain notes be taken up, the breach of this condition may be proved under the general issue.²⁰⁵ If a note is delivered for a policy of insurance, to take effect when the policy should be received, and is indorsed before that time, the question of delivery is one for the jury.²⁰⁶

And where a note was delivered to the payee in violation of a condition between the principal and surety executing it, and the payee knew of the condition, relief was given to the surety in equity, and a cancellation of the note decreed against the payee.²⁰⁷ And, in general, relief may be had before delivery to the payee by injunction in equity;²⁰⁸ and, after violation of the condition, against a payee with notice, by action of trover.²⁰⁹ Where a bill of exchange is delivered with a bill of lading attached, a condition is implied which is forfeited by detaching the bill of lading, and accept-

²⁰⁰ *Roberts v. McGrath*, 38 Wis. 52; *Roberts v. Wood*, Id. 60.

²⁰¹ *McLean v. Nugent*, 33 Wis. 353.

²⁰² *Bookstaver v. Jayne*, 60 N. Y. 146.

²⁰³ *Goddard v. Cutts*, 11 Me. 440. See, too, *Henshaw v. Dutton*, 59 Mo. 139.

²⁰⁴ *Hartley v. Wilkinson*, 4 Camp. 127.

²⁰⁵ *Bell v. Ingestre*, 12 Q. B. 317.

²⁰⁶ *Sweet v. Chapman*, 7 Hun (N. Y.) 576.

²⁰⁷ *De Vries v. Shumate*, 53 Md. 211.

²⁰⁸ *De Vries v. Shumate*, 53 Md. 211.

²⁰⁹ *Brown v. St. Charles*, 66 Mich. 71, 32 N. W. 926; *Boyer v. Fenn*, 19 Misc. Rep. 128, 43 N. Y. Supp. 533.

ance may be refused in such case.²¹⁰ But where a compromise is made by an insolvent with his creditors, conditioned on the acceptance of all, and indorsed notes are given in settlement, such indorsement amounts to a waiver of the condition on which the compromise was made.²¹¹

Delivery—Defense for Want of.

§ 230. The cases of defense above enumerated are, unless otherwise stated, all cases of defense allowed against the original payee or a holder with notice or without consideration. That a note has been delivered in escrow is no valid defense at suit of a bona fide holder for value,²¹² although it may be set up in New York against one who has taken the paper merely as security for a precedent debt without other consideration.²¹³ Where a note, therefore, is given to a company for stock, on condition that it be held until all the

²¹⁰ *Lanfear v. Blossman*, 1 La. Ann. 148.

²¹¹ *Whittemore v. Obear*, 58 Mo. 280.

²¹² *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Moore v. Miller*, 6 Lans. (N. Y.) 396; *Fearing v. Clark*, 16 Gray (Mass.) 74; *Graff v. Logue*, 61 Iowa, 704, 17 N. W. 171; *Hutchinson v. Brown*, 19 D. C. 136; *Garner v. Fite*, 93 Ala. 405, 9 South. 367. Or on condition of other signatures, *Deardorff v. Foresman*, 24 Ind. 481. This is true, also, of a note delivered for a special purpose, and fraudulently diverted. *Woodhull v. Holmes*, 10 Johns. (N. Y.) 231. But a note delivered by an accommodation maker to his co-maker to negotiate, although made payable to a payee named therein, and given for a special purpose, and indorsed, but never accepted, by such payee, has been held to have been sufficiently delivered. *Morris v. Morton*, 14 Neb. 358, 15 N. W. 725. And where the payee is ignorant of the fraud which was perpetrated by the maker's agent, who thereby obtained and delivered the check to the payee, the latter occupies the position of a bona fide holder, as to this defense. *Watson v. Russell*, 3 Best & S. 34, affirmed 5 Best & S. 968; *Jordan v. Jordan*, 10 Lea (Tenn.) 124. So, too, a transfer of stock "for value received." *McNeil v. Bank*, 46 N. Y. 325. But a payee, who knew that the note was given to the maker's agent for another purpose, and whose name was written in a blank left by the maker, is not a bona fide holder, and takes the note subject to the condition on which it was delivered to the agent. *Mills v. Williams*, 16 S. C. 593. Some cases, on the contrary, allow as a defense, even against a bona fide holder, that the note was delivered in violation of an escrow, *Chipman v. Tucker*, 38 Wis. 43; or of a condition for other signatures, *Ayres v. Milroy*, 53 Mo. 516.

²¹³ *Prentiss v. Graves*, 33 Barb. 621.

stock be subscribed and the railroad be finished, and on the further condition that the railroad be finished in two years, the breach of these conditions will constitute no defense at suit of a bona fide holder for value.²¹⁴ And where a note is delivered to the payee's agent in consideration partly for another note, and is not to be delivered to the payee until such other note is paid, it has even been held that the payee receiving such note from the agent, without notice of the condition violated, takes it clear of the condition.²¹⁵ Again, where stockholders' notes have been given to make up the impaired capital of a corporation, and deposited with a bank with the agreement that they should be credited and drawn against, only as they were made good by the company's dividends, and have been transferred in violation of this agreement by the bank as collateral, the company to whom they were made cannot recover them from such transferees.²¹⁶

And where a note after being signed was to have had a condition added to it, but was carried off by the payee against the maker's will before this was done, it was held to be good in the hands of a bona fide holder for value.²¹⁷ And the maker may be estopped by his own negligence in suffering a delivery.²¹⁸ The objection to a delivery on the ground of its escrow character is, however, precluded in a case where two exchange notes were both put in escrow, and the maker of one takes the other from escrow and holds it.²¹⁹

Parol Evidence.

§ 231. Where want of delivery or breach of condition or escrow in the delivery is available as a defense, it may be shown by parol evidence.²²⁰ So, between the immediate parties, a condition contradicting the note, e. g. that the maker should not be held liable, where

²¹⁴ *Foy v. Blackstone*, 31 Ill. 538.

²¹⁵ *Stewart v. Anderson*, 59 Ind. 375.

²¹⁶ *Black River Ins. Co. v. New York L. & T. Co.*, 73 N. Y. 282.

²¹⁷ *Clarke v. Johnson*, 54 Ill. 296.

²¹⁸ *Mulberger v. Morgan* (Tex. Civ. App.) 34 S. W. 148. And see section 217, *supra*.

²¹⁹ *Smith v. Smith*, 13 C. B. (N. S.) 418.

²²⁰ *Benton v. Martin*, 52 N. Y. 570; *Lattimer v. Hill*, 8 Hun, 171; *Sweet v. Stevens*, 7 R. I. 375; *Watkins v. Bowers*, 119 Mass. 383; *Ricketts v. Pendleton*, 14 Md. 320; *Bradley v. Bentley*, 8 Vt. 243; *Mosher v. Rogers*, 117

it was accompanied by proof of entire want of consideration.²²¹ And where a note was delivered or was placed in escrow to be delivered on a certain condition, and the depositary died before the performance of the condition, his declarations as to the condition are admissible in defense against an indorsee after maturity of the note.²²² But, even at suit of the payee, parol evidence of such condition has been held to be excluded by the absolute form of the note.²²³

Ill. 446, 5 N. E. 583; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408; *Merchants' Exch. Bank v. Luckow*, 37 Minn. 542, 35 N. W. 434; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 200; *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 64 N. W. 163. And see § 227, *supra*.

²²¹ *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018.

²²² *Goodson v. Johnson*, 35 Tex. 622.

²²³ *Roche v. Roanoke Seminary*, 56 Ind. 198; *Massmann v. Holscher*, 49 Mo. 87; after delivery to the payee, *Hunt v. Ford*, 142 Mo. 283, 44 S. W. 228.

III. INLAND AND FOREIGN BILLS.

§ 232. Origin—Distinction.

233. Foreign Bills in the United States.

234. Indorsement—Parts—Protest—Pleading.

235. Presumption from Date.

236. American Statutes.

Origin and Distinction.

§ 232. When bills of exchange are first mentioned is a matter of great uncertainty. There is no trace of them in the Roman law.²²⁴ According to the authority of Montesquieu, they were invented by the Jews and Lombards.²²⁵ At all events, it has been shown clearly that they were in use in the fourteenth century, in Venice, and were probably introduced into England before the end of that century.²²⁶

A bill of exchange is either foreign or inland. "Foreign bills," as the term is used in the United States, are either drawn or payable abroad. Such bills first received judicial sanction in England in the time of James I.²²⁷ "Inland bills" seem to have originated in England in the time of Charles II.²²⁸ At first mercantile effect was given by the courts only to bills drawn between English and foreign merchants.²²⁹ But the principles applied to them were soon extended to all traders, and finally to all persons, whether traders or not.²³⁰

Inland bills are drawn and payable in the same state or country.²³¹ A bill drawn in London, payable there to the order of a London mer-

²²⁴ Pothier, *Contrat de Change*, pl. 6.²²⁵ *Chit. Bills*, 15; 2 *Bl. Comm.* 467.²²⁶ *Claxton v. Swift*, 2 *Show.* 441.²²⁷ *Martin v. Boure*, *Cro. Jac.* 6; *Oaste v. Taylor*, *Id.* 306; *Hussey v. Jacob*, 1 *Ld. Raym.* 88.²²⁸ *Mahoney v. Ashlin*, 2 *Barn. & Adol.* 478; *Amner v. Clark*, 2 *Crompt. M. & R.* 468. Actions on such bills "did first begin," it seems, in the time of Lord Holt, C. J., and depended on proof of a special custom to support them. *Butler v. Crips*, 6 *Mod.* 29; 1 *Salk.* 130; *Holt*, 119.²²⁹ *Oaste v. Taylor*, *Cro. Jac.* 306.²³⁰ *Bromwich v. Loyd*, 2 *Lutw.* 503; *Sarsfield v. Witherly*, 2 *Vent.* 292; *Comb.* 45; *Cramlington v. Evans*, 2 *Vent.* 310.²³¹ *Story, Bills*, § 465.

chant, upon a merchant residing at Brussels, and accepted by him there, has been held to be an inland bill.²³² And the rule is thus stated by Mr. Chitty: "When both the drawer and the drawee reside in the same state or country, or in that part of the country where the bill is drawn, or when both drawn and payable in the same state or country, although accepted abroad,"²³³ it is an inland bill.

Foreign bills, on the other hand, are "such as are drawn or payable, or both, abroad."²³⁴ A fortiori, a bill drawn and payable abroad is a foreign bill.²³⁵ This applies also to bills drawn in one realm of the United Kingdom payable in another.²³⁶ Thus, a bill drawn in England, payable in Scotland or Ireland, was, until recently, by English law a foreign bill.²³⁷ But under Act 1 & 2 Geo. IV. c. 78, a bill drawn and payable in Scotland or Ireland became an inland bill, requiring acceptance in writing.²³⁸ And by Act 19 & 20 Vict. c. 97, § 7, all bills and notes drawn in one part of the British Islands, payable in another, are made inland bills.²³⁹ And this provision is continued in force in the bills of exchange act of 1882.²⁴⁰ For the purposes of the present British stamp act, only bills and notes made, or purporting to be made, out of the United Kingdom, are to be deemed foreign bills.²⁴¹

Foreign Bills in the United States.

§ 233. In the United States it is to be remembered that the states are, in law, foreign to each other.²⁴² Thus, a bill drawn in

²³² Chit. Bills, 14; *Amner v. Clark*, 2 Crompt. M. & R. 468. See *Id.*, 5 Tyrw. 942.

²³³ Chit. Bills, 14.

²³⁴ Byles, Bills, 396. And in this sense one realm of the United Kingdom is foreign to another. *Id.*

²³⁵ 1 Pars. Notes & B. 55.

²³⁶ *Godfray v. Coulman*, 13 Moore, P. C. 11; *Heywood v. Pickering*, L. R. 9 Q. B. 428.

²³⁷ *Mahoney v. Ashlin*, 2 Barn. & Adol. 478.

²³⁸ Byles, Bills, 397; *Mahoney v. Ashlin*, *supra*.

²³⁹ Byles, Bills, 398; *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Heywood v. Pickering*, *supra*.

²⁴⁰ 45 & 46 Vict. c. 61, § 4.

²⁴¹ Byles, Bills, 398; 33 & 34 Vict. c. 97, §§ 51, 52.

²⁴² 1 Daniel, Neg. Inst. 10; 1 Edw. Bills & N. § 9, 2 Edw. Bills & N. § 793; 1 Pars. Notes & B. 56; Story, Bills, §§ 23, 465; Story, Conf. Laws, § 281,

one state payable in another is a foreign bill.²⁴³ And, in general, a bill drawn in one state payable in another is such, although all parties may be citizens of one state.²⁴⁴ In like manner, if a bill is drawn in England on a house in Paris, and accepted and payable in Paris, it is a foreign bill.²⁴⁵ On the other hand, it has been held in Kentucky that if a bill is drawn by a citizen of Kentucky on a citizen of Louisiana, and payable in Louisiana, it is a foreign bill.²⁴⁶

It has been said by some text writers that a bill is foreign "when drawn by a person in one state or country upon a person in a foreign state or county."²⁴⁷ And many cases in the United States have held such bills drawn between different states to be foreign.²⁴⁸ Although it does not appear, it is probable in most of the cases, from the form of the bill, that it was payable, at least by implication, in the place where the drawee resided. Indeed, the place of payment of a bill of exchange is often expressed in no other manner. But it has also been held that a bill drawn in one state upon a citizen or resident of another is a foreign bill.²⁴⁹ So, a bill drawn and payable in England, upon a Boston house, and accepted in England by a

etc.; *Buckner v. Finley*, 2 Pet. 586; *Bank of U. S. v. Daniel*, 12 Pet. 32; *Commercial Bank v. Varnum*, 49 N. Y. 269; *Dickins v. Beal*, 10 Pet. 572; *Ocean Nat. Bank v. Williams*, 102 Mass. 141.

²⁴³ *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314; *Armstrong v. Bank*, 133 U. S. 433, 10 Sup. Ct. 450; *Warren v. Coombs*, 20 Me. 139; *Ticonic Bank v. Stackpole*, 41 Me. 302; *Joseph v. Salomon*, 19 Fla. 623.

²⁴⁴ *Grafton Bank v. Moore*, 14 N. H. 142; *Freeman's Bank v. Perkins*, 18 Me. 292; *Atwater v. Streets*, 1 Doug. (Mich.) 455.

²⁴⁵ *Rothschild v. Currie*, 1 Q. B. 43.

²⁴⁶ *Chenowith v. Chamberlin*, 6 B. Mon. (Ky.) 60.

²⁴⁷ *Chit. Bills*, 14; 1 *Edw. Bills & N.* § 8; 2 *Edw. Bills & N.* § 793; *Story, Bills*, § 22.

²⁴⁸ *Duncan v. Course*, 1 Mill, Const. (S. C.) 100; *Phoenix Bank v. Hussey*, 12 Pick. (Mass.) 483; *Brown v. Ferguson*, 4 Leigh (Va.) 37; *Wells v. Whitehead*, 15 Wend. (N. Y.) 527; *Hartridge v. Wesson*, 4 Ga. 101; *Commercial Bank v. Varnum*, 49 N. Y. 269; *Donegan v. Wood*, 49 Ala. 242; *Todd v. Neal*, *Id.* 266. And see *Lonsdale v. Brown*, 4 Wash. C. C. 86, Fed. Cas. No. 8,493. But in *Miller v. Hackley*, 5 Johns. (N. Y.) 375, such a bill was held to be an inland bill.

²⁴⁹ *Aborn v. Bosworth*, 1 R. I. 401.

partner of the Boston house who was there at the time, has been held to be a foreign bill, as though accepted in Boston.²⁵⁰

Indorsement—Parts—Protest—Pleading.

§ 234. An indorsement being equivalent to a bill drawn by the indorser upon the maker of a note, the indorsement of such a note payable in another state is equivalent to a foreign bill.²⁵¹ This has been held also to be the case where a note was drawn in one state, payable to a resident of a second state, and indorsed in a third state.²⁵²

Inland bills are generally drawn in a single part, while foreign bills are frequently drawn in sets of three or more parts.²⁵³ The chief difference, however, in effect, between inland and foreign bills, is that the latter require protest, and the former do not, except where it is otherwise provided by statute.²⁵⁴ At common law, where a suit is brought on a foreign bill, it has been held that it should be stated in the declaration to be such, and, if so stated, the action cannot be maintained by proving an inland bill or vice versa.²⁵⁵

Presumption from Date.

§ 235. Every bill is *prima facie* an inland bill.²⁵⁶ On the other hand, if it appears to be drawn abroad, there is an implied warranty on the part of the indorser that it was in reality so drawn.²⁵⁷ And by the British stamp act, as has been said, every bill purporting to be drawn out of the United Kingdom is deemed to be a foreign

²⁵⁰ *Grimshaw v. Bender*, 6 Mass. 157. In this case (page 160), Parsons, C. J., says: "It is manifest that the remedy contemplated by the parties in the event of the bill being dishonored must be sought in this state where the acceptors lived. From this view of the case, the instrument must be considered as a foreign bill."

²⁵¹ *Ticonic Bank v. Stackpole*, 41 Me. 302.

²⁵² *Carter v. Burley*, 9 N. H. 55S.

²⁵³ Byles, Bills, 398.

²⁵⁴ 1 Daniel, Neg. Inst. 9.

²⁵⁵ Byles, Bills, 398; *Arman v. Castrique*, 13 Mees. & W. 443.

²⁵⁶ Byles, Bills, 398.

²⁵⁷ Byles, Bills, 398; *Gompertz v. Bartlett*, 2 El. & Bl. 854.

bill.²⁵⁸ It was formerly held that an acceptor, knowing such a bill at the time of his acceptance to have been really drawn in England, might allege in defense, against even a bona fide holder, that it was an inland bill, and therefore void for want of a stamp.²⁵⁹ This is now made impossible by the statutes which have been referred to.

In the United States it has been held that a bill, drawn in New York by a Boston merchant on a New York merchant, but dated in Boston, is a foreign bill, not only as to bona fide holders, but even as to the original parties to it;²⁶⁰ and, on the other hand, that a bill between citizens of Illinois, actually drawn in Wisconsin, but dated and made payable in Illinois, is an inland bill, having been so intended by the parties to it.²⁶¹ If a bill is dated as though drawn abroad, it is presumed to have been so drawn; but parol evidence was formerly admitted, in England, to show the contrary, and render the bill void under the stamp act.²⁶² It may now, however, be regarded as the rule that parol evidence is inadmissible, to render such a bill void as an inland bill, against a holder who has purchased it before maturity for value and in good faith.²⁶³ And it has been held, in Missouri and Texas, that the courts will not recognize the place of date or payment named in a bill as situated in a foreign country without proof of that fact.²⁶⁴

American Statutes.

§ 236. In most of the United States all bills are foreign except such as are both drawn and payable within the limits of the particular state in question.²⁶⁵ In Georgia, if either drawer or drawee

²⁵⁸ Byles, Bills, 398; 33 & 34 Vict. c. 97, §§ 51, 52. See, too, 17 & 18 Vict. c. 83, § 4 (repealed 1870); *Siordet v. Kuczynski*, 17 C. B. 251.

²⁵⁹ Byles, Bills, 398; *Steadman v. Duhamel*, 1 C. B. 888.

²⁶⁰ *Lennig v. Ralston*, 23 Pa. St. 137. And see chapter 3, *supra*.

²⁶¹ *Strawbridge v. Robinson*, 10 Ill. 470.

²⁶² *Jordaine v. Lashbrooke*, 7 Term R. 601. As to what is sufficient evidence, see *Abraham v. Du Bois*, 4 Camp. 269; *Bire v. Moreau*, 2 Car. & P. 376.

²⁶³ *Towne v. Rice*, 122 Mass. 67.

²⁶⁴ *Riggin v. Collier*, 6 Mo. 568; *Cook v. Crawford*, 4 Tex. 420; *Andrews v. Hoxie*, 5 Tex. 171; *Yale v. Ward*, 30 Tex. 17.

²⁶⁵ ALABAMA. Code, § 1760; CALIFORNIA. Civ. Code, § 3224; COLORADO, CONNECTICUT, FLORIDA (§ 129), NEW YORK (§ 213), and VIR-

reside out of the state.²⁶⁶ In Illinois, if drawn and indorsed in that state and payable out of the United States.²⁶⁷ And so in Minnesota.²⁶⁸ But in Minnesota, if drawn on a drawee out of the state, but within the United States, they are regarded as inland bills.²⁶⁹ In Mississippi domestic bills drawn on that state, and payable in it, are put on the footing of foreign bills, if over \$20.²⁷⁰ So, in New Jersey, inland bills drawn in that state, and on a drawee there, if over eight dollars and payable at sight or on demand, or at a future time named.²⁷¹ In Virginia it seems that a bill drawn out of the state, payable in it, is a foreign bill, while one drawn in the state, on any other of the United States, is not to be so regarded, so far, at least, as protest of the bills is concerned.²⁷²

GINIA (§ 129). Negotiable Instrument Law; NORTH DAKOTA. Rev. Code, § 4946; WYOMING. Rev. St. c. 70, § 98. And this is the general rule in the absence of statutory definition.

²⁶⁶ GEORGIA. Code, § 3676.

²⁶⁷ ILLINOIS. Hurd's Rev. St. c. 98, § 1.

²⁶⁸ MINNESOTA. Gen. St. § 2234.

²⁶⁹ Id. § 2235.

²⁷⁰ MISSISSIPPI. Ann. Code, § 3507.

²⁷¹ NEW JERSEY. 2 Gen. St. p. 2604, § 2.

²⁷² Brown v. Ferguson, 4 Leigh (Va.) 37, 51; Code 1873, p. 986, § 7.

IV. PARTS OR SET OF PARTS.

§ 237. Condition Expressed.

238. Delivery.

239. Transfer.

240. Presentment and Acceptance.

241. Protest—Payment—Action.

242. Copies.

243. Foreign Statutes.

Condition Expressed.

§ 237. Foreign bills of exchange are generally drawn in a set of several parts (duplicate or triplicate, as the case may be), to guard against delay and loss. The usual number of parts is three, although there may be more or less. Each part should be designated by its number, and should refer to the other parts, requiring payment on condition of their being unpaid.²⁷³ It seems that such reference was formerly often omitted in Europe in the first part,²⁷⁴ but this practice has never found favor in the United States.²⁷⁵ All the parts, whatever may be their number, compose one set and constitute but one bill.²⁷⁶ In Great Britain, however, each part requires a stamp.²⁷⁷

²⁷³ 1 Chit. Bills, 178; Story, Bills, § 67; 1 Daniel, Neg. Inst. 122; Byles, Bills, 393. The usual form is as follows: "Thirty days after sight of this, my First of Exchange (Second and Third unpaid), pay," etc. The Civil Code of California provides for any number of parts, each making reference to the others, and all constituting one bill (section 3173). The designation of a check in parts does not make it conditional. *Merchants' Nat. Bank v. Ritzinger*, 118 Ill. 484, 8 N. E. 834.

²⁷⁴ 1 Pars. Notes & B. 59.

²⁷⁵ If the parts are not designated as such, payment of one part is no defense against the bona fide holder of another. *Roswell Mfg. Co. v. Hudson*, 72 Ga. 24.

²⁷⁶ Byles, Bills, 393; 1 Daniel, Neg. Inst. 121.

²⁷⁷ Chit. Bills, 178; 33 & 34 Vict. c. 97, § 55.

Delivery.

§ 238. All the parts should be delivered together,²⁷⁸ and in a transfer of the bill all should be transferred.²⁷⁹ And it has been said that an agreement to deliver a foreign bill of exchange requires the delivery of as many parts as may be desired.²⁸⁰ But this has been rightly questioned, and the rule is properly restricted to the usual number of parts (duplicates or triplicates).²⁸¹ If the bill is lost, another set may be demanded.²⁸² But an action will not lie against prior parties, other than the drawer or payee, for such other parts without proof of their being in their possession.²⁸³

Transfer.

§ 239. As each and all parts of the bill constitute but one bill, it follows that the indorsement of one part is a transfer of all.²⁸⁴ But the indorsement of one part is no implied warranty of possession of the other parts, although, if the indorser holds them, he may be required to give them up to his indorsee or a subsequent holder.²⁸⁵ If, indeed, the indorser indorses and transfers several parts to different holders, he will be liable generally on each.²⁸⁶ Thus, if two parts are accepted and negotiated, and the drawer knowingly receives the proceeds of both, he will be liable to the bona fide holder of the second part, although the acceptor has paid the first.²⁸⁷ In

²⁷⁸ Chit. Bills, 178; Story, Bills, § 67.

²⁷⁹ 1 Daniel, Neg. Inst. 123; Story, Bills, § 226.

²⁸⁰ Byles, Bills, 394; Chit. Bills, 178; 1 Edw. Bills & N. § 188.

²⁸¹ Story, Bills, § 66; 1 Daniel, Neg. Inst. 121; Chit. Bills, 178. In California three parts may be demanded. Civ. Code, § 3174.

²⁸² Story, Bills, § 66.

²⁸³ Pinard v. Klockmann, 3 Best & S. 388; 32 Law J. Q. B. 82.

²⁸⁴ Chit. Bills, 179; 1 Edw. Bills & N. § 188; Benj. Chalm. Dig. art. 27; Société Générale v. Metropolitan Bank, 27 Law T. (N. S.) 849; Walsh v. Blatchley, 6 Wis. 413; British Bills of Exchange Act, § 71.

²⁸⁵ Pinard v. Klockmann, supra; 1 Daniel, Neg. Inst. 122.

²⁸⁶ 1 Daniel, Neg. Inst. 123; British Bills of Exchange Act, § 71. And on payment he should have all individual payments returned to him. Byles, Bills, 394.

²⁸⁷ Wright v. McFall, 8 La. Ann. 120. And, if no condition is contained in the several parts referring to one another, a drawer or acceptor, although

like manner, where two parts have been so accepted and negotiated, the surrender of one part to the acceptor will not relieve him from liability on the other.²⁸⁸ And if one part is lost and paid to a bona fide holder on a forged indorsement, an action will still lie in favor of the rightful holder of the other parts.²⁸⁹ It seems, however, that the bona fide holder of one part by valid indorsement may claim the other parts even against later bona fide indorsees.²⁹⁰ And an averment that the defendant indorsed a certain part is sustained by proof of his indorsing another part.²⁹¹

Presentment and Acceptance.

§ 240. Any part of a bill of exchange may be presented for acceptance.²⁹² And if there are several parts, as it is easier to avoid delay and obviate loss, the presentment should be made more promptly.²⁹³ If the first part forwarded for presentment is delayed, the second should be forwarded for that purpose.²⁹⁴

But the drawee should accept only one part.²⁹⁵ And he will be liable on the part accepted by him, although one of the other parts may have been paid.²⁹⁶ So, the acceptor is liable on all parts accepted by him and transferred by him or with his knowledge.²⁹⁷ If the second part is accepted with blanks on condition of the "first unpaid," and the two parts are filled up differently, and both dis-

not concerned in the transfer of the several parts to different persons, may still be liable on them all. *Davison v. Robertson*, 3 Dow, 218. And in such case payment of one part will be no defense against the bona fide holder of another. *Id.*; *Chit. Bills*, 178; 1 *Edw. Bills & N.* § 188; *Story, Bills*, § 67.

²⁸⁸ *Holdsworth v. Hunter*, 10 Barn. & C. 449.

²⁸⁹ *Chit. Bills*, 178; *Cheap v. Harley*, 3 Term R. 127. See, too, *Smith v. Mercer*, 6 Taunt. 80; *Fuller v. Smith*, 1 Car. & P. 197; *Ryan & M.* 49.

²⁹⁰ *Byles, Bills*, 394; *Chit. Bills*, 178; *Lang v. Smyth*, 7 Bing. 284; 5 *Moore & P.* 78; *Perreira v. Jopp*, 10 Barn. & C. 450, note.

²⁹¹ *Miller v. Hackley*, Anth. (N. Y.) 91.

²⁹² *Walsh v. Blatchley*, 6 Wis. 422. So, in California, the presentment of one part for all is sufficient. *Civ. Code*, § 3175.

²⁹³ 1 *Pars. Notes & B.* 59.

²⁹⁴ *Straker v. Graham*, 4 Mees. & W. 721.

²⁹⁵ *Byles, Bills*, 395; *Chit. Bills*, 178.

²⁹⁶ *Chit. Bills*, 178; *British Bills of Exchange Act*, § 71.

²⁹⁷ *Byles, Bills*, 394; *Chit. Bills*, 178; 1 *Edw. Bills & N.* § 188; *Holdsworth v. Hunter*, 10 Barn. & C. 449.

counted, the acceptor will be liable on both to bona fide holders.²⁹⁸ When the acceptor pays a bill, he should in all cases have the accepted part returned to him.²⁹⁹ And, if it is lost, he is entitled to demand security before paying another part.³⁰⁰

Protest—Payment—Action.

§ 241. In like manner, any copy of a bill may be protested. And if the first has been sent to the indorsee and lost, and no third part can be obtained because of the drawer's absence, and a copy of the second part is protested, this will be sufficient where payment has been refused on other grounds than objection to the copy.³⁰¹

Payment of one part is payment of the whole bill.³⁰² And, except where the drawee has accepted another part, he may safely pay any part that is presented to him. If the second part is paid by the acceptor after presentment of the first and protest of it for nonacceptance, and he afterwards pays the first in the hands of a bona fide holder, he may recover the amount paid as a payment made by mistake.³⁰³ If two parts are both accepted and negotiated, and the proceeds received by the drawer, he will be liable on the first part, although the second part has been paid by the acceptor.³⁰⁴

When a bill is paid, the part which has been protested should be surrendered. So, a part which has been accepted should be surrendered; and, if this is not done, the acceptor may still remain liable to a bona fide holder.³⁰⁵ When an agreement is made to surrender a bill, it implies the surrender of all the parts.³⁰⁶ After the first part of a bill has been surrendered to the drawer with demand for

²⁹⁸ Bank of Pittsburgh v. Neal, 22 How. 96.

²⁹⁹ Byles, Bills, 395.

³⁰⁰ Chit. Bills, 178.

³⁰¹ Dehers v. Harriot, 1 Show. 163.

³⁰² Benj. Chalm. Dig. art. 29; Byles, Bills, 394; 1 Edw. Bills & N. § 188; 1 Pars. Notes & B. 59; Story, Bills, 226; British Bills of Exchange Act, § 71.

³⁰³ Durkin v. Cranston, 7 Johns. (N. Y.) 442.

³⁰⁴ Wright v. McFall, 8 La. Ann. 120.

³⁰⁵ Benj. Chalm. Dig. art. 27; British Bills of Exchange Act, § 71; Holden v. Davis, 57 Miss. 769.

³⁰⁶ Byles, Bills, 580; Chit. Bills, 178; Kearney v. Mining Co., 1 Hurl. & N. 412, 26 Law Ex. J. 15.

remittance (which amounts to extinguishing it), the holder cannot transfer the second part for the purpose of suit.³⁰⁷

When suit is brought by an indorsee against the acceptor of a bill, only the part which is accepted need be produced.³⁰⁸ But where an action is brought on the first part against the indorser, and the third part has been presented and protested for nonacceptance, it must be produced, it is said, in order to guard against the contingency of an acceptance *supra* protest.³⁰⁹ But if the indorsee bring suit against his indorser on one part, the other parts need not, in general, be produced.³¹⁰

Copies.

§ 242. In England and in the United States no general use is made of copies of bills of exchange. But on the continent of Europe, where a bill is not drawn in sets, copies are sometimes used for convenience of transfer, while the original is being forwarded for acceptance. And in some cases, although the practice is not a safe one, a copy without indorsement is sometimes substituted by the drawer for the original bill, which has been transferred and returned to him with many indorsements on it. In such case the holder of the substituted copy may be deprived of his remedy against the acceptor by this act of the drawer.³¹¹ We have seen, however, that a protest may sometimes be made on a copy instead of the original bill.³¹²

Foreign Statutes.

§ 243. Many foreign statutes require second, third, and other parts of a bill of exchange to be given on demand.³¹³ The drawer may, in general, deliver to the payee either the first or second part,

³⁰⁷ *Ingraham v. Gibbs*, 2 Dall. 134.

³⁰⁸ *Johnson v. Offutt*, 4 Mete. (Ky.) 19; *Commercial Bank v. Routh*, 7 La. Ann. 128.

³⁰⁹ *Wells v. Whitehead*, 15 Wend. (N. Y.) 527. But see, *contra*, *Kenworthy v. Hopkins*, 1 Johns. Cas. (N. Y.) 107.

³¹⁰ *Downes v. Church*, 13 Pet. 205; *Miller v. Palmer*, 58 Md. 451.

³¹¹ *Ralli v. Dennistoun*, 6 Exch. 483.

³¹² *Dehers v. Harriot*, 1 Show. 163.

³¹³ ARGENTINE REPUBLIC (Code Com. art. 769); AUSTRIA (Exch. Law, art. 66); BOLIVIA (Code Com. art. 359); BRAZIL (Code Com. art. 365);

unless otherwise stipulated.³¹⁴ If the several parts are not marked as such, each will be taken as a separate bill, and the parties on it will be liable accordingly.³¹⁵ And in such case the drawer's only remedy is against the persons fraudulently using the several parts.³¹⁶ Some states require each part, except the first, to state that they are invalid if presented after the first.³¹⁷ And some states require that, where one part of a bill is forwarded for acceptance, it must be noted on the other parts where such part can be found.³¹⁸

If a bill is sent in several parts for acceptance beyond the sea, they must be sent by different ships; and an accident to the first ship sailing will extend the time for presenting the bill.³¹⁹ Every accepted part is *prima facie* an original bill in some states.³²⁰ And in some an unaccepted part cannot be paid before maturity;³²¹

CHILI (Code Com. art. 627); COLOMBIA (Code Com. art. 394); COSTA RICA (Code Com. art. 383); ECUADOR (Code Com. as in Spain); GERMANY (Exch. Law, art. 66); GUATEMALA (Ord. Bilbao, § 5); HOLLAND (Exch. Law, art. 104); HONDURAS (same as Guatemala, 5); LOWER CANADA (Civ. Code, art. 2284); MEXICO (Code Com. art. 330); NICARAGUA (Code Com. art. 246); PERU (Code Com. art. 396); PORTUGAL (Code Com. art. 349); RUSSIA (Exch. Law, art. 554); SALVADOR (Code Com. art. 391); SPAIN (Code Com. art. 436); SWEDEN (Exch. Law, § 64); SWITZERLAND (Oblig. R. 783); URUGUAY (Code Com. art. 796); VENEZUELA (Code Com. art. 6).

³¹⁴ ARGENTINE REPUBLIC (Code Com. art. 768).

³¹⁵ ARGENTINE REPUBLIC (Code Com. arts. 771, 776); AUSTRIA (Exch. Law, art. 66); BRAZIL (Code Com. art. 354); CHILI (Code Com. art. 628); GERMANY (Exch. Law, art. 66); HUNGARY (Exch. Law, § 21); URUGUAY (Code Com. arts. 789, 798).

³¹⁶ DENMARK (Exch. Law, § 15).

³¹⁷ ARGENTINE REPUBLIC (Code Com. art. 769); CHILI (Code Com. art. 627); COLOMBIA (Code Com. art. 394); COSTA RICA (Code Com. art. 383); ECUADOR (Code Com. as in Spain); MEXICO (Code Com. art. 330); PERU (Code Com. art. 396); SALVADOR (Code Com. art. 391); SPAIN (Code Com. art. 436); VENEZUELA (Code Com. art. 5).

³¹⁸ AUSTRIA (Exch. Law, art. 68); DENMARK (Exch. Law, § 16); GERMANY (Exch. Law, art. 68); HUNGARY (Exch. Law, § 23); SWEDEN (Exch. Law, § 66); SWITZERLAND (Oblig. R. 785).

³¹⁹ COSTA RICA (Code Com. art. 431); MEXICO (Code Com. art. 378); NICARAGUA (Code Com. art. 268); SALVADOR (Code Com. art. 439).

³²⁰ HOLLAND (Exch. Law, art. 162); HUNGARY (Exch. Law, § 69); PORTUGAL (Code Com. art. 383); SWEDEN (Exch. Law, § 65).

³²¹ COLOMBIA (Code Com. art. 459); COSTA RICA (Code Com. art. 452); (428)

while in Chili it is provided that, if several parts are presented after maturity, that which bears the earliest number is to be paid.³²²

Payment and possession of any part of a bill by the acceptor discharges him.³²³ But, if he pays a part which has not been accepted, he will be liable afterwards to the bona fide holder of an accepted part, and his remedy will be against the person to whom payment has been improperly made.³²⁴ In general, payment of one part discharges all, except as to the indorsers and acceptors who have indorsed or accepted other parts.³²⁵ But it is sufficient, if the payment of one part shows on its face that the others are satisfied thereby.³²⁶ The holder, who demands payment from the acceptor of an unaccepted part, is entitled to receive it on giving security;³²⁷ and, in like manner, he may receive payment on loss

ECUADOR (Code Com. as in Spain, 505); MEXICO (Code Com. art. 397); PERU (Code Com. art. 460); SALVADOR (Code Com. art. 458); SPAIN (Code Com. art. 505).

³²² CHILI (Code Com. art. 720).

³²³ ARGENTINE REPUBLIC (Code Com. art. 770); SWEDEN (Exch. Law, § 9); URUGUAY (Code Com. art. 797).

³²⁴ ARGENTINE REPUBLIC (Code Com. art. 865); BELGIUM (Code Napoleon); BOLIVIA (Code Com. art. 398); BRAZIL (Code Com. art. 400); CHILI (Code Com. art. 719); COLOMBIA (Code Com. art. 457); COSTA RICA (Code Com. art. 450); ECUADOR (Code Com. as in Spain); FRANCE (Code Com. art. 148); GREECE (Code Nap.); HAYTI (Code Nap.) HOLLAND (Exch. Law, art. 161); ITALY (Code Com. art. 233); LOWER CANADA (Civ. Code, art. 2315); MEXICO (Code Com. art. 395); NICARAGUA (Code Com. art. 279); PERU (Code Com. art. 458); PORTUGAL (Code Com. art. 382); RUSSIA (Exch. Law, art. 626); SALVADOR (Code Com. art. 456); SAN DOMINGO (Code Nap.); SPAIN (Code Com. art. 503); TURKEY (Code Nap. 105); URUGUAY (Code Com. art. 883); VENEZUELA (Code Com. art. 64).

³²⁵ AUSTRIA (Exch. Law, art. 67); GERMANY (Exch. Law, art. 67); SWITZERLAND (Oblig. R. 784); URUGUAY (Code Com. art. 798).

³²⁶ ARGENTINE REPUBLIC (Code Com. art. 864); BELGIUM (Code Nap. 147); FRANCE (Code Nap. art. 147); GREECE (Code Nap.); HAYTI (Code Nap. 144); HOLLAND (Exch. Law, art. 160); ITALY (Code Com. art. 232); PORTUGAL (Code Com. art. 381); SAN DOMINGO (Code Nap.); TURKEY (Code Nap. 104); URUGUAY (Code Com. art. 882); VENEZUELA (Code Com. arts. 5, 63).

³²⁷ BELGIUM (Code Nap.); BOLIVIA (Code Com. art. 399); COLOMBIA (Code Com. art. 458); COSTA RICA (Code Com. art. 451); DENMARK (Exch. Law, §§ 61, 62); ECUADOR (Code Com. as in Spain); FRANCE

of the original bill without producing the other parts, on proving his property and giving security.³²⁸ And if, after offering security, payment is refused, the bill should be protested, and demand of a duplicate bill made upon the indorser.³²⁹

In Russia there are special provisions for obtaining possession and payment of a bill, where the holder has never had the original in his possession, but has only a copy.³³⁰ And many foreign statutes provide for the giving and indorsing of copies in lieu of the original.³³¹ Some statutes require that it be noted on the copy

(Code Com. arts. 150, 151); GREECE (Code Nap.); GUATEMALA (Ord. Bilbao, § 27); HAYTI (Code Nap.); HUNGARY (Exch. Laws, §§ 120, 121); ITALY (Code Com. arts. 236, 237); MEXICO (Code Com. art. 396); NICARAGUA (Code Com. art. 280); PERU (Code Com. art. 459); SALVADOR (Code Com. art. 457); SAN DOMINGO (Code Nap.); SPAIN (Code Com. art. 504); TURKEY (Code Nap. 107, 108); URUGUAY (Code Com. arts. 900–904); VENEZUELA (Code Com. arts. 66–70).

³²⁸ ARGENTINE REPUBLIC (Code Com. arts. 883–885); AUSTRIA (Exch. Law, arts. 73, 74); BELGIUM (Code Nap.); FRANCE (Code Com. art. 152); GERMANY (Exch. Law, arts. 73, 74); GREECE (Code Nap.); HAYTI (Code Nap. 149); ITALY (Code Com. art. 238); LOWER CANADA (Civ. Code, art. 2316); NICARAGUA (Code Com. arts. 282, 283); PERU (Code Com. art. 466); PORTUGAL (Code Com. art. 384); SALVADOR (Code Com. art. 461); SAN DOMINGO (Code Nap.); SWEDEN (Exch. Law, §§ 70, 71); TURKEY (Code Nap. 109); VENEZUELA (Code Com. arts. 66–70).

³²⁹ ARGENTINE REPUBLIC (Code Com. arts. 885, 887); BELGIUM (Code Nap. 153, 154); COLOMBIA (Code Com. arts. 461, 464); COSTA RICA (Code Com. arts. 454–457); ECUADOR (Code Com. as in Spain); FRANCE (Code Nap. arts. 153, 154); GREECE (Code Nap.); HAYTI (Code Nap. 150, 151); ITALY (Code Com. arts. 239, 240); MEXICO (Code Com. arts. 399–402); NICARAGUA (Code Com. arts. 280–284); PERU (Code Com. art. 467); SALVADOR (Code Com. arts. 460–463); SAN DOMINGO (Code Nap.); SPAIN (Code Com. arts. 507–510); TURKEY (Code Nap. 110, 111); URUGUAY (Code Com. arts. 900–904); VENEZUELA (Code Com. arts. 66–70).

³³⁰ RUSSIA (Exch. Law, arts. 583, 584); SWEDEN (Exch. Law, §§ 67, 69).

³³¹ ARGENTINE REPUBLIC (Code Com. art. 772); AUSTRIA (Exch. Law, arts. 70–72); BOLIVIA (Code Com. art. 360); CHILI (Code Com. art. 629); COLOMBIA (Code Com. art. 395); COSTA RICA (Code Com. art. 384); ECUADOR (Code Com. as in Spain); GERMANY (Exch. Law, arts. 70, 72, 74, 76); MEXICO (Code Com. art. 331); NICARAGUA (Code Com. art. 247); PERU (Code Com. art. 397); SALVADOR (Code Com. art. 392); SPAIN (Code Com. art. 437); SWITZERLAND (Oblig. R. 789); URUGUAY (Code Com. art. 799); VENEZUELA (Code Com. art. 6).

where the copy ends and the original indorsements begin.³³² And in some countries payment cannot be made at all on a copy without production of at least one of the original parts.³³³

³³² HUNGARY (Exch. Law, § 24); SWEDEN (Exch. Law, § 68); SWITZERLAND (Oblig. R. 787).

³³³ BOLIVIA (Code Com. art. 397); CHILI (Code Com. art. 720); COLOMBIA (Code Com. art. 460); COSTA RICA (Code Com. art. 453); ECUADOR (Code Com. as in Spain); MEXICO (Code Com. art. 398); NICARAGUA (Code Com. art. 281); PERU (Code Com. art. 461); SALVADOR (Code Com. art. 459); SPAIN (Code Com. art. 506).

CHAPTER VIII.

CAPACITY.

- I. CIVIL RESTRICTIONS.
 - II. ALIEN ENEMIES.
 - III. IDIOTS AND LUNATICS.
 - IV. DRUNKARDS.
 - V. INFANTS.
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I. CIVIL RESTRICTIONS.

- § 244. General Principles.
- 245. Civil Restrictions—Merchants.
- 246. Clergy—Soldiers—Farmers.
- 247. Felons—Bankrupts—Indians.

General Principles.

§ 244. In general, all persons who can make a legal contract can become parties to commercial paper. Want of capacity may be either *natural*, *legal*, or *political*, according as it proceeds from mental unfitness or from the requirements of local or public law. *Naturally* incapable are idiots, lunatics, and all persons of unsound or insufficient understanding. *Legally* incapable are infants, married women, and corporations, so far as their power is restricted by law. And these laws are, in some degree, based on presumptions of natural incapacity. *Politically* incapable are alien enemies, and, to a certain extent, public officers and state and municipal governments.

It is to be observed at the outset that the making of a note or the drawing of a bill of exchange is an admission of the payee's capacity to receive it.¹ So, the drawing of a bill of exchange admits the

¹ Esley v. People, 23 Kan. 510, where the note was made to a state. So, as to a corporation payee's existence, Goodrich v. Reynolds, 31 Ill. 490; especially at suit of a bona fide holder for value, Camp v. Byrne, 41 Mo. 525; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; and notwithstanding a general prohibition against doing business as a foreign corporation, Shook v. Manufacturing Co., 61 Ind. 520.

payee's capacity *at that time* to indorse it.² And in like manner an acceptor admits, and is estopped from denying, as against a bona fide purchaser of the accepted bill, the drawer's capacity *at that time* to bind himself as drawer.³ So, an indorser cannot question the capacity of a subsequent, though not immediate, indorsee to acquire a note or bill.⁴

The questions of *capacity* and *authority* of parties to make, accept, and transfer negotiable paper are governed by substantially the same rules of law that control other contracts.

Trade Restrictions—Merchants.

§ 245. No restrictions upon the capacity of a person to enter into a mercantile contract by reason of the character of his trade or occupation now exist in the United States, although it was once thought that none but merchants were capable of binding themselves by a contract under mercantile law. The mercantile character of a party to commercial paper is now of no importance either in this country or in England.⁵ And in these countries all persons, who

² *Collis v. Emett*, 1 H. Bl. 313; *Drayton v. Dale*, 2 Barn. & C. 293; *Phillips v. Im Thurn*, 18 C. B. (N. S.) 694; *Brown v. Donnell*, 49 Me. 421; *Nightingale v. Withington*, 15 Mass. 272. And this is true where the payee is known by the maker to be fictitious. *Lane v. Krekle*, 22 Iowa, 399. But the insanity of the payee and indorser may be set up in defense by the maker. *Burke v. Allen*, 29 N. H. 106; *Peaslee v. Robbins*, 3 Metc. (Mass.) 164.

³ *Cooper v. Meyer*, 10 Barn. & C. 468. So held as to a married woman's capacity, *Smith v. Marsack*, 18 Law J. C. P. 65; and that of a bankrupt, *Braithwaite v. Gardiner*, 8 Q. B. 473; and that of a corporation, *Halifax v. Lyle*, 3 Exch. 464.

⁴ *National Pemberton Bank v. Porter*, 125 Mass. 333.

⁵ *Chit. Bills*, 20; *Story, Bills*, § 71; *Story, Prom. Notes*, § 61; *Bromwich v. Lloyd*, Lutw. 503. In *Fairly v. Roch*, Id. 891, it was held on demurrer that an allegation of a custom of merchants as to bills of exchange applicable to "any merchant or other person" was too general; but in *Bromwich v. Lloyd*, *supra*, it was said by Treby, C. J., that no allegation of custom was necessary, and that the law of mercantile bills of exchange "at first extended only to merchants, strangers trading with English merchants, and afterwards to inland bills between merchants trading one with another in England, and after that to all traders and dealers, and of late to all persons trading or not."

are *sui juris* and have capacity and understanding sufficient for a valid contract, are competent to become parties to a bill of exchange, note, or check.⁶

By foreign laws, however, distinctions were formerly made, and in some cases still exist, in favor of merchants, and to the exclusion of clergymen and other professional men, soldiers, and other enumerated classes of the inhabitants. Thus, in Germany, a person not otherwise capable of making a legal contract may, *as a merchant*, possess the power to contract and even to become a party to commercial paper; and all commercial paper is presumed to be made in a mercantile transaction, unless the contrary be expressed on its face.⁷ In Spain, and in some of the Spanish-American states, bills and notes by persons who are not merchants have no mercantile character, and amount only to certificates of indebtedness, and are subject only to ordinary courts and procedure. An exception is made, however, as to drawer and acceptor, but not indorser, where the consideration is shown to have been a mercantile transaction.⁸ The like rule and exception prevail in Bolivia, saving, however, the holder's rights against other parties who are merchants, and remain liable according to mercantile law.⁹ In Hungary the power of drawing bills of exchange is conferred on merchants, manufacturers, and mechanics of full age, and registered as such in the commercial court. Bills drawn by other citizens or upon them are not commercial paper.¹⁰ In Denmark and in Switzerland all persons who are of full age, and competent to acknowledge a debt, can draw, accept, and indorse bills.¹¹ In Chili all persons capable

⁶ Chit. Bills, 20; Sarsfield v. Witherly, 2 Vent. 295; Hodges v. Steward, 12 Mod. 36, 1 Salk. 125.

⁷ Thöl, Wechselrecht, 118, 119. But in Prussia, although an infant is capable of making a mercantile contract, his bill of exchange requires the approval of the court. Id. By the German exchange law (article 1), all persons who are capable of making a contract can draw or accept a bill of exchange.

⁸ SPAIN (Code Com. art. 434); COLOMBIA (Code Com. art. 392); COSTA RICA (Code Com. art. 381); ECUADOR (Code Com. art. 434); PERU (Code Com. art. 391); SALVADOR (Code Com. art. 389).

⁹ BOLIVIA (Code Com. art. 367).

¹⁰ HUNGARY (Exch. Law, art. 10). All persons, however, capable of acquiring any right can acquire right to a bill of exchange (Id. art. 7).

¹¹ DENMARK (Exch. Law, art. 4); SWITZERLAND (Oblig. R. 720), except (434)

of making a legal contract are capable of drawing or accepting a bill of exchange.¹²

Clergy—Soldiers—Farmers.

§ 246. By St. 57 Geo. III. c. 99, spiritual persons are forbidden to trade. And it has been held under this act that a joint-stock company, in which was a beneficed clergyman, could not bring an action as indorsee of a bill of exchange.¹³ The Russian law declares all religious persons incompetent;¹⁴ the Hungarian law, all clergymen of any religion and all members of religious orders.¹⁵ In Hungary, too, all persons in active military service are incapable of drawing a bill of exchange.¹⁶ So, in Servia, all soldiers and military persons under the rank of sublieutenant, their bills of exchange having force only as acknowledgments of debt.¹⁷ So, in Russia, all soldiers in the lower military grades.¹⁸

In Servia, too, farmers cannot draw or accept a bill of exchange.¹⁹ So, in Russia, farmers who do not own land and have no trading license.²⁰

Felons—Bankrupts—Indians.

§ 247. In England an attainted felon cannot take a bill or note by indorsement.²¹ Nor can a bankrupt before receiving his discharge, although it might be held otherwise after a long lapse of years.²² But, if a bill of exchange has been transferred by a bankrupt before petition filed, his indorsement afterwards will be lawful

that summary procedure is confined to merchants and mercantile companies.

¹² CHILI (Code Com. art. 622).

¹³ Hall v. Franklin, 3 Mees. & W. 259, now remedied by 1 & 2 Vict. c. 10.

¹⁴ RUSSIA (Exch. Law, art. 546).

¹⁵ HUNGARY (Exch. Law, art. 11).

¹⁶ HUNGARY (Exch. Law, art. 11).

¹⁷ SERVIA (Code Com. arts. 76-78).

¹⁸ RUSSIA (Exch. Law, art. 546).

¹⁹ SERVIA (Code Com. arts. 76-78).

²⁰ RUSSIA (Exch. Law, art. 546).

²¹ Bullock v. Dodds, 2 Barn. & Ald. 253.

²² Pitt v. Chappelow, 8 Mees. & W. 616.

to make the transfer perfect.²³ And in such case his assignee may be directed by the court to complete the transfer by an indorsement without recourse.²⁴

Under the United States bankrupt act of 1867, it has been held that a check, drawn before an assignment in bankruptcy, but not presented until afterwards, will not transfer the fund.²⁵ But a bankrupt may draw on his own check money deposited in bank after petition in bankruptcy filed.²⁶ So, the pledgee of a bond may sell it notwithstanding the bankruptcy of the pledgor.²⁷ The effect of bankruptcy as a transfer of commercial paper, or by way of defense other than for want of original capacity on that ground, will be considered in a later part of this work. The United States bankrupt acts have given rise to few questions relating to the capacity of a party to make commercial paper. As regards his power to transfer such paper, it is rather a question of property left in him than of capacity.

As to Indians, the statutes provide that "no agreement shall be made by any person with any tribe of Indians or individual Indians not citizens of the United States for the payment or delivery of any money or other thing of value, * * * in consideration of services for said Indians relative to their lands or to any claims growing out of, or in reference to, the annuities, installments or other moneys, claims or demands or thing under laws or treaties with the United States or official acts of any officers thereof or in any way connected with or due from the United States," without prescribed formalities and official approval.²⁸ But an Indian's note is valid, if not shown to be within the statute.²⁹

²³ *Smith v. Pickering*, Peake, 69; *Hersey v. Elliot*, 67 Me. 526.

²⁴ *Ex parte Mowbray*, 1 Jac. & W. 428.

²⁵ *First Nat. Bank of Mt. Joy v. Gish's Assignees*, 72 Pa. St. 13.

²⁶ *Mays v. Bank*, 64 Pa. St. 74.

²⁷ *Jerome v. McCarter*, 94 U. S. 734.

²⁸ U. S. Rev. St. § 2103.

²⁹ *Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541, 23 N. E. 1080.

II. ALIEN ENEMIES.

- § 248. Who are Alien Enemies.
- 249. Principles Applied to American Civil War.
- 250. Contracts between Alien Enemies—Insurance.
- 251. Agency—Partnership.
- 252. Contracts, When Valid.
- 253. Commercial Paper.
- 254. Drawee an Alien Enemy.
- 255. Payee or Indorsee an Alien Enemy.

Who are Alien Enemies.

§ 248. It has been said that for political reasons alien enemies are incapable of becoming parties to commercial paper. And this incapacity extends for the protection of the state to all contracts between citizens of the state and their alien enemies pending the continuance of a war. "Every resident of a hostile place or country, even though a subject, is regarded as an alien enemy."³⁰ This applies indiscriminately to all persons within the belligerent lines, excepting, of course, such as are actually there in the service of their own government in a military capacity or otherwise.³¹ Thus, a naturalized citizen of the United States, domiciled in England, is an alien enemy as to American citizens during war with England,³² although immediately upon his departure for this country he would cease to be so.³³ In like manner, a British subject, who is a naturalized citizen of a neutral state, is to be regarded in England as an alien enemy while voluntarily residing in the enemy's country.³⁴ But a note made by a British subject to the citizen of a neutral state residing in an enemy's country may be sued upon in the English courts.³⁵ And the subject of a neutral state taken prisoner on an

³⁰ Whart. Conf. Laws, § 737a.

³¹ *Hennen v. Gilman*, 20 La. Ann. 241.

³² *The Francis*, 1 Gall. 614, Fed. Cas. No. 5,034, Story, J., saying in this case: "For all commercial purposes it is quite immaterial which is the native or adopted country of a party. He is deemed a merchant of the country where he resides and carries on trade."

³³ *The Indian Chief*, 3 C. Rob. Adm. 12.

³⁴ *O'Mealey v. Wilson*, 1 Camp. 482.

³⁵ *Houriet v. Morris*, 3 Camp. 303.

enemy's vessel, and brought to England, is no longer to be regarded as an alien enemy, but may contract and sue like other citizens in England.³⁶ A foreign corporation is an alien enemy under the same circumstances as an individual.³⁷ As a person takes his character of enemy or neutral in general from the place where he is found, it follows that a British citizen domiciled in a neutral country may lawfully trade in that country with the citizens of another country at war with Great Britain.³⁸

Principles Applied to American Civil War.

§ 249. The principles relating to alien enemies apply to their full extent to the Civil War in the United States, as regarded citizens of the two belligerent sections.³⁹ The beginning and end of the war have been judicially determined by the courts in various parts of the country. Thus, it has been held that the war ended east of the Mississippi river upon the president's proclamation of June 13, 1865;⁴⁰ and in South Carolina, that the war extended from the 19th day of April, 1861, to April 1, 1866.⁴¹ Citizens of seceded states

³⁶ *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163; *Rex v. Depardo*, 1 Taunt. 28.

³⁷ *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 132, Fed. Cas. No. 13,156. In time of peace, however, a foreign corporation, like any other foreign citizen, may make and enforce contracts in other states, unless excluded by the statutes or policy of such state. *Williams v. Creswell*, 51 Miss. 817. So, a promissory note made by an Indian is valid. *Rubideaux v. Vallie*, 12 Kan. 28.

³⁸ *Chit. Bills*, 19; *Bell v. Reid*, 1 Maule & S. 726.

³⁹ *Montgomery v. U. S.*, 15 Wall. 395; *Prize Cases*, 2 Black, 667; *Shortridge v. Macon*, Chase, 136, Fed. Cas. No. 12,812; *Hennen v. Gilman*, 20 La. Ann. 241; *Bonneau v. Dinsmore*, 23 How. Prac. (N. Y.) 397; *Sanderson v. Morgan*, 25 How. Prac. 144, 39 N. Y. 231; *McStea v. Matthews*, 3 Daly (N. Y.) 349; *Philips v. Hatch*, 1 Dill. 571, Fed. Cas. No. 11,094; *Ensley v. U. S.*, 6 Ct. Cl. 282; *Cutner v. U. S.*, Id. 415; *Brown v. Hiatt*, 1 Dill. 381, Fed. Cas. No. 2,011; *Lacy v. Sugarman*, 12 Heisk. (Tenn.) 354. In the words of Grier, J., in the *Prize Cases*, 2 Black, 667: "It is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other."

⁴⁰ *Semmes v. Insurance Co.*, 36 Conn. 543.

⁴¹ *Gooding v. Varn*, Chase, 286, Fed. Cas. No. 5,539.

were, however, not alien enemies before the secession of their states.⁴² In Texas it has been held that intercourse between its citizens and those of the state of Illinois was lawful until the passage of the act of congress of July, 1861.⁴³ And in Greenbrier county, Va., which was excepted from the operation of this act, a sale of personal property at a later period to a bona fide purchaser was held to be valid.⁴⁴

A note is not presumed to have been made between alien enemies because secured by a mortgage dated six months later, which showed the parties to be then resident in different belligerent sections.⁴⁵ But a citizen of Savannah or Memphis, after such city had been brought within the federal lines, was the alien enemy of a citizen of Alabama, although intercourse between both of the cities referred to and the rest of the United States had been prohibited by the president's proclamation of April, 1863.⁴⁶ On the other hand, it has been held, in a case regarding the statute of limitations, that a citizen of New Orleans was an alien enemy, even when the city was occupied by United States troops.⁴⁷ But a contract made between a British subject domiciled in New Orleans and a loyal citizen of the United States residing there, but acting as agent for an alien enemy, has been held to be void.⁴⁸ This has also been held to be the case with a contract between a Danish subject domiciled in New York and an alien enemy who was temporarily there, but resided in Texas.⁴⁹

Contracts between Alien Enemies—Insurance.

§ 250. It is a general rule that all contracts between alien enemies during war are void.⁵⁰ But existing and continuing contracts

⁴² U. S. v. Six Boxes of Arms, 1 Bond, 446, Fed. Cas. No. 16,295.

⁴³ McCormick v. Arnspiger, 38 Tex. 569.

⁴⁴ Hawver v. Seibert, 4 W. Va. 586.

⁴⁵ Hyatt v. James, 2 Bush (Ky.) 463.

⁴⁶ Ensley v. U. S., 6 Ct. Cl. 282; Cutner v. U. S., Id. 415; Lacy v. Sugarman, 12 Heisk. (Tenn.) 354. And see U. S. Stat. July 2, 1864, § 4.

⁴⁷ Perkins v. Rogers, 35 Ind. 124.

⁴⁸ Montgomery v. U. S., 15 Wall. 395.

⁴⁹ Habricht v. Alexander, 1 Woods, 413, Fed. Cas. No. 5,886.

⁵⁰ Byles, Bills, 70; Chit. Bills, 18; 1 Daniel, Neg. Inst. 221; 1 Edw. Bills & N. § 44; 1 Pars. Notes & B. 151; Story, Bills, § 99; Story, Prom. Notes, § 94; Wheat. Int. Law, 392; Whart. Confl. Laws, § 497; Willison v. Patteson,

are suspended and not annulled by war.⁵¹ If goods are delivered after the war has come to an end, upon a sale made during the war, this is a war contract, and void as such, and no action lies for the goods.⁵²

On the other hand, a contract of insurance is not annulled, but merely suspended, by the war.⁵³ So, if insurance premiums are not paid during the war, payment made and accepted after it is ended will revive the contract of insurance.⁵⁴ But, where the payment of the premium is made a condition precedent in the policy, its non-payment will work a forfeiture although made unavoidable by the outbreak of the war.⁵⁵ And in such case the tender of the unpaid premium after the close of the war will not revive the policy.⁵⁶ If, however, the premiums were tendered during the war to a local agent residing in the same country, the policy will not be forfeited, and recovery may be had upon the death of the person insured during the war.⁵⁷

7 Taunt. 439; *Gist v. Mason*, 1 Term R. 88; *Potts v. Bell*, 8 Term R. 548; *Furtado v. Rogers*, 3 Bos. & P. 191; *The Indian Chief*, 3 C. Rob. Adm. 12; *The Rapid*, 8 Cranch, 155; *Scholefield v. Eichelberger*, 7 Pet. 586; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438, affirming 15 Johns. (N. Y.) 57; *The Reform*, 3 Wall. 617; *U. S. v. Grossmayer*, 9 Wall. 72; *Crawford v. Penn*, 3 Wash. C. C. 484, Fed. Cas. No. 3,373; *Noblom v. Milborne*, 21 La. Ann. 641; *Graham v. Merrill*, 5 Cold. (Tenn.) 622.

⁵¹ 1 Daniel, Neg. Inst. 225; 1 Edw. Bills & N. § 44; Story, Bills, § 99; Story, Prom. Notes, § 116; *Hanger v. Abbott*, 6 Wall. 540.

⁵² *Scholefield v. Eichelberger*, 7 Pet. 586.

⁵³ *Connecticut Mut. Life Ins. Co. v. Duerson's Ex'r*, 28 Grat. (Va.) 630.

⁵⁴ *Cohen v. Insurance Co.*, 50 N. Y. 610; *Hamilton v. Insurance Co.*, 9 Blatchf. 234, Fed. Cas. No. 5,986.

⁵⁵ *Manhattan Life Ins. Co. v. Buck*, 93 U. S. 24; *New York Life Ins. Co. v. Statham, Id., Bradley, J.*, saying in this case: "The doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive." But see, contra, *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, affirming 35 N. J. Law, 415; *Semmes v. Insurance Co.*, 6 Blatchf. 445, Fed. Cas. No. 12,651; *Id.*, 36 Conn. 551.

⁵⁶ *O'Reilly v. Insurance Co.*, 2 Abb. Prac. (N. S.) 167; *Dillard v. Insurance Co.*, 44 Ga. 119.

⁵⁷ *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.) 179; *Statham v. Insurance Co.*, 45 Miss. 581; *Sands v. Insurance Co.*, 50 N. Y. 626.

Agency—Partnership.

§ 251. All contracts of agency having for their object the protection of property or collection of money, and not involving communication through the enemy's lines, remain valid and unrevoked by war. This is true of agencies to collect money,⁵⁸ to protect the principal's property,⁵⁹ or to receive payment on account of a former debt, but not to make fresh purchases.⁶⁰

Where the debtor is an alien enemy and the creditor is a citizen, the creditor's rights will not be made to suffer by the absence or legal incapacity of the debtor. Thus, it has been held that lands mortgaged in Illinois, with a power of sale, by one who afterwards becomes a resident in the Confederate States, may be lawfully sold during the war, and notwithstanding the fact that the debtor has become an alien enemy.⁶¹ Other courts, however, have held that a power of attorney for the sale of land is revoked by war.⁶² Lawful payment of a debt may be made to a resident and friendly agent of an alien enemy.⁶³ And delivery of goods after the end of the war may be lawfully made under an agency created and contract executed before the war.⁶⁴ But an agency cannot be created after the outbreak of a war.⁶⁵

The relation of partners, like that of principal and agent, is dissolved by war; and, when such partners have become alien enemies,

⁵⁸ *Maloney v. Stephens*, 11 Heisk. (Tenn.) 738; *Hale v. Wall*, 22 Grat. (Va.) 424; *Fisher v. Krutz*, 9 Kan. 501. And all agencies between citizens of slaveholding states were expressly saved in Tennessee by the act of 1861.

⁵⁹ *Buford v. Speed*, 11 Bush (Ky.) 338.

⁶⁰ *U. S. v. Lapéne*, 17 Wall. 601.

⁶¹ *University v. Finch*, 18 Wall. 106; *Willard v. Boggs*, 56 Ill. 163; *Harper v. Ely*, Id. 179; *De Jarnette v. De Giverville*, 56 Mo. 440.

⁶² *Conley v. Burson*, 1 Heisk. (Tenn.) 145. And see *Howell v. Gordon*, 40 Ga. 302. But where a sale of land was made under such a power, an action was allowed after the war to recover the purchase money from the purchaser. *King v. Hanson*, 4 Call (Va.) 259.

⁶³ *Sands v. Insurance Co.*, 59 Barb. (N. Y.) 556; *Robinson v. Assurance Soc.*, 42 N. Y. 54; *Stoddart v. U. S.*, 6 Ct. Cl. 340; *Bernheimer v. U. S.*, 5 Ct. Cl. 549. But see, contra, *Blackwell v. Willard*, 65 N. C. 555, where the payment was made in settlement of a suit pending at the outbreak of the war.

⁶⁴ *Buchanan v. Curry*, 19 Johns. (N. Y.) 137.

⁶⁵ *Cramer v. U. S.*, 6 Ct. Cl. 381, 7 Ct. Cl. 302.

the contract of one is no longer binding upon the firm.⁶⁶ Nor can a partner who is an alien enemy indorse a note belonging to the firm, so as to transfer the interest of his former partner.⁶⁷ Where, however, partners who have made a firm note before the outbreak of war afterwards become alien enemies, their individual liability as makers will not be affected.⁶⁸ And it has been held that a partner in New York will be bound by the acceptance of a bill of exchange by his partner in the Confederate States prior to the act of congress of July, 1861.⁶⁹

Contracts between Alien Enemies—When Valid.

§ 252. There are some exceptions to the rule making void contracts between alien enemies, these exceptions being made for the necessary protection by every state of its own citizen. Thus, contracts by a prisoner of war for necessities, though made with an alien enemy, are lawful.⁷⁰ So, a note given in payment for a license, to protect a ship against capture by the enemy, is valid.⁷¹ And an enemy's license of this sort will not render void a ship's policy of insurance.⁷² Moreover, contracts between alien enemies may be permitted by special license of the government. But such license must be proved by the party alleging it.⁷³

Commercial Paper.

§ 253. The principle making void contracts between alien enemies applies with full force to commercial paper.⁷⁴ And the ex-

⁶⁶ *Griswold v. Waddington*, 16 Johns. (N. Y.) 438, affirming 15 Johns. (N. Y.) 57; *Woods v. Wilder*, 43 N. Y. 164.

⁶⁷ *Bank of New Orleans v. Matthews*, 49 N. Y. 12.

⁶⁸ *Booker v. Kirkpatrick*, 26 Grat. (Va.) 145.

⁶⁹ *McStea v. Matthews*, 3 Daly (N. Y.) 349, affirmed 50 N. Y. 166; *Matthews v. McStea*, 91 U. S. 7.

⁷⁰ 1 Pars. Notes & B. 152; *Story*, Bills, § 101; *Story*, Prom. Notes, § 96.

⁷¹ *Coolidge v. Inglee*, 13 Mass. 26.

⁷² *Hayward v. Blake*, 12 Mass. 176.

⁷³ *Lacy v. Sugarman*, 12 Heisk. (Tenn.) 354; *In re Ouachita Cotton*, 6 Wall. 531.

⁷⁴ 1 Daniel, Neg. Inst. 222; 1 Edw. Bills & N. § 44; 1 Pars. Notes & B. 151; *Story*, Bills, § 100; *Story*, Prom. Notes, § 95; *Wheat. Int. Law*, 392;

ceptions above referred to are also applicable to it. Thus, a bill of exchange given to an alien enemy for the ransom of a captured ship is valid.⁷⁵ So, too, if given for repairs made to a ship in the enemy's country under protection of a cartel.⁷⁶ But a bill of exchange drawn by a British prisoner, in France, upon a British subject, and made payable to an alien enemy, is void, in England, by statute.⁷⁷

Drawee an Alien Enemy.

§ 254. This has been held to be the case also with a bill of exchange drawn by a citizen of the state of Georgia, on a citizen of the state of New York, after the outbreak of the war;⁷⁸ or by a citizen of Mobile, while it was in the Confederate lines, on a citizen of New Orleans, while it was in the control of the United States troops, intercourse between the two being then prohibited.⁷⁹ Such paper, however, has been held to be valid in the hands of a bona fide holder for value.⁸⁰ So, too, if transferred to the United States government.⁸¹ And, where such a bill is invalid, it has been held that a payee, who took it in ignorance of the capture of New Orleans and of its possession by federal troops, might recover all payments made by him for it.⁸²

Payee or Indorsee an Alien Enemy.

§ 255. In like manner, a bill of exchange is void if the drawer and drawee are both citizens of the United States and the payee is an enemy;⁸³ or if the drawer and payee are alien enemies, and

Woods v. Wilder, 43 N. Y. 164; *Philips v. Hatch*, 1 Dill. 571, Fed. Cas. No. 11,094; *McVeigh v. Bank*, 26 Grat. (Va.) 785.

⁷⁵ *Ricord v. Bettenham*, 3 Burrows, 1734. Much more a bill of exchange for such consideration given to an alien friend. *Maisonnaire v. Keating*, 2 Gall. 325, Fed. Cas. No. 8,978.

⁷⁶ *Suckley v. Furse*, 15 Johns. (N. Y.) 338.

⁷⁷ 34 Geo. III. c. 9, § 2.

⁷⁸ *Woods v. Wilder*, 43 N. Y. 164.

⁷⁹ *Tarleton v. Bank*, 49 Ala. 229.

⁸⁰ *Lacy v. Sugarman*, 12 Heisk. (Tenn.) 354.

⁸¹ *U. S. v. Barker*, 1 Paine, 156, Fed. Cas. No. 14,517.

⁸² *Williams v. Bank*, 2 Woods, 501, Fed. Cas. No. 17,729.

⁸³ *Craft v. U. S.*, 12 Ct. Cl. 178.

the drawee a citizen of the United States.⁸⁴ But if the bill is drawn by a citizen of the United States, on an alien enemy, in favor of another alien enemy, and is delivered by the drawer to another citizen of the United States, on an agreement that he will pay the drawer whatever sum of money is paid by the drawee to the payee, this agreement will be valid, as it involves no transfer of funds to the enemy's country.⁸⁵

The indorsement of a note in the enemy's country, and its delivery to a messenger to deliver in this country, during the war, to one of our own citizens, is illegal.⁸⁶ So, a bill drawn in France by an alien enemy residing then in France, upon a British subject residing in England, and indorsed to a British subject residing in France, is illegal.⁸⁷

But the transfer of a note in this country is valid, although the maker may be an alien enemy, and the note itself in the hands of the enemy's government.⁸⁸ And an indorsee in the United States may sue his indorser here upon an indorsement made here of a certificate of deposit made in the enemy's country between alien enemies, and void on that account.⁸⁹ And it has been held that an indorsement to an alien enemy by a British subject residing in France, who is the payee of a bill of exchange drawn there by a British prisoner upon a British subject in England, will be valid in England.⁹⁰

Although a note between alien enemies is void, a subsequent promise to pay it may be valid.⁹¹ This is true, although payment of such instrument during the war be expressly forbidden by statute.⁹² In like manner, a note may be lawfully given after the end of the war

⁸⁴ *Moore v. Foster*, Chase, 222, Fed. Cas. No. 9,760; *Billgerry v. Branch*, 19 Grat. (Va.) 393; *Tarleton v. Bank*, 49 Ala. 229. And payment by such a bill is no payment unless accepted as such. *Moore v. Foster*, supra.

⁸⁵ *Haggard v. Conkwright*, 7 Bush (Ky.) 16.

⁸⁶ *Russell v. Russell*, 1 MacArthur, 263.

⁸⁷ *Willison v. Patteson*, 7 Taunt. 439.

⁸⁸ *Morris v. Poillon*, 50 Ala. 403.

⁸⁹ *Morrison v. Lovell*, 4 W. Va. 346.

⁹⁰ *Antoine v. Morshead*, 6 Taunt. 237, 1 Marsh. 558; *Daubuz v. Morshead*, 6 Taunt. 332.

⁹¹ *Ledoux v. Buhler*, 21 La. Ann. 130.

⁹² *Duhammel v. Pickering*, 2 Starkie, 90.

in payment of a debt created during the war.⁹³ And it should be in all cases remembered that the legality of a payment made to an alien enemy, and received by him, cannot be questioned by himself.⁹⁴

⁹³ *Borland v. Sharp*, 1 Root (Conn.) 178.

⁹⁴ *Rogers v. Gibbs*, 25 La. Ann. 563.

III. IDIOTS AND LUNATICS.

- § 256. Lunatic's Contracts—Voidable or Void.
- 257. Defense—Admissible When.
- 258. What Amounts to Lunacy.
- 259. Pleading—Evidence.
- 260. Inquisition—How Far Conclusive—Spendthrifts.

Lunatic's Contracts—Voidable or Void.

§ 256. All persons of unsound mind—idiots, lunatics, and imbeciles—are by nature incapable of entering into any contract, commercial or otherwise, requiring mental understanding and consent. The law throws its protection over all such persons by declaring their contracts void.⁹⁵ A deed by such a person is absolutely void,⁹⁶ especially where it is merely voluntary.⁹⁷ So, an implied authority to an agent to give or surrender a note is revoked by the principal's lunacy.⁹⁸ In general, however, it is more correct to say that a lunatic's contract is *voidable*.⁹⁹ It may be avoided by the personal representative of the lunatic, or by his guardian, or by a subsequent

⁹⁵ Byles, Bills. 63; 1 Daniel, Neg. Inst. 215; Story, Prom. Notes, § 101; *Sentance v. Poole*, 3 Car. & P. 1; *Baxter v. Lord Portsmouth*, 2 Car. & P. 178, 5 Barn. & C. 170.

⁹⁶ *Van Deusen v. Sweet*, 51 N. Y. 378. And the property conveyed may be recovered. *Alston v. Boyd*, 6 Humph. (Tenn.) 504. So, too, in an action brought for that purpose by the lunatic's guardian. *Gibson v. Soper*, 6 Gray (Mass.) 279.

⁹⁷ *Manning v. Gill*, L. R. 13 Eq. 485.

⁹⁸ Thus, where a surrender of a note was made by the wife of a dying lunatic to whom it belonged, the surrender was held not to be binding. *Davis v. Lane*, 10 N. H. 156. A person who is incompetent cannot authorize an agent to execute a valid note for him. *Shotts v. Boyd*, 77 Ind. 223.

⁹⁹ 1 Edw. Bills & N. § 24; Story, Prom. Notes, § 101, note by Mr. Perkins. So held of deeds, *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Allis v. Billings*, 6 Metc. (Mass.) 415; *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Ingraham v. Baldwin*, 9 N. Y. 45; *Cates v. Woodson*, 2 Dana (Ky.) 452; *Hovey v. Hobson*, 53 Me. 451; *Elston v. Jasper*, 45 Tex. 409; *Breckinridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Fitzgerald v. Reed*, 9 Smedes & M. (Miss.) 94; *Lilly v. Waggoner*, 27 Ill. 395; *Arnold v. Iron Works*, 1 Gray (Mass.) 434; and of notes, in Indiana, notwithstanding a statute apparently declaring them void, *Crouse v. Holman*, 19 Ind. 30.

grantee of the property which the lunatic has conveyed.¹⁰⁰ But it cannot be avoided by the other party to the contract.¹⁰¹

It is voidable rather than void, because it is capable of ratification.¹⁰² But the contracts of a lunatic, it is said, after office found, are absolutely void.¹⁰³ It seems, however, that even such contracts may be ratified.¹⁰⁴ And a subsequent inquisition, finding the maker of a note to have been insane at the time of making it, will not affect the instrument in the hands of a bona fide holder for value before maturity.¹⁰⁵

A distinction is made, in regard to this question, between executed contracts and those which are only executory. Where the consideration is still executory, the contract will be declared void, even against a party who entered into it in ignorance of the mental condition of the other party.¹⁰⁶ On the other hand, where the contract has been executed and the consideration paid and enjoyed, as in the case of goods sold to, and consumed by, a lunatic before inquisition found, no relief will generally be granted against an in-

¹⁰⁰ *By personal representatives or heirs*, Breckinridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236; Hovey v. Hobson, 53 Me. 451; *by guardian*, Crouse v. Holman, 19 Ind. 30; Gibson v. Soper, 6 Gray (Mass.) 279; *by grantee* under subsequent deed, Cates v. Woodson, 2 Dana (Ky.) 452.

¹⁰¹ Allen v. Berryhill, 27 Iowa, 534.

¹⁰² Allis v. Billings, 6 Mete. (Mass.) 415; Wait v. Maxwell, 5 Pick. (Mass.) 217; Eaton v. Eaton, 37 N. J. Law, 108, where a deed was voidable for fraud in reading it falsely to an aged and infirm man. So, the ratification of a deed may be inferred from subsequent receipt of the consideration, which had been secured by notes. Arnold v. Iron Works, 1 Gray (Mass.) 434.

¹⁰³ Jackson v. Gumaer, 2 Cow. (N. Y.) 552; Hovey v. Hobson, 53 Me. 451; Nichol v. Thomas, 53 Ind. 42; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235. So held, also, as to a waiver of notice of protest after inquisition found. Wadsworth v. Sherman, 14 Barb. (N. Y.) 169; Wadsworth v. Sharpsteen, 8 N. Y. 388. So, as to a check, although paid in good faith by the drawee, American Trust & Banking Co. v. Boone (Ga.) 29 S. E. 182.

¹⁰⁴ 1 Daniel, Neg. Inst. 219; 1 Pars. Notes & B. 151.

¹⁰⁵ Lancaster Co. Nat. Bank v. Moore, 78 Pa. St. 407. So, too, of a deed. Yauger v. Skinner, 14 N. J. Eq. 389.

¹⁰⁶ Byles, Bills, 64; Sentance v. Poole, 3 Car. & P. 1; Baxter v. Lord Portsmouth, 2 Car. & P. 178, 5 Barn. & C. 170, and 7 Dowl. & R. 614. In the former case (Sentance v. Poole) the note was in an unusual form,—payable: "to your order."

nocent party, although fraud on his part or knowledge of the lunatic's condition would make it otherwise.¹⁰⁷ So, a lunatic is liable on his executed contract for necessities, but only for their actual value.¹⁰⁸ And his executor will be liable for such necessities sold to him before office found.¹⁰⁹ And, even after office found, it has been held that a lunatic is liable for necessary medical services rendered to his wife.¹¹⁰

Defense—Admissible When.

§ 257. It was formerly held that a person could not be allowed to "stultify himself" by setting up his lunacy in defense against a contract made by him.¹¹¹ The absurdity of this rule is apparent, and

¹⁰⁷ *Sergeson v. Sealey*, 2 Atk. 412; *Beals v. See*, 10 Pa. St. 56; *Matthiesen v. McMahon*, 38 N. J. Law, 536; *Young v. Stevens*, 48 N. H. 133; *Wilder v. Weakley*, 34 Ind. 181; *Ballard v. McKenna*, 4 Rich. Eq. (S. C.) 358; *Sims v. McLure*, 8 Rich. Eq. (S. C.) 286; *Dodds v. Wilson*, 1 Tread. Const. (S. C.) 448; *Scanlan v. Cobb*, 85 Ill. 296; or for money loaned to him, *Lancaster Co. Nat. Bank v. Moore*, 78 Pa. St. 407.

¹⁰⁸ 1 Pars. Notes & B. 149; 1 Story, Eq. Jur. § 228; *Read v. Legard*, 6 Exch. 636; *Barnes v. Hathaway*, 66 Barb. (N. Y.) 456; *Van Horn v. Hann*, 39 N. J. Law, 207; *Hallett v. Oakes*, 1 Cush. (Mass.) 296; *Kendall v. May*, 10 Allen (Mass.) 59; *Skidmore v. Romaine*, 2 Bradf. Sur. (N. Y.) 122; *Williams v. Wentworth*, 5 Beav. 325; *Sawyer v. Lufkin*, 56 Me. 308. So, a note given for a reaping machine by an insane person has been held binding upon him on the same ground. *McCormick v. Littler*, 85 Ill. 62. So, in general, of a lunatic's note, so far as it represents necessities. *Surles v. Pipkin*, 69 N. C. 513; *McCormick v. Littler*, 85 Ill. 62; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, the burden of proof of consideration being on the holder. See, also, *Id.*, 35 Lawy. Rep. Ann. 161, note.

¹⁰⁹ *La Rue v. Gilkyson*, 4 Pa. St. 375; *Richardson v. Strong*, 35 N. C. 106; *Tally v. Tally*, 22 N. C. 387.

¹¹⁰ *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658.

¹¹¹ *Brown v. Joddrell*, 1 Moody & M. 105, 3 Car. & P. 30; *Levy v. Baker*, 1 Moody & M. 106; *Dane v. Kirkwall*, 8 Car. & P. 679; *Beverley's Case*, 4 Coke, 126; *Stroud v. Marshall*, Cro. Eliz. 398. This rule is well declared by Fonblanque to be "in defiance of natural justice and the universal practice of all the civilized nations in the world." 1 Fonbl. Eq. 46. The case of *Brown v. Joddrell*, *supra*, has been overruled in Massachusetts. *Seaver v. Phelps*, 11 Pick. 304. In this case Lord Tenterden had laid down the rule as follows: "I think this defense cannot be allowed, and that no person can be suffered to stultify himself and to set up his own lunacy as a defense. If, indeed, it can be shown that the defendant has

it may now be regarded as abandoned.¹¹² The defense of lunacy is, however, still held to be unavailable in England, unless the fact was known to the other contracting party at the time.¹¹³ And in the United States, also, it is held that, in the absence of such knowledge and of fraud, the contract cannot be avoided without full reinstatement of the other party in his former position.¹¹⁴

If the contract has been obtained from the lunatic through fraud, this will be a good defense even against a bona fide holder for value.¹¹⁵ So, an accommodation indorsement will not render a lunatic

been imposed upon by the plaintiff in consequence of his mental imbecility, it might be otherwise, and such a defense might be admitted." In *Webster v. Woodford*, 3 Day (Conn.) 101, it is said that, "in the time of Edward I., non compos mentis was allowed to be a sufficient plea to avoid a man's own bond. It was not until the reign of Edward III. that any scruple was entertained respecting the power of a person who had been non compos mentis to avoid his act, and it was as late as the reign of Henry VI. before there was any judicial determination that a person who had been non compos mentis could not avoid a deed given by him during his insanity. * * * The ancient common law was that a man might allege his own incapacity to avoid his deed, and this remained law during a long period of time, and has never been altered by any legal act, but the contrary doctrine depends upon decisions of courts in direct opposition to the common law."

¹¹² Byles, Bills, 63; 1 Daniel, Neg. Inst. 215; 1 Edw. Bills & N. § 25; 1 Pars. Notes & B. 149; *Gore v. Gibson*, 13 Mees. & W. 623; *Alcock v. Alcock*, 3 Man. & G. 268; *Rice v. Peet*, 15 Johns. (N. Y.) 503; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 237; *Webster v. Woodford*, 3 Day (Conn.) 90; *Taylor v. Dudley*, 5 Dana (Ky.) 308; *Lang v. Whidden*, 2 N. H. 435. And the insanity of one who has signed a note as surety may be set up in defense against a holder who had no knowledge of it. *Van Patton v. Beals*, 46 Iowa, 62.

¹¹³ Byles, Bills, 64; *Molton v. Camroux*, 4 Exch. 19, affirming 2 Exch. 487; *Beavan v. McDonnell*, 9 Exch. 309; *Elliot v. Ince*, 7 De Gex. M. & G. 475; See, too, 1 Pars. Notes & B. 149, where this is said to be "possibly" the rule. And see *Shoulders v. Allen*, 51 Mich. 529, 16 N. W. 888; *Moore v. Hershey*, 90 Pa. St. 196. And this seems to be the rule by statute in Louisiana. *Succession of Smith*, 12 La. Ann. 24.

¹¹⁴ *Carr v. Holliday*, 21 N. C. 344; *Fitzgerald v. Reed*, 9 Smedes & M. (Miss.) 94; *Yanger v. Skinner*, 14 N. J. Eq. 389.

¹¹⁵ *Chit. Bills*, 24; 1 Daniel, Neg. Inst. 216; *Sentance v. Poole*, 3 Car. & P. 1; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040; *Moore v. Hershey*, 90 Pa. St. 196. In the words of Paxson, J., in *Moore v. Hershey*, Id. 201: "If such paper can be protected in the hands of a holder who has paid

tic liable even to a bona fide holder for value.¹¹⁶ This is true, too, of a note pledged by one who is non compos mentis,¹¹⁷ or indorsed for much less than its actual value.¹¹⁸

It seems, moreover, that the insanity of an indorser may be set up by the maker of a note in defense to a suit on it by the indorsee,¹¹⁹ although this seems to be a departure from the common rule as to such defenses. And it seems reasonable, as in other cases of one party's incapacity, that this should in no way affect the holder's remedy against other parties.¹²⁰

What Amounts to Insanity.

§ 258. It is not necessary to a complete defense that the party alleged to be incapable should be wholly or even partially deranged. Any imbecility is a sufficient defense which renders him incapable of fully understanding and intending the contract in question, especially if such imbecility on his part be accompanied with fraud on

value, however trifling, this helpless class would have little protection. A principle that renders such results possible must be essentially and radically wrong. We believe that none such exists. On the contrary, the true rule applicable to such cases is that, while the purchaser of a promissory note is not bound to inquire into the consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration."

¹¹⁶ *Wirebach's Ex'r v. Bank*, 97 Pa. St. 543. So, where the lunatic has signed a note as surety. *Van Patton v. Beals*, 46 Iowa, 62. But he will be liable on his renewal of an accommodation indorsement given before he became insane. *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716; *School Dist. v. Sheidley*, 138 Mo. 672, 40 S. W. 656.

¹¹⁷ *Seaver v. Phelps*, 11 Pick. (Mass.) 304.

¹¹⁸ *Jeneson v. Jeneson*, 66 Ill. 259.

¹¹⁹ *Burke v. Allen*, 29 N. H. 106; *Peaslee v. Robbins*, 3 Metc. (Mass.) 164. As to the invalid character of such a transfer, see, also, *Hannahs v. Sheldon*, 20 Mich. 278. But it has been held that the maker cannot set up in defense, at suit of an indorsee, that the indorsement was procured by undue influence, where the indorser has not disaffirmed it. *Carrier v. Sears*, 4 Allen (Mass.) 336.

¹²⁰ 1 Pars. Notes & B. 150.

the other side.¹²¹ Mere weakness of intellect, however, without fraud, is no defense.¹²² But the importance of mental weakness as evidence of fraud is not to be overlooked.¹²³

Pleading—Evidence.

§ 259. It was formerly held, in England, that lunacy as a defense must be specially pleaded.¹²⁴ And the presumption of law is in favor of sanity.¹²⁵ This throws the burden of proof upon the party making the allegation of insanity, but the presumption of

¹²¹ *Johnson v. Chadwell*, 8 Humph. (Tenn.) 145.

¹²² *Chit. Bills*, 25; 1 *Daniel, Neg. Inst.* 217; 1 *Edw. Bills & N.* § 24; 2 *Bl. Comm.* 292; *Baxter v. Earl Portsmouth*, 7 *Dowl. & R.* 614, 5 *Barn. & C.* 170, and 2 *Car. & P.* 178; *Faulder v. Silk*, 3 *Camp.* 126; *Yates v. Boen*, 2 *Strange*, 1104; *Lewis v. Pead*, 1 *Ves. Jr.* 19; *Farnam v. Brooks*, 9 *Pick. (Mass.)* 212; *Graham v. Castor*, 55 *Ind.* 559; *Marmon v. Marmon*, 47 *Iowa*, 121; *Maddox v. Simmons*, 31 *Ga.* 512. *Parker, C. J.*, in *Farnam v. Brooks*, 9 *Pick. (Mass.)* 220, says: "We understand the law to be that no degree of physical or mental imbecility which leaves the party legal competency to act is of itself sufficient to avoid a contract or settlement with him, but, if advantage is taken of his weakness to draw from him a contract or settlement which is unfavorable by misrepresentation, imposition, or undue influence, such contract or settlement cannot be upheld in a court of equity."

¹²³ *Harris v. Wamsley*, 41 *Iowa*, 671; *Hoagland v. Titus*, 16 *N. J. Eq.* 44; *McFaddin v. Vincent*, 21 *Tex.* 47; especially when coupled with inadequacy of consideration, *Cadwallader v. West*, 48 *Mo.* 483. So, too, the weakness of old age. *James v. Langdon*, 7 *B. Mon. (Ky.)* 193; *Wilson v. Oldham*, 12 *B. Mon. (Ky.)* 55; *Coleman v. Frazer*, 3 *Bush (Ky.)* 300; *Eaton v. Eaton*, 37 *N. J. Law*, 108. So, the fact that the person defrauded was illiterate and unable to read the paper signed by him. *Anderson v. Walter*, 34 *Mich.* 113; *First Nat. Bank v. Lierman*, 5 *Neb.* 247.

¹²⁴ *Byles, Bills*, 64; 1 *Daniel, Neg. Inst.* 215; 1 *Edw. Bills & N.* § 26; *Harrison v. Richardson*, 1 *Moody & R.* 504. But see, contra, *Mitchell v. Kingman*, 5 *Pick. (Mass.)* 431. Such plea should, however, set up that the defendant was non compos mentis at the time when the contract was made. *Taylor v. Dudley*, 5 *Dana (Ky.)* 309.

¹²⁵ 1 *Daniel, Neg. Inst.* 214; 1 *Edw. Bills & N.* § 26; 1 *Pars. Notes & B.* 150; *Jackson v. King*, 4 *Cow. (N. Y.)* 207. But the presumption may be rebutted by common report to the contrary. *Rogers v. Walker*, 6 *Pa. St.* 371.

sanity may be rebutted and the burden of proof shifted by proof of general derangement.¹²⁶

Periodical intervals of recovery will, however, destroy any such presumption of insanity.¹²⁷

Inquisition—How Far Conclusive—Spendthrifts.

§ 260. Even an inquisition and finding of insanity will not be conclusive evidence against any one not a party to it.¹²⁸ Nor will the finding of a probate court of equity, afterwards affirmed by inquisition and verdict, be conclusive against the validity of a deed executed by the lunatic in the interval.¹²⁹ But an inquisition and finding will amount to sufficient proof until overcome by other evidence,¹³⁰ and will be admissible as evidence even against an earlier

¹²⁶ *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; *Aurentz v. Anderson*, 3 Pittsb. R. 310. When, however, the presumption of sanity is once rebutted by common report, etc., the burden of proving a lucid interval falls on the person who seeks to hold the alleged lunatic. *Rogers v. Walker*, 6 Pa. St. 371. In such case actions touching the same subject-matter at times when he was admitted to be sane are admissible as evidences of his sanity, e. g. his subsequently taking indemnity against the note given by him and in controversy. *Grant v. Thompson*, 4 Conn. 203.

¹²⁷ *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Staples v. Wellington*, 58 Me. 453; *People v. Francis*, 38 Cal. 183. "The question is whether such transaction has been affected by it," *Beasley, C. J., in Lozeur v. Shields*, 23 N. J. Eq. 509.

¹²⁸ *Sergeson v. Sealey*, 2 Atk. 412; *Den v. Clark*, 10 N. J. Law, 217; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 516; *Hoyt v. Adees*, 3 Lans. (N. Y.) 173. But in *White v. Palmer*, 4 Mass. 150. Chief Justice Parsons says: "There are some strong grounds on which it may be inferred that a letter of guardianship of any person adjudged to be non compos, so long as it is unrevoked or not annulled, is conclusive evidence of his insanity, but on this point we give no opinion." And see, to same effect, *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Leonard v. Leonard*, 14 Pick. (Mass.) 283. And so, too, as to contracts made afterwards. *Tozer v. Saturlee*, 3 Grant, Cas. (Pa.) 162. After a man's reason has been restored, a prior decree of insanity and letters of guardianship unrevoked are not conclusive evidence against the validity of a will made three years afterwards. *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. (Mass.) 115.

¹²⁹ *Gibson v. Soper*, 6 Gray (Mass.) 279.

¹³⁰ *Sergeson v. Sealey*, 2 Atk. 412; *Hicks v. Marshall*, 8 Hun (N. Y.) 327; *Hoyt v. Adees*, 3 Lans. (N. Y.) 173; *White v. Palmer*, 4 Mass. 147; *Goodell v.*

contract.¹³¹ And proof of insanity of the maker of a note, both before and after it was made, is a sufficient defense to the note on his part.¹³²

The subsequent insanity of the maker of a note will not, however, be a defense, even though the payee and plaintiff has been appointed guardian for him.¹³³

Spendthrifts, under statutory guardianship, are incapacitated in like manner, and an indorsement by such spendthrift passes no valid title to the paper.¹³⁴

Harrington, 3 Thomp. & C. (N. Y.) 345; Rogers v. Walker, 6 Pa. St. 371; Tozer v. Saturlee, 3 Grant, Cas. (Pa.) 162; McGinnis v. Com., 74 Pa. St. 245. And may be traversed, Sergeson v. Sealey, *supra*; or met by other evidence to the contrary without formal traverse, Den v. Clark, 10 N. J. Law, 217.

¹³¹ 1 Edw. Bills & N. § 27; Hicks v. Marshall, 8 Hun (N. Y.) 327. And, a fortiori, a finding that the obligor of a bond was a lunatic before its execution. Faulder v. Silk, 3 Camp. 126.

¹³² Ellars v. Mossbarger, 9 Bradw. (Ill.) 122.

¹³³ Smith v. Davis, 45 N. H. 566. So, the fatal illness of the maker of a note and his loss of consciousness before it was negotiated, but after delivery by him. Estate of Bechtel, 133 Pa. St. 367, 19 Atl. 412.

¹³⁴ Lynch v. Dodge, 130 Mass. 458; Gen. St. c. 109, §§ 9, 12.

IV. DRUNKARDS.

- § 261. Drunkenness—A Valid Defense.
- 262. Commercial Paper.
- 263. Defense—When Admissible.
- 264. Action—Pleading—Evidence.

Drunkenness—A Valid Defense.

§ 261. The mental condition of a drunkard, so far as it renders him imbecile or insane, seems to entitle him to the same protection and defenses that belong to an idiot or lunatic. Formerly, however, drunkenness was held to be no defense without fraud.¹³⁵ And it is still the rule of law that partial drunkenness, not involving actual mental incapacity, is no defense,¹³⁶ unless there be fraud in connection with it.¹³⁷

Drunkenness, however, like weakness of intellect, is important evidence in ascertaining whether fraud has been practiced.¹³⁸ And even partial drunkenness will be regarded as strong evidence of fraud, if induced by the other party to the contract.¹³⁹ So, if a note be made by a person enfeebled by disease and drinking, this will in some cases, of itself, raise a presumption of fraud.¹⁴⁰ If, on the

¹³⁵ Byles, Bills, 64; 1 Pars. Notes & B. 151; Johnson v. Medlicott, 3 P. Wms, note, 130; Cooke v. Clayworth, 18 Ves. 12.

¹³⁶ 1 Daniel, Neg. Inst. 219; 1 Edw. Bills & N. § 28; 1 Pars. Notes & B. 151; Johns v. Fritchey, 39 Md. 258; Bates v. Ball, 72 Ill. 108; Miller v. Finley, 26 Mich. 249; Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Cavender v. Waddingham, 5 Mo. App. 457. In this case (page 465) Bakewell, J., lays down the rule as follows: "Mere excitement from the use of intoxicating liquors is not such drunkenness as will enable a party to avoid his contracts. Such excitement and drunkenness must be excessive and absolute, so as to suspend the reason and create impotence of mind at the time of entering into the contract." It must be "so great as to produce an absolute privation of understanding for the time similar to cases of idiocy or insanity." Blackford, J., in Harbison v. Lemon, 3 Blackf. (Ind.) 51.

¹³⁷ Chit. Bills, 104; Burroughs v. Richman, 13 N. J. Law, 233.

¹³⁸ Prentice v. Achorn, 2 Paige (N. Y.) 30; French's Heirs v. French, 8 Ohio, 214.

¹³⁹ Samuel v. Marshall, 3 Leigh (Va.) 567; Curtis v. Hall, 4 N. J. Law, 361.

¹⁴⁰ Holland v. Barnes, 53 Ala. 83.

other hand, a person has made himself drunk for the purpose of giving his contract such an appearance or raising such presumption, he will be estopped from setting up the defense.¹⁴¹

Commercial Paper.

§ 262. Total drunkenness is, in general, a perfect defense against the drunkard's bill or note.¹⁴² And, where a contract for work has been made by a man while drunk, he may recover the actual value of the work done without the production of the contract.¹⁴³ The validity of such defense to a bill of exchange is recognized in England, where the bill has been obtained by fraud,¹⁴⁴ both as against the party originally receiving it¹⁴⁵ and against all holders with notice.¹⁴⁶ On the other hand, drunkenness is no defense against a bona fide holder for value before maturity.¹⁴⁷ And it has been held that a contract by one who is drunk may be avoided, although the other party be not guilty of fraud or fault.¹⁴⁸ It has also been held that a drunkard's note is void and cannot be ratified.¹⁴⁹ The better

¹⁴¹ 1 Daniel, Neg. Inst. 220; 1 Pars. Notes & B. 151.

¹⁴² Byles, Bills, 64; 1 Daniel, Neg. Inst. 219; 1 Edw. Bills & N. § 28; Gore v. Gibson, 13 Mees. & W. 623; Bliss v. Railroad Co., 24 Vt. 424; Berkley v. Cannon, 4 Rich. Law (S. C.) 136; Harbison v. Lemon, 3 Blackf. (Ind.) 51; Wigglesworth v. Steers, 1 Hen. & M. (Va.) 70; Phelan v. Gardner, 43 Cal. 306; Reinskopf v. Rogge, 37 Ind. 207. So, to a bond. Morris v. Clay, 53 N. C. 216. So, the drunkenness of one joint obligor of a bond. Jenners v. Howard, 6 Blackf. (Ind.) 240. And a contract executed "after reaching a stage of delirium tremens, in 1850, and being crazy, silly, and foolish when drunk then, and continuing constantly in this habit for four years longer," was set aside as the act of one non compos mentis. Menkins v. Lightner, 18 Ill. 282. On the other hand, a broken-down inebriate, with occasional fits of insanity, is not to be presumed insane, so as to relieve the defense of the burden of proof. Gardner v. Gardner, 22 Wend. (N. Y.) 526.

¹⁴³ Fenton v. Halloway, 1 Starkie, 126.

¹⁴⁴ Pitt v. Smith, 3 Camp. 33.

¹⁴⁵ Chit. Bills, 24; Pitt v. Smith, supra; Gregory v. Fraser, 3 Camp. 454; Fenton v. Halloway, supra; Yates v. Boen, 2 Strange, 1104; Bull. N. P. 172.

¹⁴⁶ Molton v. Camroux, 2 Exch. 487, affirmed 4 Exch. 19.

¹⁴⁷ Chit. Pl. 24; 1 Daniel, Neg. Inst. 219; Northam v. Latouche, 4 Car. & P. 145; Johnson v. Medlicott, 3 P. Wms. 130; McSparran v. Neeley, 91 Pa. St. 17; State Bank v. McCoy, 69 Pa. St. 204.

¹⁴⁸ Barrett v. Buxton, 2 Aiken (Vt.) 167.

¹⁴⁹ Berkley v. Cannon, 4 Rich. Law (S. C.) 136.

opinion is, however, that it is only voidable,¹⁵⁰ and can be ratified.¹⁵¹

In many states the contracts of *habitual drunkards* are made void by statute.¹⁵² And it has been held, in Pennsylvania, that, after office found, an habitual drunkard cannot bar the statute of limitations on a former note by a new promise of payment.¹⁵³

Defense—When Admissible.

§ 263. Drunkenness is, in general, not a valid defense, unless the consideration received can be returned.¹⁵⁴ In all such cases, a distinction is to be made between express contracts and those which the law implies.¹⁵⁵ In the latter case, e. g. a contract for necessities purchased and consumed by the drunkard, the contract may be binding on the drunkard, though made by him after the appointment of a guardian.¹⁵⁶

¹⁵⁰ Joest v. Williams, 42 Ind. 565; McGuire v. Callahan, 19 Ind. 128.

¹⁵¹ Matthews v. Baxter, L. R. 8 Exch. 132. If supported by a valid consideration, Lyon v. Phillips, 106 Pa. St. 57.

¹⁵² Thus, an indorsement made pending a proceeding for the appointment of a guardian for such drunkard transfers no title. McCrillis v. Bartlett, 8 N. H. 569. Much more after inquisition found. L'Amoureux v. Crosby, 2 Paige (N. Y.) 427, under New York act of 1821; Clark v. Caldwell, 6 Watts (Pa.) 139, under Pennsylvania act of 1819. So, a bond executed after inquisition found. Imhoff v. Whitmer, 31 Pa. St. 243. So, the waiver of notice of protest by a drunkard after inquisition found, Wadsworth v. Sharpsteen, 8 N. Y. 388; Wadsworth v. Sherman, 14 Barb. (N. Y.) 169; or a will under like circumstances, In re Patterson, 4 How. Prac. (N. Y.) 34.

¹⁵³ Hannum's Appeal, 9 Pa. St. 471.

¹⁵⁴ Joest v. Williams, 42 Ind. 565; McGuire v. Callahan, 19 Ind. 128. But in Berkley v. Cannon, 4 Rich. Law (S. C.) 136, a note, given while very drunk, for the purchase of a horse, was held void, leaving undecided the question of a right to recover for the value of the horse.

¹⁵⁵ "Where the right of action is grounded upon a specific distinct contract requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances,—in fact, the law makes the contract for the parties. Thus, * * * a tradesman who supplies a drunken man with necessities may recover the price of them, if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail." Pollock, C. B., in Gore v. Gibson, 13 Mees. & W. 625.

¹⁵⁶ Darby v. Cabanné, 1 Mo. App. 126. But the burden of proving that a

Action—Pleading—Evidence.

§ 264. Where a note is made by a drunkard before the appointment of a guardian, the action on it must be brought against him, and not against the guardian.¹⁵⁷ The defense of drunkenness should be specially pleaded,¹⁵⁸ although it has been held to be admissible under the general issue.¹⁵⁹ The fact of drunkenness and the degree of incapacity caused by it are for the jury to determine.¹⁶⁰ The burden of proof lies on the party alleging it as a defense;¹⁶¹ but, if insanity for such cause be once shown, the burden is shifted to the plaintiff to establish sanity at the time of the contract in question.¹⁶² The finding of an inquisition, as in the case of lunacy, is presumptive evidence to support the defense.¹⁶³ And it seems that a note, inadmissible as evidence of debt for want of a stamp, is admissible as evidence of the maker's condition at the time, in disproof of an allegation of drunkenness and fraud.¹⁶⁴ As with other defenses, where the fact of drunkenness is once established, the burden is thrown upon the holder of the paper to show himself a bona fide holder for value before maturity.¹⁶⁵

note given by a drunkard was for necessities rests on the party offering it. *Devin v. Scott*, 34 Ind. 67.

¹⁵⁷ *Coombs v. Janvier*, 31 N. J. Law, 240.

¹⁵⁸ *Byles, Bills*, 64; 1 *Daniel, Neg. Inst.* 220; *Gore v. Gibson*, 13 Mees. & W. 623.

¹⁵⁹ *Pitt v. Smith*, 3 Camp. 33.

¹⁶⁰ *Cummings v. Henry*, 10 Ind. 109.

¹⁶¹ *Burroughs v. Richman*, 13 N. J. Law, 233.

¹⁶² *Menkins v. Lightner*, 18 Ill. 282. But evidence that the maker of the note was a broken-down inebriate, with occasional fits of insanity, is not enough to shift the burden of proof. *Gardner v. Gardner*, 22 Wend. (N. Y.) 526.

¹⁶³ *McGinnis v. Com.*, 74 Pa. St. 245. But in *Devin v. Scott*, 34 Ind. 67, it was held to be conclusive evidence.

¹⁶⁴ *Gregory v. Fraser*, 3 Camp. 454.

¹⁶⁵ *Hale v. Brown*, 11 Ala. 87.

V. INFANTS.

- § 265. Disability of Infants—Foreign Statutes.
- 266. — Common Law.
- 267. Contracts for Benefit—Executed and Executory.
- 268. — In Trade.
- 269. — For Necessaries.
- 270. Commercial Paper—Infant Maker—Acceptor.
- 271. — Infant Indorser.
- 272. Defense of Infancy Personal—Estoppel.
- 273. Ratification—What Amounts to.
- 275. — Implied.
- 276. — Requisites of.
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Disability of Infants—Foreign Statutes.

§ 265. By the law merchant, as by the common law of England, infants are incapable of binding themselves by legal contract. This incapacity extends at common law, and by statute in most of the United States, to all persons under the age of 21 years. The minority of women ends, however, by the statutes of some states, at the age of 18 years.¹⁶⁶ Such contracts of infants as were formerly voidable at common law are now made void by the infants' relief act, passed in England in 1874.¹⁶⁷ By the Code Napoleon, and in the countries following its lead, bills of exchange drawn by minors, who are not traders, are void as to them, although the rights of

¹⁶⁶ ARKANSAS (Sand. & H. Dig. § 3567); IOWA (Rev. Code, § 3188).

¹⁶⁷ 37 & 38 Vict. c. 62. This act provides as follows (section 1): "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be void: provided, always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable." Section 2: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

other parties relative to one another are saved.¹⁶⁸ By the German exchange law an infant's power to make a bill or note is, in general, co-extensive with his power to make other binding contracts. This power exists for the most part only where the infant contracts as a merchant.¹⁶⁹ In Venezuela such bills are mere acknowledgments of debt, and not subject to the rules of the *lex mercatoria*, unless the infant have been declared competent to engage in trade.¹⁷⁰

Disability at Common Law.

§ 266. The rule of the English common law is that infants' contracts are, in general, not absolutely void, but only voidable, and therefore capable of ratification.¹⁷¹ This is true even of contracts which are not for necessities.¹⁷² Thus, an exchange of horses by an infant is voidable, and he may recover the price agreed on.¹⁷³ So, if a horse purchased by him is retained by his administrator, the voidable contract is ratified, and the infant's estate liable.¹⁷⁴ So, a seaman's contract is voidable only, and he may recover a quantum meruit.¹⁷⁵ The following contracts by an infant have, in like manner, been held to be voidable only and capable of ratification: A chattel mortgage;¹⁷⁶ an undertaking for a stay of execution;¹⁷⁷

¹⁶⁸ FRANCE (Code Com. art. 114); GREECE (Code Com. art. 114); HAYTI (Code Com. art. 112); ITALY (Code Com. art. 200); MONACO (Code Com. art. 104); ROUMANIA (Code Com.); SERVIA (Code Com. art. 79); SAN DOMINGO (Code Nap. art. 114). In the Servian Code the liability of an infant for benefit actually received is reserved, although his bill of exchange is declared void.

¹⁶⁹ Thöl, Wechselrecht, 108. In some cases, however, the consent of the minor's guardian is required. *Id.*

¹⁷⁰ VENEZUELA (Code Com. art. 8).

¹⁷¹ *Chit. Bills*, 27; *Warwick v. Bruce*, 2 Maule & S. 205, 6 Taunt. 118. See, too, *Byles, Bills*, 59; *Story, Prom. Notes*, § 67; 1 *Pars. Notes & B.* 67; *Tucker v. Moreland*, 10 Pet. 59; *Rogers v. Hurd*, 4 Day (Conn.) 57; *Woolston v. King*, 3 N. J. Law, 1049; *Moses v. Stevens*, 2 Pick. (Mass.) 332.

¹⁷² *Hands v. Slaney*, 8 Term R. 578.

¹⁷³ *Grace v. Hale*, 2 Humph. (Tenn.) 27.

¹⁷⁴ *Shropshire v. Burns*, 46 Ala. 108.

¹⁷⁵ *Vent v. Osgood*, 19 Pick. (Mass.) 572.

¹⁷⁶ *Chapin v. Shafer*, 49 N. Y. 407.

¹⁷⁷ *Harner v. Dipple*, 31 Ohio St. 72.

a marriage contract;¹⁷⁸ an account stated;¹⁷⁹ and even a deed reciting a valuable consideration received.¹⁸⁰

Contracts Beneficial or Otherwise—Executory or Executed.

§ 267. The true distinction is probably between contracts which are for the advantage of the infant and those which are not, the latter being held to be void and the former only voidable.¹⁸¹ Thus, a note given by an infant for the debt of another is void¹⁸² although it has been held that even such a note may be ratified.¹⁸³ On the other hand, a contract for the hire of a servant, which has been for the benefit of the minor, will be binding upon him.¹⁸⁴ And it has been held that a contract which has been made for the advantage of the infant may be enforced against him in equity.¹⁸⁵ But if the contract be merely executory, e. g. a sale of goods to be delivered, it will not be binding on the infant without such delivery made.¹⁸⁶

Contracts in Trade.

§ 268. Where an infant is engaged in trade, either alone or as member of a firm, his contract in such business is voidable only.¹⁸⁷

¹⁷⁸ Willard v. Stone, 7 Cow. (N. Y.) 22.

¹⁷⁹ Williams v. Moor, 11 Mees. & W. 256.

¹⁸⁰ Bool v. Mix, 17 Wend. (N. Y.) 119; Wheaton v. East, 5 Yerg. (Tenn.) 41; Bozeman v. Browning, 31 Ark. 364. But see Porch v. Fries, 18 N. J. Eq. 204.

¹⁸¹ Zouch v. Parsons, 3 Burrows, 1794, cited by Lord Eldon in 17 Ves. 383; Allen v. Allen, 2 Dru. & War. 307; Rogers v. Hurd, 4 Day (Conn.) 57.

¹⁸² Maples v. Wightman, 4 Conn. 376; Wentworth v. Wentworth, 5 N. H. 410; Fetrow v. Wiseman, 40 Ind. 148; Williams v. Harrison, 11 S. C. 412.

¹⁸³ Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, *supra*; Williams v. Harrison, *supra*.

¹⁸⁴ Wood v. Fenwick, 10 Mees. & W. 195.

¹⁸⁵ Radford v. Westcott, 1 Desaus. Eq. (S. C.) 596.

¹⁸⁶ Fonda v. Van Horne, 15 Wend. (N. Y.) 635.

¹⁸⁷ Hunt v. Massey, 5 Barn. & Adol. 902, 3 Nev. & M. 109. So, too, a note for goods purchased for business purposes. Wright v. Steele, 2 N. H. 51; Thing v. Libbey, 16 Me. 55; Booth v. McFarland, 2 La. Ann. 398; Skinner v. Maxwell, 66 N. C. 45. But see, *contra*, as to an infant's business note, Van Winkle v. Ketcham, 3 Caines (N. Y.) 323; Houston v. Cooper,

And even his note given for goods purchased by his firm has been held to be voidable only.¹⁸⁸ An infant is not, however, liable in general on a partnership note given by the firm to which he belongs.¹⁸⁹ As to the infant partner, such note is voidable, and it seems that, if it be a joint note, the other partners cannot be held upon it without him, until it is disaffirmed by him.¹⁹⁰ If, however, the infant has failed to give public notice of his leaving the firm, he will be liable, after coming of age, upon firm notes given after that time, as in the case of an adult retiring partner.¹⁹¹

Contracts for Necessaries.

§ 269. An exception to the rule exonerating infants from liability is made by the law in favor of contracts for necessities. But what are necessities is a question of fact for the jury.¹⁹² Where one who sells goods to an infant seeks to recover for them as necessities, he assumes the burden of proving them such.¹⁹³ Among many things held under the circumstances of the individual case to be necessities for an infant are a miner's outfit,¹⁹⁴ solitaire diamonds,¹⁹⁵ board,¹⁹⁶ funeral expenses for husband;¹⁹⁷ while, on the contrary, a horse and saddle,¹⁹⁸ horse hire for a minor student at Oxford,¹⁹⁹ and even college tuition and room rent,²⁰⁰ have been held not to be necessities. The circumstances of each particular case

3 N. J. Law, 866; and as to other business contracts, e. g. a sale of goods, *Latt v. Booth*, 3 Car. & K. 292.

¹⁸⁸ *Minock v. Shortridge*, 21 Mich. 304.

¹⁸⁹ *Conklin v. Ogborh*, 7 Ind. 553; *James v. Alford*, 15 La. Ann. 506; *Neal v. Berry*, 86 Me. 193.

¹⁹⁰ *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478.

¹⁹¹ *Goode v. Harrison*, 5 Barn. & Ald. 147.

¹⁹² *Ryder v. Wombwell*, L. R. 4 Exch. 32; *Bonney v. Reardin*, 6 Bush (Ky.) 34.

¹⁹³ *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419.

¹⁹⁴ *Breed v. Judd*, 1 Gray (Mass.) 455.

¹⁹⁵ *Ryder v. Wombwell*, L. R. 4 Exch. 32.

¹⁹⁶ *Bradley v. Pratt*, 23 Vt. 378. And a note given for it was held valid.

Id.

¹⁹⁷ *Chapple v. Cooper*, 13 Mees. & W. 252.

¹⁹⁸ *Beeler v. Young*, 1 Bibb (Ky.) 519.

¹⁹⁹ *Harrison v. Fane*, 1 Man. & G. 550.

²⁰⁰ *Middlebury College v. Chandler*, 16 Vt. 683.

must be left to determine the question as one of fact only in that case.

But, if the infant is provided with necessaries, he will not be liable for goods which might otherwise be held necessary for him.²⁰¹ So, too, if he is living with his parents,²⁰² or has left his father's house voluntarily,²⁰³ or has purchased the goods without the consent of his guardian, while remaining under his charge,²⁰⁴ he will not be liable for them as necessaries. Nor will he be liable for food and clothing furnished him under an indenture of apprenticeship which is void for want of his guardian's consent.²⁰⁵ Moreover, an infant is not liable for money borrowed, although he has spent it on necessaries.²⁰⁶ But a debt so incurred will be included under a general provision in his will for the payment of his debts.²⁰⁷ In like manner, an account stated by an infant for necessaries will not be binding upon him, although, as we have seen, it may afterwards be ratified by him.²⁰⁸ So, a bond with penalty and interest given by an infant is of no effect, and, it is said, cannot be ratified;²⁰⁹ although, it seems, he may give a bond without penalty or interest for the exact sum due for necessaries furnished him.²¹⁰

²⁰¹ Byles, Bills, 59; 1 Daniel, Neg. Inst. 227; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; *Perrin v. Wilson*, 10 Mo. 451.

²⁰² *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Connolly v. Hull*, 3 McCord (S. C.) 6; *Jones v. Colvin*, 1 McMul. (S. C.) 14.

²⁰³ *Angel v. McLellan*, 16 Mass. 28.

²⁰⁴ *Watson v. Hensel*, 7 Watts (Pa.) 344. Nor will the guardian himself be liable in such case. *Elrod v. Myers*, 2 Head (Tenn.) 33. But a guardian, who has assented to a sale of goods to his ward, cannot avoid it. *Oliver v. Houdlet*, 13 Mass. 237.

²⁰⁵ *Guthrie v. Murphy*, 4 Watts (Pa.) 80.

²⁰⁶ *Darby v. Boucher*, 1 Salk. 279.

²⁰⁷ *Marlow v. Pitfeild*, 1 P. Wms. 558.

²⁰⁸ Byles, Bills, 61; Chit. Bills, 26; 1 Edw. Bills & N. § 32; *Trueman v. Hurst*, 1 Term R. 40; *Bartlett v. Emery*, Id. 42, note; *Ingledew v. Douglas*, 2 Starkie, 36.

²⁰⁹ *Story*, Prom. Notes, § 77; *Baylis v. Dineley*, 3 Manle & S. 477; *Hunter v. Agnew*, 1 Fox & S. 15; *Russel v. Lee*, 1 Lev. 86; *Fisher v. Mowbray*, 8 East, 330.

²¹⁰ Byles, Bills, 59; Chit. Bills, 26; 1 Daniel, Neg. Inst. 227; 1 Pars. Notes & B. 68; *Russel v. Lee*, 1 Lev. 86; *Trueman v. Hurst*, 1 Term R. 41.

Commercial Paper—Infant Maker—Acceptor.

§ 270. The bill or note of an infant, like his other contracts, is, in general, voidable only, and may be ratified.²¹¹ On the other hand, a court of equity will assume jurisdiction for the purpose of setting aside, on the ground of fraud, a note made after the maker's attaining his majority, for extravagant supplies sold to him while an infant.²¹² But a note given by an infant for the exact value of necessities supplied to him will support a recovery,²¹³ although it may be doubted whether the note in such cases is more than *prima facie* evidence of the purchase made and the value of the goods.²¹⁴ But, if the note be ratified by the infant after attaining full age, there can be no doubt of its legal force.²¹⁵ Such a note has, however, been held valid without ratification, so as to render the maker liable to a surety paying the same.²¹⁶

The general rule, nevertheless, remains unaltered, that without ratification an infant is not liable on his note as such, although given for necessities;²¹⁷ while some cases hold such a note to be void,²¹⁸ leaving unaffected the payee's right to recover the value of

²¹¹ Byles, Bills, 60; Chit. Bills, 27; 1 Daniel, Neg. Inst. 226; Reed v. Batchelder, 1 Mete. (Mass.) 559; Everson v. Carpenter, 17 Wend. (N. Y.) 419; Hodges v. Hunt, 22 Barb. (N. Y.) 150; Stokes v. Brown, 3 Pin. (Wis.) 311; Fant v. Cathcart, 8 Ala. 725; Best v. Givens, 3 B. Mon. (Ky.) 72; Aldrich v. Grimes, 10 N. H. 194; Boody v. McKenney, 23 Me. 517; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Alsop v. Todd, 2 Root (Conn.) 109; Stern v. Freeman, 4 Mete. (Ky.) 309; Trustees of La Grange Inst. v. Anderson, 63 Ind. 367; Wright v. Steele, 2 N. H. 51; Thing v. Libbey, 16 Me. 55.

²¹² Brooke v. Gally, 2 Atk. 34.

²¹³ Bradley v. Pratt, 23 Vt. 378; Dubose v. Wheddon, 4 McCord (S. C.) 221. But see Fenton v. White, 4 N. J. Law, 100. And see, *contra*, Ayers v. Burns, 87 Ind. 245, as to recovery pending infancy.

²¹⁴ Morton v. Steward, 5 Ill. App. 533.

²¹⁵ Lawson v. Lovejoy, 8 Me. 405; Cheshire v. Barrett, 4 McCord (S. C.) 241; Bobo v. Hansell, 2 Bailey (S. C.) 114.

²¹⁶ Haines' Adm'r v. Terrant, 2 Hill (S. C.) 400; Conn v. Coburn, 7 N. H. 372.

²¹⁷ Even though such note has not been disaffirmed on the infant's coming of age. Buzzell v. Bennett, 2 Cal. 101; Dunlap v. Hales, 47 N. C. 381.

²¹⁸ Swasey v. Vanderheyden's Adm'r, 10 Johns. (N. Y.) 33; Henderson v. Fox, 5 Ind. 489; Fenton v. White, 4 N. J. Law, 100; Morton v. Steward, 5 Ill. App. 533.

the necessities furnished.²¹⁹ And in such case a bill of exchange given for necessities has been canceled by a court of equity and decree rendered for the payment of the reasonable value.²²⁰ So, the collection of a note made by an infant has been restrained by injunction.²²¹ It has been held, however, that such a note given for necessities is admissible evidence, under the common counts, to sustain a recovery for the value of the goods furnished.²²²

On the same principle, the acceptance of a bill of exchange by an infant is invalid,²²³ although he would be liable on an acceptance, given after attaining the age of 21 years, upon a bill drawn on him during his infancy.²²⁴

Infant Indorser.

§ 271. In like manner, the indorsement of an infant is voidable.²²⁵ But, notwithstanding the infancy of the indorser, the maker, drawer, and acceptor remain liable.²²⁶ And this is true, in general, not only as to infancy, but upon all other questions of the indorser's capacity. The maker of a note, or the drawer of a bill of exchange, cannot

²¹⁹ Earle v. Reed, 10 Metc. (Mass.) 387.

²²⁰ McMinn v. Richmonds, 6 Yerg. (Tenn.) 9.

²²¹ Parker v. Baker, 1 Clarke, Ch. (N. Y.) 136.

²²² Rundel v. Keeler, 7 Watts (Pa.) 237.

²²³ Williams v. Harrison, 3 Salk. 197; Williamson v. Watts, 1 Camp. 552. But see Jones v. Darch, 4 Price, 300. "If an infant accepted a bill of exchange or gave a promissory note for the price of necessities supplied to him, and he were sued upon the bill or the note by a man who had supplied the necessities, and the plaintiff relied on the bill or note, and gave no evidence of the supply of necessities, the infant would not be liable. He is not liable upon a bill of exchange or a promissory note under any circumstances." Esher, M. R., in *Re Soltykoff* [1891] 1 Q. B. 413. And a ratification of such an acceptance after action brought will not support the action. *Thornton v. Illingworth*, 2 Barn. & C. 824. But an acceptance may be ratified before action brought. *Hunt v. Massey*, 5 Barn. & Adol. 902, 3 Nev. & M. 109.

²²⁴ Byles, Bills, 61; Chit. Bills, 26; *Stevens v. Jackson*, 4 Camp. 164.

²²⁵ *Semple v. Morrison*, 7 T. B. Mon. (Ky.) 298; *Roach v. Woodall*, 91 Tenn. 206, 18 S. W. 407.

²²⁶ *Taylor v. Croker*, 4 Esp. 187; *Grey v. Cooper*, 1 Selw. N. P. 302, 3 Doug. 65; *Nightingale v. Withington*, 15 Mass. 272; *Frazier v. Massey*, 14 Ind. 382; *Hardy v. Waters*, 38 Me. 450; *Hastings v. Dollardhide*, 24 Cal. 195.

question the payee's capacity to indorse it.²²⁷ If, however, the payee's infancy is known both to his indorsee and to the maker of the note, payment by the latter to the indorsee will be no defense to an action brought on the note by the payee's guardian.²²⁸ But if, on the other hand, the note was transferred without such notice to the indorsee, payment to the father of the infant payee would constitute no defense to an action by the indorsee.²²⁹ If, indeed, the indorsement of the infant and the note to him have been rescinded, and a new note given by the maker of the original note to the father of the infant payee in consideration of discharge from liability on the old note, it will bar a recovery on the first note.²³⁰

By statute, in some of the United States, indorsement by an infant passes the property without creating personal liability.²³¹

Defense of Infancy—A Personal Privilege—Estoppel.

§ 272. The privilege of avoiding an infant's note or indorsement for want of capacity belongs only to him and to his personal representatives.²³² And an infant is not estopped from setting up such defense by reason of having made false representations as to his

²²⁷ On account of bankruptcy, *Drayton v. Dale*, 2 Barn. & C. 293; *Pitt v. Chappelow*, 8 Mees. & W. 616; or want of authority in a corporation payee, *Halifax v. Lyle*, 3 Exch. 446; or want of compliance with the law of a foreign country, where the transfer was made, *Lebel v. Tucker*, 8 Best & S. 833. But see, contra, as to maker's right to set up in his defense the indorsee's insanity, *Burke v. Allen*, 29 N. H. 106.

²²⁸ *Briggs v. McCabe*, 27 Ind. 327. And in such case the declaration need not aver a disaffirmance by the infant before such payment. *Id.*

²²⁹ *Nightingale v. Withington*, 15 Mass. 272.

²³⁰ *Willis v. Twambly*, 13 Mass. 204.

²³¹ Negotiable Instrument Law in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 22), NEW YORK and MARYLAND (§ 41).

²³² *Hastings v. Dollarhide*, 24 Cal. 195. The defense cannot be set up by a co-maker. *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Howard v. Simpkins*, 70 Ga. 322. And a co-maker, sued with an infant, will be liable as a sole maker on discontinuance of the suit as to the infant. *Taylor v. Dansby*, 42 Mich. 82, 3 N. W. 267; *Rohrer v. Morningstar*, 18 Ohio, 579. So, a special partner cannot set up the infancy of a member of the firm against a partnership note which has not been disaffirmed by the infant. *Continental Nat. Bank v. Strauss*, 137 N. Y. 148, 32 N. E. 1066.

age.²³³ So, a note signed, "A. B., Widow," will not estop the maker from showing her coverture in defense.²³⁴ Nor is a married woman liable, on a note given by her, for her false representations in the nature of a warranty of her capacity.²³⁵ But an infant who has obtained a loan through false representations as to his age, has been held liable in equity, so far as to render the debt contracted provable in bankruptcy.²³⁶ And, in Iowa, an infant is made liable by statute for his false representations as to his age.²³⁷

It follows, from the principle above laid down as to an infant's estoppels, that he cannot be rendered liable in such a case for his contracts, entered into under fraudulent representations as to his age, by merely changing the form of remedy sought into an action for fraud or tort.²³⁸ If, however, the tort is distinct from all question of contract, he is liable as in other cases of tort.²³⁹ Thus, he would be liable for retaining a deposit of stakes made with him on an illegal wager contract.²⁴⁰ And he might, in a proper case, be

²³³ *Johnson v. Pie*, 1 Keb. 905, 1 Lev. 169; *Manby v. Scott*, 1 Sid. 109; *Jennings v. Rundall*, 8 Term R. 335; *Bartlett v. Wells*, 1 Best & S. 836; *Fitts v. Hall*, 9 N. H. 441; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127. And such false representations cannot serve as matter for replication, at law or in equity, to a plea of infancy. *Bartlett v. Wells*, *supra*.

²³⁴ *Cannam v. Farmer*, 3 Exch. 698.

²³⁵ *Wright v. Leonard*, 11 C. B. (N. S.) 258.

²³⁶ *Ex parte Unity Banking Ass'n*, 3 De Gex & J. 63.

²³⁷ Iowa Code renders an infant liable on all contracts not disaffirmed within a reasonable time (section 3189), and provides (section 3190) that "no contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting." And it is not necessary, under this statute, that the debt should have been contracted in the minor's business. *Jaques v. Sax*, 39 Iowa, 367. If, however, the other contracting party knew of the minor's infancy, the infant is not liable on the contract. *Beller v. Marchant*, 30 Iowa, 350.

²³⁸ *Grove v. Nevill*, 1 Keb. 778; *People v. Kendall*, 25 Wend. (N. Y.) 399; *Brown v. Dunham*, 1 Root (Conn.) 272; *Wilt v. Welsh*, 6 Watts (Pa.) 9; *West v. Moore*, 14 Vt. 447; *Morrill v. Aden*, 19 Vt. 505; *Vasse v. Smith*, 6 Cranch. 226; *Fitts v. Hall*, 9 N. H. 441; *Heath v. Mahoney*, 7 Hun, 100.

²³⁹ *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Vasse v. Smith*, 6 Cranch, 226; *Fitts v. Hall*, 9 N. H. 441; *Towne v. Wiley*, 23 Vt. 355; *Nelson v. Stocker*, 23 Law J. Ch. 760, 4 De Gex & J. 458.

²⁴⁰ *Lewis v. Littlefield*, 15 Me. 233.

held criminally for his wrongful act or representation.²⁴¹ So, he would be liable on his note given in settlement of damages for wrongfully overdriving a horse,²⁴² or in compromise of a bastardy proceeding,²⁴³ but not on a note given in settlement of an award for a tort committed by him.²⁴⁴

Ratification—What Amounts to.

§ 273. If a person, after attaining full age, promise expressly to pay a liability contracted by him while a minor, this will amount to a ratification of it.²⁴⁵ And he may in this way ratify a note or bill made during his infancy, but the ratifying promise must be express.²⁴⁶ In the language of Chief Justice Savage: "A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed. There should be a promise to a party in interest or his agent, or, at least, an explicit admission of an existing liability from which a promise may be implied."²⁴⁷ A mere declaration of intention is not sufficient for this purpose,²⁴⁸ nor a mere acknowledgment, or a promise after action brought.²⁴⁹ Where there is a sufficient new promise, the action properly lies on the latter, and not on the original, note.²⁵⁰ And such promise may be only to pay a part, and would then amount, like a part payment, only to a ratification *pro tanto*.²⁵¹ So, where

²⁴¹ *People v. Kendall*, 25 Wend. (N. Y.) 399.

²⁴² *Ray v. Tubbs*, 50 Vt. 688.

²⁴³ *Gavin v. Burton*, 8 Ind. 69.

²⁴⁴ *Hanks v. Deal*, 3 McCord (S. C.) 257.

²⁴⁵ *Ackerman v. Runyon*, 1 Hilt. (N. Y.) 169; *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541.

²⁴⁶ *Chit. Bills*, 27; *Wilcox v. Roath*, 12 Conn. 550; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301; *Conklin v. Ogborn*, 7 Ind. 553; *Alexander v. Hutcheson*, 2 Hawks (N. C.) 535; *Petty v. Roberts*, 7 Bush (Ky.) 410; *Baker v. Kennett*, 54 Mo. 82.

²⁴⁷ *Goodsell v. Myers*, 3 Wend. (N. Y.) 479. So, too, *Hoit v. Underhill*, 9 N. H. 436; *Bigelow v. Grannis*, 2 Hill (N. Y.) 120.

²⁴⁸ *Orvis v. Kimball*, 3 N. H. 314.

²⁴⁹ *Thrupp v. Fielder*, 2 Esp. 628; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Proctor v. Sears*, 4 Allen (Mass.) 95; *Hinely v. Margaritz*, 3 Pa. St. 428; *Conklin v. Ogborn*, 7 Ind. 553; *Ring v. Jamison*, 2 Mo. App. 584.

²⁵⁰ *Hodges v. Hunt*, 22 Barb. (N. Y.) 150.

²⁵¹ *Hinely v. Margaritz*, 3 Pa. St. 428.

a joint note is paid in part by one of the makers, who is an adult, and the other, an infant, promises, after attaining his full age, to pay the balance, this will be a ratification of the note.²⁵² So, a letter relating to an award of dower, and inclosing a payment with the words, "In part towards your right of dower; the remainder I shall forward you in a few days,"—amounts to a ratification of the award.²⁵³ So, an agreement, after attaining the age of 21, to pay a note in work or money, is sufficient ratification,²⁵⁴ or to pay "when I return from this voyage."²⁵⁵ So, too, the following: "I am not prepared for you, but will, without neglect, remit you in a short time,"—naming neither amount nor payee.²⁵⁶ So, an agreement that a bill of exchange should be paid shortly;²⁵⁷ or that he "would endeavor to procure the money and send it to him."²⁵⁸ But a promise to pay "when he could" is conditional, and requires proof of the promisor's ability to pay.²⁵⁹

§ 274. And, in general, if the new promise fall short of an absolute promise to pay, it will not be equivalent to a ratification. This was held in the case of a letter saying: "If they will not accept of the proposition, I suppose I will have to pay for them, but I shall do so at my convenience, as it will be nothing less than a free gift on my part, the negroes being entirely worthless."²⁶⁰ So, a letter saying: "I consider it worthy my attention, but not my first attention. As soon as I can settle my business, I will give it the

²⁵² Peirce v. Tobey, 5 Metc. (Mass.) 168.

²⁵³ Barnaby v. Barnaby, 1 Pick. (Mass.) 221.

²⁵⁴ Elgerly v. Shaw, 25 N. H. 514.

²⁵⁵ Martin v. Mayo, 10 Mass. 137. And this was held not to be a promise conditioned on his safe return, but his estate was held liable notwithstanding his death at sea.

²⁵⁶ Hartley v. Wharton, 11 Adol. & E. 934.

²⁵⁷ Harris v. Wall, 1 Exch. 122. In this case the rule was laid down by Baron Rolfe that "any act or declaration, which recognizes the existence of the promise as binding, is a ratification. * * * Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification."

²⁵⁸ Whitney v. Dutch, 14 Mass. 457.

²⁵⁹ Cole v. Saxby, 3 Esp. 159; Thompson v. Lay, 4 Pick. (Mass.) 48; Ever-son v. Carpenter, 17 Wend. (N. Y.) 419; Bresee v. Stanly, 119 N. C. 278, 25 S. E. 870; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245.

²⁶⁰ Dunlap v. Hales, 47 N. C. 381.

attention due to it.”²⁶¹ So, it is not a sufficient ratification of an infant’s note to make a will after coming of age directing the payment of all his just debts;²⁶² or to say he would pay “as fast as he got able”;²⁶³ or that the plaintiff “would get his pay”;²⁶⁴ or to tell the holder of an accommodation acceptance to “make yourself easy about it, as I will take care that it is paid”;²⁶⁵ or to promise, while under arrest, to pay part of a note, if released.²⁶⁶

But the employment of an agent to find a note and pay it has been held to be a ratification, although the agent did not pay it.²⁶⁷ So, the delivery of corn in part payment,²⁶⁸ or retaining, for an unreasonable time, goods for which the note was given,²⁶⁹ and selling part of them.²⁷⁰ So, if an infant receive a note in payment for work done by him, and retain it eight months after coming of age, he will be deemed to have ratified the payment and discharged the original debtor.²⁷¹ In like manner, if the purchaser of goods die, while still under age, after giving his note for them, the retention of the goods by his administrator will be a ratification of the note.²⁷² So, if money due to an infant be paid to his guardian, and he receive it from the guardian after arriving at full age, it will ratify the payment.²⁷³

²⁶¹ Wilcox v. Roath, 12 Conn. 550.

²⁶² Smith v. Mayo, 9 Mass. 62.

²⁶³ Chandler v. Glover, 32 Pa. St. 509.

²⁶⁴ Hale v. Gerrish, 8 N. H. 374.

²⁶⁵ Mawson v. Blane, 10 Exch. 206; Baron Parke in this case (page 210). defining “ratification” to be “an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant.”

²⁶⁶ Martin v. Byrom, Dud. (Ga.) 203.

²⁶⁷ Orvis v. Kimball, 3 N. H. 314.

²⁶⁸ Stokes v. Brown, 3 Pin. (Wis.) 311.

²⁶⁹ Boyden v. Boyden, 9 Mete. (Mass.) 519; Booth v. McFarland, 2 La. Ann. 398.

²⁷⁰ Boyden v. Boyden, *supra*.

²⁷¹ Delano v. Blake, 11 Wend. (N. Y.) 86.

²⁷² Shropshire v. Burns, 46 Ala. 108.

²⁷³ Jones v. Bank, 8 N. Y. 228; Pursley v. Hays, 17 Iowa, 310.

Ratification—Implied.

§ 275. Ratification may be implied as well as express. The mere acquiescence of the drawer of an order, without any disaffirmance for several years after coming of age, and after receiving notice of nonpayment, will amount to a ratification.²⁷⁴ So, failure, for an unreasonable time after coming of age, to disaffirm a marriage settlement, raises a presumption that it has been ratified;²⁷⁵ or, as we have seen, retaining the goods, for which the note was given, especially after return of them has been demanded.²⁷⁶

But a subsequent promise to pay a note, made while under age, is no waiver of errors in a judgment rendered on the note.²⁷⁷ Nor is it, in England, a ratification under the infants' relief act to suffer a judgment by default on the note.²⁷⁸

Acquiescence, however, for several years in a sale of land made during infancy,²⁷⁹ or continuing in possession of land purchased during infancy and expressly promising to pay a note given for it,²⁸⁰ or continuing in possession and making a sale of it after coming of age,²⁸¹ is an act of ratification; as, also, taking a property in exchange and retaining it 10 years;²⁸² giving a note for land purchased, and mortgaging the land after coming of age;²⁸³ or occupying and improving it after coming of age and offering it for sale.²⁸⁴ But remaining in possession for six weeks after coming of age,²⁸⁵

²⁷⁴ *Thomasson v. Boyd*, 13 Ala. 419.

²⁷⁵ *Jones v. Butler*, 30 Barb. (N. Y.) 641.

²⁷⁶ *Aldrich v. Grimes*, 10 N. H. 194; *Philpot v. Manufacturing Co.*, 18 Neb. 54, 24 N. W. 428.

²⁷⁷ *Goodridge v. Ross*, 6 Metc. (Mass.) 487.

²⁷⁸ *Ex parte Kibble*, 10 Ch. App. 373. But where an infant accepted a deed of land, containing a clause assuming the payment of a mortgage upon it, suffering a foreclosure without defense has been held in New York to raise the presumption of a ratification. *Flinn v. Powers*, 36 How. Prac. (N. Y.) 289.

²⁷⁹ *Belton v. Briggs*, 4 Desaus. Eq. (S. C.) 465.

²⁸⁰ *Armfield v. Tate*, 29 N. C. 258.

²⁸¹ *Hubbard v. Cummings*, 1 Me. 11.

²⁸² *Deason v. Boyd*, 1 Dana (Ky.) 45.

²⁸³ *Montgomery v. Witbeck*, 23 Minn. 173.

²⁸⁴ *Robbins v. Eaton*, 10 N. H. 561.

²⁸⁵ *Petty v. Roberts*, 7 Bush (Ky.) 410.

or remaining in possession and submitting to arbitration,²⁸⁶ is not sufficient evidence of ratification.

Ratification—Requisites—Writing—Knowledge—Full Age.

§ 276. At common law, as will be inferred from what has been already said, ratification of an infant's note or other contract need not be in writing. And even his bond may be ratified by a parol promise.²⁸⁷ But it was provided in Great Britain, in 1828, by Lord Tenterden's act, that no action should lie "upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy," unless it be made in writing and signed by the party to be bound by it. And this law has been followed by similar statutes in several of the United States.²⁸⁸

Moreover, as in other cases, knowledge of the circumstances and of a party's existing freedom from liability are necessary to constitute a good ratification.²⁸⁹ Such knowledge will, however, in general be presumed.²⁹⁰

If the ratification is conditional, the performance of the condition must be proved by the holder.²⁹¹

A proper ratification of an infant's contract cannot take place until he comes of age;²⁹² although it has been held that, as to personal property, an infant may disaffirm his contract during his mi-

²⁸⁶ *Benham v. Bishop*, 9 Conn. 330.

²⁸⁷ *West v. Penny*, 16 Ala. 186; *Reed v. Boshears*, 4 Sneed (Tenn.) 118.

²⁸⁸ 9 Geo. IV. c. 14. The law is the same, substantially, in ARKANSAS (*Sand & H. Dig.* § 3482); KENTUCKY (Ky. St. § 470; *Stern v. Freeman*, 4 Metc. 309); MAINE (Rev. St. c. 111, § 2); MISSOURI (Rev. St. § 5189); NEW JERSEY (Gen. St. p. 1604, § 7); VIRGINIA (Code, § 2840).

²⁸⁹ *Kay v. Smith*, 21 Beav. 522. Especially where the infant was only a surety. *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305. "In the case of an infant who was merely surety, where the contract is absolutely void, it would appear to me to require a confirmation when of full age, with an intention of confirming, and with the knowledge that the act would be void unless he confirmed it." *Duncan, J.*, in above case (page 311). But see, as to the knowledge necessary in such case, *Morse v. Wheeler*, 4 Allen (Mass.) 570.

²⁹⁰ *Taft v. Sergeant*, 18 Barb. (N. Y.) 320.

²⁹¹ *Peacock v. Binder*, 57 N. J. Law, 374, 31 Atl. 215.

²⁹² *Dunton v. Brown*, 31 Mich. 182; *Corey v. Burton*, 32 Mich. 30.

nority,²⁹³ especially if it be an executory contract.²⁹⁴ And it has been held that the manner of ratification should be averred in pleading.²⁹⁵ And the ratification should be within a reasonable time after the infant comes of age,²⁹⁶ and may be presumed, especially in the case of a continuing contract, if there be no disaffirmance within such reasonable time.²⁹⁷

Disaffirmance—Return of Consideration Necessary.

§ 277. An infant, on arriving at his majority, cannot disaffirm his contract without returning the consideration received by him, if that is possible.²⁹⁸ And this is expressly provided by statute in Iowa.²⁹⁹ If an infant has received goods in payment for work done by him, he must, on disaffirming the contract, give credit to the full value of the goods received.³⁰⁰ So, if he disaffirms a note given by him for the purchase of property, the proceeds of the property sold must

²⁹³ *Stafford v. Roof*, 9 Cow. (N. Y.) 626, reversing 7 Cow. (N. Y.) 179; *Hoyt v. Wilkinson*, 57 Vt. 404.

²⁹⁴ *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 429.

²⁹⁵ *Williams v. Moor*, 11 Mees. & W. 256.

²⁹⁶ *Thompson v. Strickland*, 52 Miss. 574.

²⁹⁷ This has been held in case of a partnership, *Goode v. Harrison*, 5 Barn. & Ald. 147; or partnership lease, *Holmes v. Blogg*, 8 Taunt. 35; or of a note for purchase money of land conveyed, *Richardson v. Boright*, 9 Vt. 368.

²⁹⁸ *Lynde v. Budd*, 2 Paige (N. Y.) 191; *Hillyer v. Bennett*, 3 Edw. Ch. (N. Y.) 222; *Kitchen v. Lee*, 11 Paige (N. Y.) 107; *Ottman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Badger v. Phinney*, 15 Mass. 359; *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, Id. 417; *Gray v. Lessington*, 2 Bosw. (N. Y.) 257; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Heath v. West*, 28 N. H. 101. But see, contra, *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88, as to disaffirmance by infant wife of joint note given with her husband, where the consideration was paid to him.

²⁹⁹ IOWA (Code, § 3189): "A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after attaining his majority."

³⁰⁰ *Taft v. Pike*, 14 Vt. 405.

be paid to the holder of the note.³⁰¹ And if, in an exchange of property, that received by him is injured, no re-exchange can take place on his disaffirmance of the contract.³⁰² Nor could he retain the property received in exchange, and have an action of trover for that given by him.³⁰³

But it has been held that an offer to return the consideration received by an infant for his indorsement is not necessary to his disaffirmance.³⁰⁴ And where a contract for labor and wages has been executed and the wages paid, there can be no subsequent disaffirmance and recovery for additional value of the work performed.³⁰⁵ On the other hand, where work has been performed in payment for land conveyed to the infant, a recovery by him of the actual value of the work was afterwards allowed.³⁰⁶

And a contract, so far as it remains executory, e. g. for a partnership, may always be disaffirmed and money paid on it recovered.³⁰⁷ So, too, a contract which is usurious in its terms may be disaffirmed, and money paid on it recovered.³⁰⁸

Any act showing a clear purpose to disaffirm a contract will amount to a disaffirmance of it.³⁰⁹ Thus, a seaman's contract is disaffirmed by desertion;³¹⁰ a conveyance to an infant, by his remaining in possession of the land and conveying it after he comes of age.³¹¹

Action by Infant—Defense—Pleading.

§ 278. As a general rule, infancy creates no incapacity to receive a bill or note, or to sue upon it as payee or holder.³¹² And where

³⁰¹ *Strain v. Wright*, 7 Ga. 568.

³⁰² *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428.

³⁰³ *Farr v. Sumner*, 12 Vt. 28.

³⁰⁴ *Briggs v. McCabe*, 27 Ind. 327.

³⁰⁵ *Stone v. Dennison*, 13 Pick. (Mass.) 1.

³⁰⁶ *Medbury v. Watrous*, 7 Hill (N. Y.) 110, overruling *McCoy v. Huffman*, 8 Cow. (N. Y.) 84.

³⁰⁷ *Corpe v. Overton*, 10 Bing. 252.

³⁰⁸ *Millard v. Hewlett*, 19 Wend. (N. Y.) 301.

³⁰⁹ *Chapin v. Shafer*, 49 N. Y. 407.

³¹⁰ *Vent v. Osgood*, 19 Pick. (N. Y.) 572.

³¹¹ *Tucker v. Moreland*, 10 Pet. 59.

³¹² *Holliday v. Atkinson*, 5 Barn. & C. 501, 8 Dowl. & R. 163.

the holder is a firm, of which one partner is an infant, he must join with the others in an action brought by the firm.³¹³ And it is said, in like manner, that where the suit is against a firm on its acceptance, the infant's contract being only voidable, he must be joined.³¹⁴ The weight of authority seems, however, to sustain an action in such case against the adult parties alone.³¹⁵ And an action is plainly sustainable against the adult makers alone on a joint and several note executed by them and an infant maker.³¹⁶

Infancy is available as a defense on the infant's part against all holders,³¹⁷ and is admissible under a plea of non assumpsit, although the contrary has been held as to a plea of nil debet.³¹⁸ But other parties, e. g. a joint maker,³¹⁹ or subsequent indorser,³²⁰ cannot avail themselves of the defense, which is, as has been said, the personal privilege of the infant and his representatives.

³¹³ Teed v. Elworthy, 14 East, 210; Slocum v. Hooker, 13 Barb. (N. Y.) 536, reversing 12 Barb. (N. Y.) 563.

³¹⁴ Gibbs v. Merrill, 3 Taunt. 307.

³¹⁵ Byles, Bills, 62; Chit. Bills, 27; 1 Daniel, Neg. Inst. 237; Burgess v. Merrill, 4 Taunt. 468. So, on other than commercial contracts. Chandler v. Parkes, 3 Esp. 76; Jaffray v. Frebain, 5 Esp. 47.

³¹⁶ Hartness v. Thompson, 5 Johns. (N. Y.) 160.

³¹⁷ Patterson v. Cave, 61 Mo. 439.

³¹⁸ Young v. Bell, 1 Cranch, C. C. 342, Fed. Cas. No. 18,152.

³¹⁹ Reid v. Degener, 82 Ill. 508; Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066.

³²⁰ So held as to the analogous incapacity of coverture, Haly v. Lane, 2 Atk. 181; Prescott Bank v. Caverly, 7 Gray (Mass.) 217; Erwin v. Downs, 15 N. Y. 575; and also as to the authority of an agent, Burrill v. Smith, 7 Pick. (Mass.) 291.

CHAPTER IX.

CAPACITY—MARRIED WOMEN.

- I. COVERTURE AT COMMON LAW AND BY STATUTE.
 - II. WIFE'S SEPARATE ESTATE.
 - III. RIGHTS OF HUSBAND.
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I. COVERTURE AT COMMON LAW AND BY STATUTE.

- § 279. Common Law Modified by Statute.
- 280. Contracts as to Separate Estate.
- 281. Foreign Statutes—Lex Loci.
- 282. Liability on Bills and Notes—Estoppel.
- 283. Recent Statutes Affecting Wife's Bill or Note.
- 284. Commercial Paper for Property Purchased—Money Borrowed.
- 287. Extent of Incapacity—Pleading.
- 288. Indorsement by Wife.
- 289. Contracts as Surety—Accommodation.
- 291. — Recent Statutes.
- 292. Accommodation and Express Charge of Separate Estate.
- 293. Ratification after Husband's Death or Divorce.
- 294. Defense of Coverture—Bona Fide Holder—Personal.
- 295. Contracts While Living Separate.
- 296. Living Separate and with Separate Estate.
- 297. — As Sole Trader.
- 298. — Deserted by Husband.
- 299. Separate Estate and Sole Trader.

Common Law Modified by Statute.

§ 279. By the rules of the English common law, the person and property of the wife are to a great extent absorbed in that of the husband, and her power to make a contract legally binding upon herself or her property is suspended during her coverture. The severity of these rules is wanting in the Roman law, which prevails, with more or less modification, over the whole continent of Europe and in Central and South America.

The common law has, however, been greatly modified by statute, both in England and in the United States. In the United States

a wife is often made liable upon her contract by statute as a feme sole.¹ In New Jersey she may contract as an unmarried woman, except by accommodation indorsements and contracts of guaranty and suretyship.² In New Hampshire and Georgia the only exceptions to her power to make contracts are contracts as surety or guarantor for her husband.³ In Illinois she may contract as an unmarried woman, but cannot make a partnership contract without the consent of her husband, unless he has deserted her, or is idiotic or insane, or a prisoner in the penitentiary.⁴ In North Carolina she is only enabled to contract for personal necessities, or for the support of her family, or for the payment of antenuptial debts, unless spe-

¹ MAINE (Rev. St. c. 61, § 1, as to separate estate); MISSISSIPPI (Rev. Code, § 2289); NEW YORK (Pub. Laws 1884, c. 381). Such statutes are not retrospective. *Bryant v. Merrill*, 55 Me. 515; *Rogers v. Lynch* (W. Va.) 29 S. E. 507. But a note dated on the day the statute takes effect is prima facie valid. *Knisely v. Sampson*, 100 Ill. 574.

² NEW JERSEY (2 Gen. St. p. 2017, § 26). "Nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person." *Id.* It follows that in New Jersey a married woman cannot bind herself as surety by accepting a bill of exchange for the debt of a third person, *Cooley v. Barcroft*, 43 N. J. Law, 363; or signing or indorsing an accommodation note, *Vankirk v. Skillman*, 34 N. J. Law, 109; *Perkins v. Elliott*, 22 N. J. Eq. 127, 23 N. J. Eq. 526; *Peake v. Labaw*, 21 N. J. Eq. 269. And even in the hands of a bona fide holder for value such an instrument would not be binding upon her. *Cooley v. Barcroft*, *supra*. But she can make a note for a loan to herself, although intending to turn the money over to her husband. *Todd v. Bailey*, 58 N. J. Law, 10, 32 Atl. 696.

³ NEW HAMPSHIRE (Pub. St. c. 176, § 2); GEORGIA (Civ. Code, § 2488). Thus, a note given in Georgia by a married woman for property purchased by her is valid, and will sustain an action at law. *Davis v. Moorefield*, 40 Ga. 185. And a note made by him for the benefit of her business, and secured by mortgage on her land, may be treated as her debt incurred by her agent, *Maddox v. Wilson*, 91 Ga. 39, 16 S. E. 213. And, if the note was taken for the payee by his agent, the agent's knowledge will bind the payee. *Strickland v. Vance*, 99 Ga. 531, 27 S. E. 152. So, a consideration moving from husband to wife will take away the character of suretyship on her part, *Strickland v. Gray*, 98 Ga. 667, 27 S. E. 155; but not a mere recital of goods to be furnished to her, when the entire actual consideration went to the husband's business, *Smith v. Hardman*, 99 Ga. 381, 27 S. E. 731. Even as a free trader she cannot bind herself by an accommodation acceptance, *Madden v. Blain*, 86 Ga. 780, 13 S. E. 128.

⁴ ILLINOIS (Rev. St. c. 68, § 6).

cially licensed and registered as a sole trader.⁵ In Tennessee the wife's separate estate is by statute made liable for contracts for necessities for herself or her minor children.⁶ In Connecticut she may contract "for the benefit of herself, her family, or her separate or joint estate."⁷ In Mississippi the statute formerly made a wife's separate estate liable on contracts by herself and husband, or either of them, for the benefit of her plantation, or by the wife alone, or by the husband with her consent, for family supplies, education, carriage, and horses, and for the improvement of her separate estate.⁸ But in Mississippi and many other states all disabilities of coverture are now removed.⁹ In Pennsylvania she may have a separate estate not liable for her husband's debts. It will be liable, however, for family supplies necessarily purchased, and for debts contracted by herself.¹⁰ In others she may contract substantially as a feme sole, except to become liable as surety or guarantor.¹¹

⁵ NORTH CAROLINA (Code, § 1826).

⁶ TENNESSEE (Code, § 4244).

⁷ CONNECTICUT (Gen. St. p. 417, § 9). But a joint note of herself and husband is not presumptively such a contract. *Way v. Peck*, 47 Conn. 23. On the other hand, her note by way of gift to a church, in consideration of a contemplated devise by her husband, will be upheld, and enforced as a charge upon the land devised. *Buckingham v. Clark*, 61 Conn. 204, 23 Atl. 1085.

⁸ *Pendleton v. Gallbreath*, 45 Miss. 43. But she had no power under this act (1857) to render the estate of a minor ward liable, *McGavock v. Whitfield*, 45 Miss. 452; nor her own estate, leased to and in the possession of her husband, *Grubbs v. Collins*, 54 Miss. 485. In equity she could not, however, retain the consideration, e. g. land purchased, and avoid the note. *Hendrick v. Foote*, 57 Miss. 117.

⁹ OHIO (Ann. St. § 3114); IOWA (Code, § 3164); KENTUCKY (Act 1866; Meyer's Supp. p. 728); MISSISSIPPI (Ann. Code, § 2289); OKLAHOMA (St. § 2968). Including all disability as surety. *Cooper v. Bank*, 4 Okl. 632, 46 Pac. 475; *Hart v. Grigsby*, 14 Bush (Ky.) 542. But see now, in Kentucky, *Russell v. Rice* (Ky.) 44 S. W. 110.

¹⁰ PENNSYLVANIA (Purd. Dig. 1298, § 22; 1302, § 42). But, so far as relates to her debts, antenuptial debts only are intended by this act. *Mahon v. Gormley*, 24 Pa. St. 80; *Glyde v. Keister*, 32 Pa. St. 85; *Bear v. Bear*, 33 Pa. St. 529.

¹¹ ALABAMA (Code, § 2349); INDIANA (Horner's Rev. St. §§ 5115, 5117); PENNSYLVANIA (Act 1893; Purd. Dig. p. 1299, § 2); NEW JERSEY (2 Gen. St. p. 2017, § 26); SOUTH CAROLINA (Rev. St. § 2167); WEST VIRGINIA

In Tennessee she may contract as an unmarried woman, if her husband is found insane by the verdict of a jury.¹² So, in Maine, if she comes from another state or country and is not living with her husband.¹³ So, in Connecticut, if she is abandoned by her husband, her position and capacity are those of a feme sole.¹⁴ In West Virginia a wife living separate from her husband has the capacity of a sole trader.¹⁵ So, in North Carolina, if living separate under a decree of court or a deed of separation.¹⁶ So, in Pennsylvania, as far as the disposition of her property goes, whenever her husband, "from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for his wife, or shall desert her."¹⁷ In Vermont the statute enables her to acquire the capacity of a sole trader by order of the court, if her husband "deserts her, or from intemperance or other cause becomes incapacitated, or neglects to provide for his family."¹⁸ In Kentucky she may make contracts and convey her property as a feme sole under the order of the court, if her husband abandons her or fails to support her.¹⁹

In Kansas she may carry on business as a feme sole, with all the liabilities and capacity of such.²⁰ In California she may become a sole trader by judgment of the court.²¹ In some states she

(Code, c. 66, § 11). But in Alabama her indorsement as payee is invalid, unless her husband joins in it, *First Nat. Bank v. Nelson*, 105 Ala. 180, 16 South. 707.

¹² TENNESSEE (Code, § 4241).

¹³ MAINE (Rev. St. c. 61, § 10).

¹⁴ CONNECTICUT (Gen. St. p. 187). So, in NORTH CAROLINA (Code, § 1832), as also if he "maliciously turn her out of doors."

¹⁵ WEST VIRGINIA (Acts 1893, c. 3, § 15). And a joint note of herself and husband for a debt of the husband to his firm would be binding on her separate estate. *Dages v. Lee*, 20 W. Va. 584.

¹⁶ NORTH CAROLINA (Code, § 1831).

¹⁷ PENNSYLVANIA (Purd. Dig. p. 904, § 5).

¹⁸ VERMONT (V. S. § 2701). So, too, pending the husband's confinement in the state prison. *Id.* § 2904.

¹⁹ KENTUCKY (Ky. St. § 2128). So, in case of abandonment or failure to support, in MISSOURI (Rev. St. § 6857).

²⁰ KANSAS (2 Gen. St. c. 123, §§ 16, 17).

²¹ CALIFORNIA (Code Civ. Proc. § 1811). But her note, though given for a consideration in itself sufficient, is of no force unless the statutory requirements are followed. *Belloc v. Davis*, 38 Cal. 242.

may be relieved altogether from the disabilities of coverture by order of court.²²

Contracts as to Separate Estate—Statutes.

§ 280. In Massachusetts, New York, and some other states she has unrestricted power, as in equity, to make contracts like an unmarried woman for the benefit of her separate estate.²³ In Ohio

²² KENTUCKY (Ky. St. § 2131); MICHIGAN (How. Ann. St. §§ 6267, 6275, 6288). So, in LOUISIANA, to the extent of borrowing money and contracting and securing debts for her separate benefit and advantage (Rev. Civ. Code, art. 126). And, where notes are given in accordance with this act, the burden of proof does not lie on the holder to show that the note was given for the maker's separate benefit. *Miller v. Wisner*, 22 La. Ann. 457. Nor can the maker show that it was not so, in contradiction of her judicial admissions. *Feltus v. Blanchin*, 26 La. Ann. 401. Notes exceeding \$1,500 must be authorized by a district judge; those below that sum, by a parish judge. *Stuffer v. Puckett*, 30 La. Ann. 811.

²³ KANSAS (Gen. St. c. 123, §§ 13, 14); MASSACHUSETTS (Pub. St. c. 147, § 10); NEW YORK (Pub. Laws 1860, c. 90, § 2; Pub. Laws 1884, c. 381); INDIANA (Pub. Laws 1879, c. 160, § 3), now restricted as to suretyship; RHODE ISLAND (Gen. Laws, c. 194, § 3), requiring joinder of husband in certain cases; NEW HAMPSHIRE (Pub. St. c. 176, §§ 1, 2). Under these and similar statutes, she could bind her separate estate by a note for property purchased by her. *Wulschner v. Sells*, 87 Ind. 71; *Arnold v. Engleman*, 103 Ind. 513, 3 N. E. 238; *Rothschild v. Raab*, 93 Ind. 488; or for money borrowed for her separate business, *Wallace v. Rowley*, 91 Ind. 586; or by an indorsement for that purpose, *Mathes v. Shank*, 94 Ind. 501; or by a renewal of an earlier note, *Barton v. Beer*, 35 Barb. (N. Y.) 78; although the money was not actually used for her benefit, *Scott v. Otis*, 25 Hun (N. Y.) 33; *Sargeant v. French*, 54 Vt. 384; but not by a joint note with her husband, on his mere representation that the separate estate would be liable, *Bloomington v. Lisberger*, 24 Hun (N. Y.) 355; nor by her own note for money borrowed to purchase a separate estate, *Ames v. Foster*, 42 N. H. 381. But she would not bind her separate estate by a joint note with her husband for goods purchased by him, *Caldwell v. Jones* (Mich.) 73 N. W. 129; nor, in general, without benefit or credit to her separate estate, on a note given as a surety only, *Union Stock-Yards Nat. Bank of South Omaha v. Coffman* (Iowa) 70 N. W. 693 (Nebraska contract). And see §§ 302, 312, *infra*. And, on her pleading coverture, the burden of showing the existence of a separate estate, and an intention to bind it, is upon the holder. *Grand Island Banking Co. v. Wright* (Neb.) 74 N. W. 82. But, as in other notes, the presumption of valid considera-

she might contract under former statutes for the benefit of her separate estate.²⁴ In Mississippi her separate estate is liable for her antenuptial debts, but her husband is not.²⁵ In Wisconsin she may sue and be sued as to her separate property.²⁶ And in many states she may convey her separate property.²⁷ But in Delaware, as well as in other common-law states where no statutory provision exists, she cannot convey her separate property without the co-operation of her husband.²⁸

Many states now provide by statute for the acquiring and holding by the wife of separate property not liable for the debts of her husband, according to the principle already established in equity.²⁹ Thus, in Connecticut, a wife's real estate, purchased with her own

tion is against her, *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; and the burden of proving a suretyship is upon her, *Union Stock-Yards Nat. Bank of South Omaha v. Coffman*, *supra*. And see § 302, *infra*. But in a note payable to her husband, and discounted for him, there is no presumption, even from her having a separate estate, that the note was given for the benefit of such estate, but this fact must be proved. *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250.

²⁴ OHIO (Rev. St. § 3108). And an intention to bind her separate estate by a note given as surety for her husband, was presumed from her having such estate. *Hershizer v. Florence*, 39 Ohio St. 516.

²⁵ MISSISSIPPI (Rev. Code, c. 40, art. 25; Rev. Code, § 1780).

²⁶ WISCONSIN (Sanb. & B. Ann. St. § 2345).

²⁷ ILLINOIS (Rev. St. c. 68, § 9); IOWA (Code, § 3153); KANSAS (Gen. St. c. 123, § 14); MARYLAND (Pub. Gen. Laws, art. 45, § 7); MASSACHUSETTS (Pub. St. c. 147, § 1); MAINE (Rev. St. c. 61, § 1); SOUTH CAROLINA (Rev. St. § 2166); WISCONSIN (Sanb. & B. Ann. St. § 2342).

²⁸ DELAWARE (Rev. Code, p. 625).

²⁹ ALABAMA (Code, § 2341); CALIFORNIA (Civ. Code, § 5162); DELAWARE (Rev. Code, p. 601); IOWA (Code, § 3153); KANSAS (Gen. St. c. 123, § 13); MARYLAND (Pub. Gen. Laws, art. 45, § 2); MASSACHUSETTS (Pub. St. c. 147); MICHIGAN (How. Ann. St. § 6288); MINNESOTA (St. § 5531); MISSOURI (Rev. St. § 6869); NEW HAMPSHIRE (Pub. St. c. 176, § 1); NEW JERSEY (2 Gen. St. p. 2013, § 4); NEW YORK (Pub. Laws 1848, c. 307; Pub. Laws 1849, c. 528); PENNSYLVANIA (Purd. Dig. p. 1298, § 22). And property acquired by her while deserted by her husband is her separate property in Pennsylvania. *Starrett v. Wynn*, 17 Serg. & R. (Pa.) 130. But a note made to the wife at the husband's request, and for a consideration proceeding from him, is within the exception of the Massachusetts act as to gifts from husband to wife. *Towle v. Towle*, 114 Mass. 167.

earnings, is made her separate property by statute.³⁰ And in Missouri, while her husband fails to support her, her earnings are her separate property.³¹ A more comprehensive and detailed statement of these and similar statutes is to be sought rather in works relating to the special subject. Cases based on the recent statutes, however, and illustrating the change in this branch of the law, which has now become largely statutory, have been freely cited throughout this chapter.

Foreign Statutes—*Lex Loci*.

§ 281. By the English statute of 1870, a wife's earnings, her distributive share of property received under the intestate laws, and legacies and gifts to her up to the amount of £200, are her separate property.³² And by the act of 1874 the husband is now liable in England for his wife's debts and torts while sole, only so far as he has received assets from her.³³

By foreign law, as a rule, a wife's capacity to make, accept, or indorse commercial paper is, in general, the same as that of an unmarried woman. By the German exchange law she has power to make bills of exchange.³⁴ In Hungary no women are competent to make bills or notes unless registered as merchants.³⁵ In France and other countries governed by the Code Napoleon, a woman's commercial paper amounts only to an acknowledgment of indebtedness, unless she is engaged in trade.³⁶ In Russia all women, except those

³⁰ Connecticut (Gen. St. 1875, p. 186, § 1).

³¹ Missouri (Rev. St. § 6859).

³² 33 & 34 Vict. c. 93. In Upper Canada, by the act of 1872, she may bind her separate estate by a note or indorsement given for the accommodation of her husband, *Frazee v. McFarland*, 43 U. C. Q. B. 281; especially if reference be made in the note to such estate, *Consolidated Bank v. Henderson*, 29 U. C. C. P. 549.

³³ 37 & 38 Vict. c. 50, repealing 33 & 34 Vict. c. 93, § 12, which had released the husband from all liability for such debts. These acts applied in terms only to marriages taking effect after their passage, viz. August 9th and July 30th, respectively.

³⁴ Thöl, W. R. 106. This is subject to local restrictions requiring consent or co-operation of the husband.

³⁵ HUNGARY (Exch. Law, art. 9).

³⁶ FRANCE (Code Com. art. 113); GREECE (Code Com. art. 113); HAYTI (Code Com. art. 111); ITALY (Code Com. art. 199); MONACO (Code Com.

engaged in trade, are incompetent to make bills of exchange or notes, without the consent of husband or parents.³⁷ And in Servia commercial paper signed by a woman, without the consent of husband or parent in the manner prescribed by law, is a mere acknowledgment of debt.³⁸ In the Argentine Republic the husband acquires by marriage the right to indorse bills of exchange drawn payable to his wife before marriage.³⁹ It will be observed that the foregoing statutes make no distinction between married and unmarried women. This was also the case, in great degree, with the Roman law, from which they are in part derived.

Common-Law Liability on Bills and Notes—Estoppel.

§ 282. By the English common law, and wherever it is in force without statutory modification, the bill of exchange, promissory note, or check of a married woman is legally void;⁴⁰ although in

art. 103); ROUMANIA (Code Com.); VENEZUELA (Code Com. art. 8); SAN DOMINGO (Code Nap. art. 113).

³⁷ RUSSIA (Exch. Law, art. 546).

³⁸ SERVIA (Code Com. arts. 76-78).

³⁹ ARGENTINE REPUBLIC (Code Com. art. 807).

⁴⁰ Byles, Bills, 65; 1 Daniel, Neg. Inst. 238; Robertson v. Bruner, 24 Miss. 242; Van Steenburgh v. Hoffman, 15 Barb. (N. Y.) 28; Bloomingdale v. Lisberger, 24 Hun (N. Y.) 355; Griffith v. Clark, 18 Md. 457; Kenton Ins. Co. v. McClellan, 43 Mich. 564, 6 N. W. 88; Reed v. Buys, 44 Mich. 80, 6 N. W. 111; Howe v. Wildes, 34 Me. 566; Mahon v. Gormley, 24 Pa. St. 80; Snow v. Mather, 52 Tex. 650; Hodges v. Price, 18 Fla. 342; Pippen v. Wesson, 74 N. C. 437; Goodhue v. Barnwell, Rice, Eq. 198; Phillips v. Hagadon, 12 How. Prac. (N. Y.) 17; Simpers v. Sloan, 5 Cal. 457; Bryant v. Merrill, 55 Me. 515, until St. 1866, c. 52; Comings v. Leedy, 114 Mo. 454, 21 S. W. 804; Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73; Hanover Nat. Bank v. Howell, 118 N. C. 271, 23 S. E. 1005; Higgins v. Willis, 25 Ind. 371, until Act 1879, p. 160; Wooden v. Wampler, 69 Ind. 88; Thomas v. Passage, 54 Ind. 106; Williams v. Wilbur, 67 Ind. 42; Daudistel v. Bennighof, 71 Ind. 389 (the note in this case having been made in 1860); Fry v. Hamner, 50 Ala. 52. So, the joint note of both is good against the husband only. McClelland v. Bishop, 42 Ohio St. 113. Davis v. Foy, 7 Smedes & M. (Miss.) 64, held that the act of 1839 (Laws 1839, p. 72) simply gave a married woman the right to acquire and hold separate property, and did not change the common-law rule as to her want of power to make contracts. Complete power is, however, now given by statute (Rev. Code, § 1167) in Mississippi.

England a married woman has been held liable to arrest, as if sole, as the drawer of a bill of exchange.⁴¹ But a married woman cannot be estopped from setting up the disability of coverture by reason of having signed a note as "A. B., Widow."⁴² Nor will she be estopped by recitals or mere form of instrument.⁴³ Her representations will, however, bind her as to parties without notice, relying upon them.⁴⁴

⁴¹ *Jones v. Lewis*, 7 Taunt. 55; *Id.*, 2 Marsh. 385.

⁴² *Cannam v. Farmer*, 3 Exch. 698. So, a recital that the note was given for advances to her will not estop her from showing that it was for the accommodation of her husband, and therefore void. *March v. Clark*, 9 Fed. 753. And parol evidence is admissible to show the undisclosed coverture of the maker of a note. *Mount v. Zisken*, 7 N. J. Law, 71. It has been held, however, that her execution of a note as co-maker will estop her from claiming that she is a surety only, as against a bona fide holder. *Venable v. Lippold* (Ga.) 29 S. E. 181. But see, contra, *Scott v. Taul* (Ala.) 22 South. 447.

⁴³ If she is really a surety, without benefit to her separate estate, she will not be charged by a mere recital in the mortgage that she is principal, and her husband surety, *Orr v. White*, 106 Ind. 341, 6 N. E. 909; *Cole v. Temple*, 142 Ind. 498, 41 N. E. 942; nor (between parties with knowledge of the facts) by a recital in the note that it was for her "sole use and benefit," *Bowles v. Trapp*, 139 Ind. 56, 38 N. E. 406; nor, in general, by the form of the note, *Voreis v. Nussbaum*, 131 Ind. 267, 31 N. E. 70; nor by the fact that the money was paid in the first instance to her, and indirectly to him, *Orr v. White*, *supra*.

⁴⁴ E. g. by representing herself as the purchaser of the property, *Lane v. Schlemmer*, 114 Ind. 296, 15 N. E. 454; or that the money borrowed was for her own use, *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. 201; or by recital of benefit to separate estate, together with an express charge, *White v. Gldsberg*, 49 S. C. 530, 27 S. E. 517; or by her application for the loan, representing that it was for her own benefit, *Bouvey v. McNeal*, 126 Ind. 541, 26 N. E. 396; although an original note of the husband was taken up by her note with such representations, *Wertz v. Jones*, 134 Ind. 475, 34 N. E. 1; or although she handed the money over to her husband in pursuance of her original intention, *Cummings v. Martin*, 128 Ind. 20, 27 N. E. 173; *Todd v. Bailey*, 58 N. J. Law, 10, 32 Atl. 696; or although discount of her note was procured by the husband, and the bank knew that the note was made to be discounted, but gave a check for it payable to her order, *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 157, 27 Atl. 920. So, she may be estopped, as against a bona fide holder, by a recital of benefit to her separate estate. *Nott v. Thomson*, 35 S. C. 461, 14 S. E. 940; *Bailey v. Seymour*, 42 S. C. 322, 20 S. E. 62.

Recent Statutes as Affecting a Wife's Bill or Note.

§ 283. In New York, under the acts of 1860 and 1861, an accommodation note made by a married woman is void.⁴⁵ In Mississippi, prior to 1880, the wife's separate estate was not liable for the payment of a note made jointly with her husband, unless made by her in the course of her separate business or charging the separate estate.⁴⁶ In Arkansas a married woman's note or bill of exchange, not given for her personal benefit or for that of her separate property, is void.⁴⁷ In Pennsylvania it is held that the incapacity of a married woman is not changed by the statute of 1848, except as to antenuptial debts and those contracted in the management of her separate property or for the purchase of family necessities. And other contracts by her, in the form of commercial paper or otherwise are invalid.⁴⁸ In California the wife is held not to be personally liable on a joint note and mortgage security made by herself and husband.⁴⁹ In New York the act of 1848, it is held, did not render a married woman liable for goods purchased by her merely because she had a separate estate.⁵⁰ But under the law of New York, as it now is, a married woman having a separate estate is liable on her note given for the purchase of a sewing machine;⁵¹ but not on a note for goods purchased for the family, notwithstanding her promise of payment in the latter case, made after her husband's death.⁵² In Louisiana a married woman's note, authorized by her husband and given for the support of the family, is binding.⁵³ But she is not liable on the joint note of her-

⁴⁵ *Scudder v. Gori*, 3 Rob. 661, 18 Abb. Prac. 223.

⁴⁶ *Nelson v. Miller*, 52 Miss. 410; Code 1871, § 1780.

⁴⁷ *Conner v. Abbott*, 35 Ark. 365.

⁴⁸ *Mahon v. Gormley*, 24 Pa. 80. The act of 1893 (Purd. Dig. §§ 23, 24) gives her full power to contract, "but she may not become accommodation indorser, maker, guarantor, or surety for another." This will not, however, apply to the renewal of an accommodation note made before her marriage. *Harrisburg Nat. Bank v. Bradshaw*, 178 Pa. St. 180, 35 Atl. 629.

⁴⁹ *Brown v. Orr*, 29 Cal. 120.

⁵⁰ *Bass v. Bean*, 16 How. Prac. 93; *Arnold v. Ringold*, Id. 158. This act and the New York act of 1849 confer no new capacity to contract with personal liability. *Switzer v. Valentine*, 4 Duer, 96.

⁵¹ *Williamson v. Dodge*, 5 Hun (N. Y.) 497.

⁵² *Smith v. Allen*, 1 Lans. (N. Y.) 101.

⁵³ *Fenn v. Holmes*, 6 La. Ann. 199; Rev. Civ. Code, § 2409.

self and husband, notwithstanding that property acquired after marriage is held by them in community.⁵⁴ In Mississippi it has been held, prior to 1880, that a married woman's note given for slaves purchased on credit was not binding upon her,⁵⁵ although a surety on such a note would still be liable.⁵⁶ And in Texas a woman has been held as maker on such a note given jointly with her supposed husband.⁵⁷

Commercial Paper for Property Purchased—Money Borrowed.

§ 284. A wife's note given for land conveyed to her is not binding upon her at common law.⁵⁸ Nor is her separate estate liable on a note given for such consideration jointly with her husband, unless it is expressly charged.⁵⁹ And such a note by husband and wife has been held to be the contract of the husband alone.⁶⁰ So, where a wife is living with her husband, her note for goods purchased by her for household supplies is void, although she may have promised after her husband's death to pay them.⁶¹ It has, however, been often held, as we shall see, that an intention to charge her separate estate or the fact of a separate benefit to her estate may be presumed from her mere act in making the purchase. But it has been held in Louisiana that her note, made without authorization of her husband, for property bought by her during marriage, where there is no proof that the property inured to her separate benefit, or that she was administering her paraphernalia, or even had any separate

⁵⁴ Wiley v. Hunter, 2 La. Ann. 806.

⁵⁵ Pollen v. James, 45 Miss. 129; Whitworth v. Carter, 43 Miss. 61.

⁵⁶ Whitworth v. Carter, 43 Miss. 61.

⁵⁷ George v. Stevens, 31 Tex. 670.

⁵⁸ Howe v. Wildes, 34 Me. 566; Dunning v. Pike, 46 Me. 461; Carpenter v. Mitchell, 50 Ill. 470; Pemberton v. Johnson, 46 Mo. 342; Dollner v. Snow, 16 Fla. 86. So, in Texas, a note by husband and wife for community property is voidable by the wife or her administrator, Snow v. Mather, 52 Tex. 650.

⁵⁹ Kimm v. Weippert, 46 Mo. 532.

⁶⁰ Doyle v. Orr, 51 Miss. 229; Smith v. Wilson (Tex. Civ. App.) 32 S. W. 434.

⁶¹ Smith v. Allen, 1 Lans. (N. Y.) 101.

property, cannot render her liable.⁶² Where, however, a note given by her for the purchase of land is void, as has been said, and she does not elect to pay for the land, it may be subjected to a sale to satisfy the vendor's lien.⁶³ And a court of equity would in no case permit her to retain the land or other property purchased and disclaim all liability to pay for it.⁶⁴

A wife cannot at common law bind herself by joint note with her husband for money received by her.⁶⁵ Nor is she liable on her note for money borrowed for the purchase of a piece of land.⁶⁶ Nor on the joint note of herself and husband for such consideration, where there is no proof that the money was applied to her use and benefit or the benefit of her separate estate.⁶⁷ So, she is not liable on such joint note reciting that it was given for money loaned to her for the purpose of purchasing family supplies and necessities, especially where the money was not shown to have been actually so used.⁶⁸

And it has even been held in Louisiana that a wife could not be held liable after her husband's death on their joint note given during their marriage for the purchase of land, which stood in the wife's name, but was really community property.⁶⁹ So, the wife's separate

⁶² *Graham v. Thayer*, 29 La. Ann. 75.

⁶³ *Johnson v. Jones*, 51 Miss. 860; *McDuff v. Beauchamp*, 50 Miss. 531; *Nicholson v. Heiderhoff*, Id. 56; *Gordon v. Manning*, 44 Miss. 757; *Farr v. Wright*, 27 Tex. 96.

⁶⁴ *Hendrick v. Foote*, 57 Miss. 117. And would enforce it as a trust against a purchaser with notice. *Ogle v. Ogle*, 41 Ohio St. 359.

⁶⁵ *Thatcher v. Cannon*, 6 Bush (Ky.) 541.

⁶⁶ *Riley v. Pierce*, 50 Ala. 93.

⁶⁷ *Stokes v. Shannon*, 55 Miss. 583; *Conrad v. Le Blanc*, 29 La. Ann. 123. Such a note, to be binding on the wife, requires a separate consideration to her, and no consideration between herself and husband will be sufficient to bind her. *Reed v. Buys*, 44 Mich. 80, 6 N. W. 111. So, a joint note given by husband and wife to pay a judgment entered against both is not binding on her, she being ignorant of the purpose for which it was given, and receiving no separate consideration for it. *Schlatterer v. Nickodemus*, 51 Mich. 626, 17 N. W. 210. So, too, her individual note requires a separate consideration to her, which will not be presumed. *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 6 N. W. 88.

⁶⁸ *Viser v. Scruggs*, 49 Miss. 705; *Sharp v. Proctor*, 5 Bush (Ky.) 396; *Gatewood v. Bryan*, 7 Bush (Ky.) 509; *Hutchinson v. Underwood*, 27 Tex. 255; *McMahon v. Lewis*, 4 Bush (Ky.) 138.

⁶⁹ *Millaudon v. Carson*, 25 La. Ann. 380.

estate is not liable for a note made by her jointly with her husband for the tuition and board of their daughter.⁷⁰

§ 285. In New York, since the statutes of 1860 and 1861, a married woman may contract, in general, as if she were unmarried.⁷¹ And she may give a valid note for her release from a contract for the sale of a farm.⁷² So, her note given in part for goods purchased by her is so far valid, although partly given for a debt of her husband and to that extent invalid.⁷³ But the common-law presumption that a married woman's note is invalid still prevails in New York, and the holder of such note must show that it was given by her as a sole trader, or for her separate benefit, or on the credit of her separate estate.⁷⁴ And, where she transacts business through her husband as agent, a note made by her husband, in her name but not in her business or for her separate benefit, will not be binding upon her, although it had been represented by the husband to be in her business and for her benefit, and had come to the hands of a bona fide owner for value.⁷⁵

Since the recent statutes above referred to, a married woman is liable in Massachusetts on her acceptance of a bill of exchange given in consideration of debts due from her to the drawer.⁷⁶ And it has been held in Texas, in apparent disregard of the common-law presumption, that the holder of a married woman's note is, without proof of its consideration, such a creditor as to entitle him to letters of administration on her estate.⁷⁷ In Massachusetts it has been held that a married woman's note given for money loaned her is now binding upon her, although the money was borrowed with the intention of using it to assist her husband, and this was known to the lender.⁷⁸ So she has been held liable on a partnership note, as a member of the firm, her husband not being a member.⁷⁹ This

⁷⁰ Collins v. Underwood, 33 Ark. 265.

⁷¹ Foster v. Conger, 61 Barb. (N. Y.) 145.

⁷² Willsey v. Hutchins, 10 Hun (N. Y.) 502.

⁷³ Spencer v. Humiston, 9 Hun (N. Y.) 71.

⁷⁴ Hallock v. De Munn, 2 Thomp. & C. 350.

⁷⁵ Bogert v. Gulick, 65 Barb. (N. Y.) 322, 45 How. Prac. (N. Y.) 385.

⁷⁶ Pierce v. Kittredge, 115 Mass. 374.

⁷⁷ Nickelson v. Ingram, 24 Tex. 630.

⁷⁸ Wilder v. Richie, 117 Mass. 382.

⁷⁹ Plumer v. Lord, 5 Allen (Mass.) 460.

has also been held to be the existing law in New Jersey.⁸⁰ In Mississippi a married woman is liable upon a note made by her before marriage for debts contracted at the time.⁸¹ And in New Hampshire it has been held that a woman is liable upon her note made after marriage in renewal of an earlier note made while unmarried.⁸²

§ 286. In New York a married woman having separate property is liable for a note given by her for a sewing machine purchased by her in the presence of her husband, he refusing to have anything to do with it and she promising to pay for it.⁸³ In Massachusetts her note given for real estate purchased for her separate property is now binding on her.⁸⁴ So, in Ohio, a joint note of husband and wife for real estate purchased and put in her name, the husband having become insolvent.⁸⁵ So, in Massachusetts, her note for work done on lands held by herself and her husband as tenants in common.⁸⁶ In Mississippi, where she gives notes partly for supplies for her plantation and in part for her husband's debts, and secures them by mortgage on her land, her estate will be liable to the extent of the supplies furnished and the income of her land will be liable for the husband's debts secured.⁸⁷ And in West Virginia, in an attempt to enforce the joint bond of a husband and wife against the wife's land, it was held that she might act as a feme sole in respect to all her personal estate, and to the rents and profits of her real estate.⁸⁸

In Louisiana she may make a valid note by authorization of her husband or by order of court.⁸⁹ But, where she has executed such note under authority of the court, she may set up in defense that

⁸⁰ Merritt ads. Day, 38 N. J. Law, 32.

⁸¹ Travis v. Willis, 55 Miss. 557.

⁸² Shannon v. Canney, 44 N. H. 592.

⁸³ Williamson v. Dodge, 5 Hun, 497.

⁸⁴ Estabrook v. Earle, 97 Mass. 302.

⁸⁵ Avery v. Vansickle, 35 Ohio St. 270.

⁸⁶ Burr v. Swan, 118 Mass. 588.

⁸⁷ Dibrell v. Carlisle, 48 Miss. 691.

⁸⁸ Radford v. Carwile, 13 W. Va. 573.

⁸⁹ Bank of Lafayette v. Bruff, 33 La. Ann. 624. And a note made after the husband's death by an attorney acting under the joint power of attorney of husband and wife, made during coverture with the required authorization of a judge, is not binding on her, without separate benefit or ratification by her. Calhoun v. Bank, 30 La. Ann. 772.

the note was obtained by fraud, and was given for her husband's debt.⁹⁰ And she may even prove by parol in such case that no money was actually borrowed by her and that the whole consideration was the debt of her husband.⁹¹

Extent of Incapacity—Pleading.

§ 287. Where husband and wife have executed a joint note, on which the wife is liable, their subsequent divorce will not relieve her from liability.⁹² If, however, a married woman's note is utterly void, although in its form negotiable and in compliance with mercantile law, it will not operate as payment of a valid debt for which it was given.⁹³ On the other hand, although such note may be void at law, a mortgage by the wife of her separate estate given to secure it may be valid.⁹⁴

And it has been held that a married woman's note is not per se void and subject to be disposed of as such on demurrer, but the disability must be pleaded as a defense.⁹⁵ And, where she has failed to plead it, a motion in arrest of judgment will not be sustained as to her separate property (although it might be sustained as to community property), the declaration on the note not having averred that she was a married woman.⁹⁶ Where one of several makers of a joint note pleads her coverture, it has been held that the plaintiff may discontinue as to her and proceed against the others.⁹⁷ And where the declaration or petition contains no averment of separate benefit or that the note was given for necessities, it seems that a judgment rendered against her by default may be opened, the note in this case being a joint one of husband and wife.⁹⁸

⁹⁰ *Barth v. Kasa*, 30 La. Ann. 940.

⁹¹ *Hall v. Wyche*, 31 La. Ann. 734.

⁹² *Schaeffer v. Ivory*, 7 Mo. App. 461. But see *Hooton v. Ransom*, 6 Mo. App. 19.

⁹³ *Little v. Machine Co.*, 67 Ind. 67.

⁹⁴ *Brookings v. White*, 49 Me. 479.

⁹⁵ *Hughes v. Brown*, 3 Bush (Ky.) 660.

⁹⁶ *Phelps v. Brackett*, 24 Tex. 236.

⁹⁷ *Shipman v. Allee*, 29 Tex. 17; *McGuire v. Johnson*, 2 Lans. (N. Y.) 305.

⁹⁸ *Trimble v. Miller*, 24 Tex. 214; *Covington v. Burleson*, 28 Tex. 368. Even though entered by consent. *Bullock v. Hayter*, 24 Tex. 9.

Indorsement by Married Woman.

§ 288. At common law a married woman is not liable upon her indorsement of a bill of exchange or note.⁹⁹ And many American statutes, which provide for the separate property of the wife, give her no separate power of disposal. This is the case in New Jersey with the married woman's act of 1852.¹⁰⁰ But in Virginia a married woman having a separate estate is liable upon her indorsement.¹⁰¹

At common law her indorsement did not even effect a transfer of the paper.¹⁰² And this is still so in some states, if the indorsement be made without the husband's consent.¹⁰³ In other states an indorsement, made by the wife after her marriage to confirm her previous transfer of a note by delivery, passes a perfect legal title.¹⁰⁴ And in New York, before the act of 1848, a wife might indorse in her maiden name a note made to her before marriage, if the authority of her husband could be inferred from her being a sole trader or from other circumstances.¹⁰⁵ And it seems that, even where a married woman's indorsement does not render her personally liable, it may still be sufficient to effect a valid transfer.¹⁰⁶ And an indorsement by the wife, of a note made to her for property purchased from her husband, would put the note out of reach of an attachment at suit of the husband's creditors.¹⁰⁷ So, a wife may, with the consent of her husband, make a good equitable assignment by delivery of a note and mortgage executed to her.¹⁰⁸ And, where a bill or note is made payable to a married woman, her indorsement, with the

⁹⁹ *Barlow v. Bishop*, 3 Esp. 266, 1 East, 432.

¹⁰⁰ *Naylor v. Field*, 29 N. J. Law, 287; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512; *Belford v. Crane*, Id. 265; *Vreeland v. Ryno*, 26 N. J. Eq. 160.

¹⁰¹ *Frank v. Lillienfeld*, 33 Grat. (Va.) 377.

¹⁰² *Barlow v. Bishop*, 1 East, 432, 3 Esp. 266; *Tillinghast v. Holbrook*, 7 R. I. 230. But such indorsement effects a sufficient transfer in Mississippi. *Harding v. Cobb*, 47 Miss. 599.

¹⁰³ *Hemmingway v. Mathews*, 10 Tex. 207.

¹⁰⁴ *Guptill v. Horne*, 63 Me. 405.

¹⁰⁵ *Miller v. Delamater*, 12 Wend. (N. Y.) 433.

¹⁰⁶ *Moreau v. Branson*, 37 Ind. 195.

¹⁰⁷ *Way v. Pierce*, 51 Vt. 326.

¹⁰⁸ *Baker v. Armstrong*, 57 Ind. 189.

authority or consent of her husband, effects a valid transfer at common law,¹⁰⁹ especially if the husband be present when the transfer is made.¹¹⁰

And, where she has indorsed and transferred a note made to her, payment may be made to the holder until her presumed authority is revoked.¹¹¹ The husband's authority to his wife to indorse such a note may be presumed from his conduct or from a subsequent ratification of her act.¹¹² So, his consent may be presumed, where the note in question has been given to her for a bill of exchange drawn by him payable to her order.¹¹³ Consent may likewise be presumed from his joining in the indorsement and signing his name on the back of the note with her.¹¹⁴ And where the maker of a note payable to a married woman and transferred by her indorsement has subsequently promised payment to the indorsee, the husband's authority for the indorsement will be presumed as against such maker.¹¹⁵

Contracts as Surety—Accommodation.

§ 289. At common law a married woman cannot render herself liable as a surety or guarantor for another; and this is true, as we have seen, in many states under the most recent statutory changes of the law. At common law a married woman is not liable upon her bond or other instrument given for the debt of her husband, nor is her separate estate liable in equity for the payment of such an instrument.¹¹⁶

¹⁰⁹ *Prestwich v. Marshall*, 4 Car. & P. 594, 7 Bing. 565; *Smith v. Marsack*, 6 C. B. 486; *Stevens v. Beals*, 10 Cush. (Mass.) 291; *Mudge v. Bullock*, 83 Ill. 22; *McClain v. Weidemeyer*, 25 Mo. 364; *Nims v. Bigelow*, 45 N. H. 343. So, by statute in Alabama. *Bullock v. Vann*, 87 Ala. 372, 6 South. 150.

¹¹⁰ *Menkens v. Heringhi*, 17 Mo. 297.

¹¹¹ *George v. Cutting*, 46 N. H. 130.

¹¹² *Prince v. Brunatte*, 1 Bing. N. C. 435; *Mudge v. Bullock*, 83 Ill. 22.

¹¹³ *McClain v. Weidemeyer*, 25 Mo. 364.

¹¹⁴ *Collier v. Connelly*, 15 Ind. 141; *Cobb v. Duke*, 36 Miss. 60.

¹¹⁵ *Cotes v. Davis*, 1 Camp. 485.

¹¹⁶ *Dalbiac v. Dalbiac*, 16 Ves. 116; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575. So, although her estate was benefited. *Wiltbank v. Tobler*, 181 Pa. St. 103, 37 Atl. 188. So, even on a draft drawn by her against her separate estate. *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420. So, a guaranty signed and delivered in Connecticut, to be performed in Illi-

A wife's separate estate is not, in general, bound by her indorsement of a note as surety for her husband.¹¹⁷ And even now a note, given in New York to a married woman by her husband's firm and indorsed by her as an accommodation for the debt of the firm, will not bind her separate estate, where there is neither separate benefit nor an express charge of her estate.¹¹⁸ And, in general, a bill or note given by a married woman for her husband's debt will not render her liable,¹¹⁹ although she may have a separate estate.¹²⁰ Such a note, given as surety for the husband's debt already existing, is void.¹²¹ This was also the rule in Massachusetts prior to the act of 1874.¹²² But, where the husband's debt is only part of the consideration for the wife's note, the balance of the note, being for goods purchased by her, will be valid.¹²³

A wife's note, as surety for the husband's debt, will not be rendered more binding on her by the fact that the husband has joined

nois, *First Nat. Bank v. Mitchell*, 84 Fed. 90. And see, as to wife's liability as surety for her husband, 20 Cent. Law J. 205, March 13, 1885.

¹¹⁷ *Levi v. Earl*, 30 Ohio St. 147. So, too, where the wife indorsed the note to the husband, and he procured its discount for his own benefit, the bank of discount knowing the facts. *First Nat. Bank of Marquette v. Hanscom*, 104 Mich. 67, 62 N. W. 167. And even though, under those circumstances, the note was renewed by her, and its discount paid to her, and by her applied to the original note. *Patrick v. Smith*, 165 Pa. St. 526, 30 Atl. 1044. As to burden of proof see § 312, *infra*. Where a bank discounts the husband's note with the wife's indorsement, it has been held to be notice of her character as surety, *Continental Nat. Bank v. Clarke* (Ala.) 22 South. 988.

¹¹⁸ *Phillips v. Wicks*, 36 N. Y. Super. Ct. 254; *Union Nat. Bank v. Chapman*, 7 App. Div. 450, 39 N. Y. Supp. 1051, under Code Ala. § 2349. Or a guaranty, *Sexton v. Fleet*, 2 Hilt. 477.

¹¹⁹ *Williams v. Hayward*, 117 Mass. 532; *Ross v. Walker*, 31 Mich. 120; *Alger v. Scott*, 54 N. Y. 14; *Emery v. Lord*, 26 Mich. 431; *Hetherington v. Hixon*, 46 Ala. 297; *State Sav. Bank v. Scott*, 10 Neb. 83, 4 N. W. 314.

¹²⁰ *McClure v. Harris*, 7 Heisk. (Tenn.) 379; *Hanse v. De Witt*, 63 Barb. (N. Y.) 53. Unless an intention to charge it appears on the face of the paper. *State Sav. Bank v. Scott*, *supra*; *Eckman v. Scott*, 34 Neb. 817, 52 N. W. 822. As to charge of separate estate, see §§ 302 et seq., *infra*.

¹²¹ *Wilhelm v. Schmidt*, 84 Ill. 183.

¹²² *Nourse v. Henshaw*, 123 Mass. 96.

¹²³ *Spencer v. Humiston*, 9 Hun (N. Y.) 71. But see, *contra*, where such double consideration was expressed, but the money went entirely to the husband, *Smith v. Hardman*, 99 Ga. 381, 27 S. E. 731.

in executing it.¹²⁴ Nor will the wife be liable as surety on another note given to take up such joint note.¹²⁵ Nor can she, in general, bind her separate estate by executing such a joint note as surety.¹²⁶ So, she cannot be bound in Georgia by her note for money borrowed to pay her husband's debts, the lender knowing the object of the loan.¹²⁷ So, in Louisiana, a note of the wife, received knowingly by a creditor of the husband for the payment of his debt, is, in the hands of such creditor, utterly void.¹²⁸

But in New York, if a joint note of husband and wife, executed by her as surety for her husband, be expressed to be a "lien and claim" on her separate estate, it will bind such separate estate as belongs to her at the time that judgment is rendered.¹²⁹ So, if a wife gives her note in New York, to pay her husband's note given for clothing for their children, with the intention of charging her separate estate, it will be valid.¹³⁰ But in Connecticut a wife's separate estate is not bound by her joint note with her husband given for his debt, and containing the words, "each intending hereby to charge our individual estate."¹³¹

§ 290. In Indiana a wife will not be bound by a note given for her husband.¹³² Nor in Alabama for a note given by her after her

¹²⁴ *National Bank of New England v. Smith*, 43 Conn. 327. So, in Vermont, by act of 1884, her actual character being provable by parol. *Bradley Fertilizer Co. v. Caswell*, 65 Vt. 231, 26 Atl. 956.

¹²⁵ *Athol Machine Co. v. Fuller*, 107 Mass. 437; *Frecking v. Rolland*, 33 N. Y. Super. Ct. 499, 53 N. Y. 422; *King v. Thompson*, 59 Ga. 380.

¹²⁶ *Saulsbury v. Weaver*, 59 Ga. 254; *Bartington v. Bradley*, 16 La. Ann. 310. Although in equity she has been held liable on such a note, containing an express charge. *Bradford v. Greenway*, 17 Ala. 797.

¹²⁷ *Veal v. Hurt*, 63 Ga. 728; Code Ga. § 1783, prohibiting all "assumption of debts of the husband." And she may recover the payments made by her on such a note, *Lewis v. Howell*, 98 Ga. 428, 25 S. E. 504.

¹²⁸ *Claverie v. Gerodias*, 30 La. Ann. 291.

¹²⁹ *Todd v. Ames*, 60 Barb. 454.

¹³⁰ *Francis v. Ross*, 17 How. Prac. (N. Y.) 561.

¹³¹ *Smith v. Williams*, 43 Conn. 409.

¹³² INDIANA (Rev. St. 1881, § 5119; Rev. St. 1894, § 6964). E. g. for goods sold to him, *Brick v. Scott*, 47 Ind. 299; or for payment of his debt, *McCarty v. Tarr*, 83 Ind. 444; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833; although induced by threat of contest of her title to separate property mortgaged as collateral, *Warey v. Forst*, 102 Ind. 205, 26 N. E. 87. Nor on a note with another as sureties for her husband, *Daudistel v. Bennighof*, 71

husband's death, as a renewal, in payment of a note which she had signed *after its delivery* as surety for him in his lifetime.¹³³ And it has been held that, when a married woman's note for her husband's debt is void, the mortgage given to secure it will be void also,¹³⁴ and that no judgment can properly be rendered against her on a mortgage given to secure her husband's note.¹³⁵

Nor does the fact that her note was given for necessities sold to her husband render her liable.¹³⁶ Nor that it was given for the discontinuance of a suit against the husband,¹³⁷ or in payment of a judgment against him.¹³⁸ Nor is she liable on her joint note with her husband for his debt, because her father's estate, inherited partly by her, was liable as surety for it.¹³⁹ Nor is she liable because the notes were given to enable her husband to carry on the work of a plantation not belonging to her.¹⁴⁰ But her note given for a loan made to the husband, to enable him to carry on the work of her farm, would be binding on her.¹⁴¹ And in Louisiana, where authorization of a wife's note by a judge is provided for by statute, such authorization will not prevent her setting up that the note in question was given for a debt of her husband.¹⁴²

Recent Statutes on the Subject.

§ 291. In some states, however, by force of recent statutes, a wife may bind herself by a note given for her husband's debt without any separate benefit or express charge. This is so in Kansas

Ind. 389. On the other hand, the joint note of husband and wife for fees of an attorney employed by her to defend him may be her debt, and make her liable. *Young v. McFadden*, 125 Ind. 256, 25 N. E. 284. As to effect of recitals and estoppel by conduct, see § 282, *supra*.

¹³³ *Hetherington v. Hixon*, 46 Ala. 297.

¹³⁴ *Koechlin v. Lorber*, 26 La. Ann. 737.

¹³⁵ *Ferguson v. Reed*, 45 Tex. 574. The mortgage in this case covered part of her homestead.

¹³⁶ *Hutchinson v. Underwood*, 27 Tex. 255.

¹³⁷ *De Vries v. Conklin*, 22 Mich. 255.

¹³⁸ *Griffin v. Ragan*, 52 Miss. 78.

¹³⁹ *West v. Laraway*, 28 Mich. 464.

¹⁴⁰ *Draughon v. Ryan*, 16 La. Ann. 309.

¹⁴¹ *Smith v. Kennedy*, 13 Hun (N. Y.) 9.

¹⁴² *Barth v. Kasa*, 30 La. Ann. 910.

and Maryland;¹⁴³ and to some extent in South Carolina;¹⁴⁴ and in Wisconsin formerly;¹⁴⁵ and, since 1874, in Massachusetts.¹⁴⁶ In Mississippi such a note binds her personal property and the income of her real estate,¹⁴⁷ but not the income of her real property after her death.¹⁴⁸ As to such income for her life, her power, in Mississippi, extends also to the giving of a mortgage securing her notes for her husband's debts.¹⁴⁹

In Massachusetts, since the statute already referred to, a wife may give or indorse a note for the accommodation of her husband's firm, which will be valid even between the original parties to it.¹⁵⁰ So, in Maine, a wife's note, signed as surety with her husband in Massachusetts and delivered by mail in Maine, is held to be binding on her.¹⁵¹ In Missouri, if a married woman give her note to take up a note of her son, which is thereupon surrendered and destroyed, her note will be binding upon her without mention of any separate es-

¹⁴³ *Deering v. Boyle*, 8 Kan. 525; *Fredericktown Sav. Inst. v. Michael*, 81 Md. 487, 32 Atl. 189. And by a joint note with him for his debts. *Wicks v. Mitchell*, 9 Kan. 80; *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045. But in Maryland, until 1882, a note by the wife without her husband was invalid. *Hoffman v. Shupp*, 80 Md. 611, 31 Atl. 505; P. L. 1872, c. 270.

¹⁴⁴ Her separate estate will be liable for her bond, given on sufficient consideration, as surety for her husband. *Witte v. Wolfe*, 16 S. C. 256; or on her note, for like consideration, and given without duress, for her husband, *Clinkscales v. Hall*, 15 S. C. 602; or for her son, *Pelzer v. Campbell*, Id. 581. On the other hand, without such consideration, even an express charge will not bind her separate estate for his benefit. *American Mortg. Co. of Scotland v. Owens*, 18 C. C. A. 513, 72 Fed. 219.

¹⁴⁵ *Heath v. Van Cott*, 9 Wis. 516. But see now, *contra*, *Kavanagh v. O'Neill*, 53 Wis. 101, 10 N. W. 369; *Mueller v. Wiese*, 95 Wis. 381, 70 N. W. 485.

¹⁴⁶ *Major v. Holmes*, 124 Mass. 108; *Thacher v. Churchill*, 118 Mass. 108; Mass. Laws 1874, c. 184; *Binney v. Bank*, 150 Mass. 574, 23 N. E. 380. So, the wife's indorsement of her guaranty on her husband's note before its delivery with an express charge of her separate estate. *Robertson v. Rowell*, 158 Mass. 94, 32 N. E. 898.

¹⁴⁷ *Dibrell v. Carlisle*, 48 Miss. 691.

¹⁴⁸ *Reed v. Coleman*, 51 Miss. 836.

¹⁴⁹ *Foxworth v. Magee*, 44 Miss. 430; *Foxworth v. Bullock*, Id. 457.

¹⁵⁰ *Kenworthy v. Sawyer*, 125 Mass. 28; *Foster v. Leach*, 160 Mass. 418, 36 N. E. 69.

¹⁵¹ *Bell v. Packard*, 69 Me. 105.

tate.¹⁵² But in this case she can hardly be looked upon as a mere surety, there having been a fresh and original consideration for her note. So, in Massachusetts, where her note was given for money loaned at the time to her husband at his request.¹⁵³ So, in Georgia, where her note was given jointly with her husband in regard to her own business conducted by him for her, although she would not have been bound as a mere surety for him in his business.¹⁵⁴ Whether, in such a case, the wife signs as surety for her husband or in her own separate business, is a question for the jury.¹⁵⁵

Accommodation Paper with Express Charge of Separate Property.

§ 292. In New York the wife's indorsement for her husband, with an express charge of her separate estate, renders her liable.¹⁵⁶ And, where she cannot bind herself for the debt of her husband, her joint note with him for a debt constituting a lien upon his land (the note containing an express charge of her separate estate) has been held binding upon her in consideration of the benefit received by her in regard to her dower interest in the land.¹⁵⁷ And in New York

¹⁵² *Meyers v. Van Wagoner*, 56 Mo. 115.

¹⁵³ *Goodnow v. Hill*, 125 Mass. 587.

¹⁵⁴ *King v. Thompson*, 59 Ga. 380. Nor would she be liable on a note given to her son-in-law to enable him to raise money for his own use. *Strauss v. Friend*, 73 Ga. 782.

¹⁵⁵ *Freckling v. Rolland*, 53 N. Y. 422. And is not controlled by a device creating the appearance of a separate benefit. *Emerson-Talcott Co. v. Knapp*, 96 Wis. 34, 62 N. W. 945. The note is not given as surety, if the money was actually borrowed by the wife for her son's debts, *National Bank v. Carlton*, 96 Ga. 469, 23 S. E. 388; or to pay off a mortgage debt of the husband, which the wife had assumed on buying the property, *Daniel v. Royce*, 96 Ga. 566, 23 S. E. 493.

¹⁵⁶ *Corn Exch. Ins. Co. v. Babcock*, 42 N. Y. 613; *Barnett v. Lichtenstein*, 39 Barb. 194. The case of *Kelso v. Tabor*, 52 Barb. 125, in which the contrary was held, is no longer an authority. *Corn Exch. Ins. Co. v. Babcock*, *supra*. Such express charge is also necessary in Nebraska to render valid a wife's note given as surety. *State Sav. Bank v. Scott*, 10 Neb. 83, 4 N. W. 314.

¹⁵⁷ *Perkins v. Elliott*, 22 N. J. Eq. 127, 23 N. J. Eq. 526; *Marx v. Bellel* (Mich.) 72 N. W. 620. But see, *contra*, in Alabama, *Richardson v. Stephens*, 114 Ala. 238, 21 South. 949.

a wife's note, made payable "out of my separate estate," is a sufficient admission that she had such estate.¹⁵⁸ In Massachusetts, before the act of 1874, a wife's estate was not liable, even in equity, upon an accommodation note, where there was neither separate benefit to her, nor express charge of her estate, nor credit given to it.¹⁵⁹ And this is still the rule in New York, and, in general, wherever there is not statutory provision to the contrary.¹⁶⁰

And it is a good plea by a married woman that she signed the note simply as surety for her husband without any separate benefit to herself or to her separate estate.¹⁶¹ An intention to charge her separate estate may, however, be presumed from circumstances, and such presumption has been made in the case of a joint note given in compromise of a suit against the husband.¹⁶² So, where the wife signs as principal and the husband as surety, and the payee is directed to send the money to her, the note will be presumed to have been made for her separate use, but the presumption may be rebutted by evidence of a renewal by the husband without the wife.¹⁶³

¹⁵⁸ *Waggoner v. Millington*, 8 Hun, 142.

¹⁵⁹ *Willard v. Eastham*, 15 Gray, 328. "And our conclusion," said Judge Hoar in this case (page 335), "is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate, or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate unless an express instrument makes the debt a charge on it."

¹⁶⁰ *Yale v. Dederer*, 18 N. Y. 265, 22 N. Y. 450, and 68 N. Y. 329. "If the promise," said Judge Comstock in this case, "is on her own account,—if she or her separate estate receives a benefit,—equity will lay hold of these circumstances, and compel her property to respond to the engagement. Where these grounds of liability do not exist, there is no principle on which her estate can be made answerable."

¹⁶¹ *Coats v. McKee*, 26 Ind. 223.

¹⁶² *Lincoln v. Rowe*, 51 Mo. 571.

¹⁶³ *Prendergast v. Borst*, 7 Lans. (N. Y.) 489.

Subsequent Promise after Death of Husband or Divorce.

§ 293. At common law the wife's incapacity to bind herself by contract during coverture extended to her subsequent promise made after her husband's death in consideration of such contract, and the subsequent promise was held to be without valid consideration.¹⁶⁴ So, a note given by her after her husband's death has been held in New York not to be supported by a purchase of goods made by her during coverture as a sole trader.¹⁶⁵ So, forbearance extended to a wife on her note given as a sole trader is no consideration for her note given after her husband's death.¹⁶⁶ So, she cannot make herself liable for a note given as surety for her husband by a renewal of it after his death.¹⁶⁷ And, in like manner, her promise after his death to pay a note made by her during coverture is unavailable.¹⁶⁸ But she would be bound by her promise after his death to pay a joint note given by them for her antenuptial debts.¹⁶⁹ Although, as has been seen, a new note by her as widow in payment of a joint note made with her husband will not be binding on her, especially if given by her without knowledge that she was not liable on the former note.¹⁷⁰ Nor will a promise, made after her husband's death, to pay for goods purchased by her while living separate from her husband and in adultery, be binding on her, although these circumstances were unknown to the holder.¹⁷¹

In like manner her promise, made after divorce, to pay for goods purchased by her while married, is without consideration.¹⁷² And this is even true of her promise made after divorce to pay a note given by her for necessities furnished on her credit before the divorce, and while she was living separate from, and deserted by, her

¹⁶⁴ Byles, Bills, 65; 1 Pars. Notes & B. 79; *Littlefield v. Shee*, 2 Barn. & Adol. 811; *Felton v. Reid*, 52 N. C. 269; *Vance v. Wells*, 6 Ala. 737; *Porterfield v. Butler*, 47 Miss. 165.

¹⁶⁵ *Goulding v. Davidson*, 28 Barb. 438.

¹⁶⁶ *Loyd v. Lee*, 1 Strange, 94.

¹⁶⁷ *Hetherington v. Hixon*, 46 Ala. 297.

¹⁶⁸ *Smith v. Allen*, 1 Lans. (N. Y.) 101.

¹⁶⁹ *Parker v. Cowan*, 1 Heisk. (Tenn.) 518.

¹⁷⁰ *Coward v. Hughes*, 1 Kay & J. 443.

¹⁷¹ *Meyer v. Haworth*, 8 Adol. & E. 467.

¹⁷² *Watkins v. Halstead*, 2 Sandf. (N. Y.) 311.

husband.¹⁷³ In Pennsylvania, however, an agreement by the wife before divorce is sufficient consideration for a promise made by her afterwards.¹⁷⁴

And, notwithstanding a wife's common-law incapacity to make a note, she may as a widow bind herself in some cases by a subsequent ratification, e. g. by keeping from her husband's administrator the goods purchased by her, for which she had given the note.¹⁷⁵ And, if money is borrowed by a wife having a separate estate, her liability in equity is a sufficient consideration for a promise of payment made by her after her husband's death.¹⁷⁶ And it has been held that her liability as a wife for the rent of a house is good consideration for her duebill given after she became a widow.¹⁷⁷

Defense of Coverture—Bona Fide Holder—Personal.

§ 294. In general, where a wife's note is invalid, as in the case of her acting as surety for her husband's debt, she may set up the defense, even against a bona fide holder of the note.¹⁷⁸

The defense of coverture, like all other defenses growing out of a party's incapacity, is the personal privilege of the married woman or her representative, and the indorser of a note cannot set up in his defense the coverture of the maker.¹⁷⁹ Nor can such defense be made by a subsequent purchaser or incumbrancer of the land

¹⁷³ *Hayward v. Barker*, 52 Vt. 429.

¹⁷⁴ *Hemphill v. McClimans*, 24 Pa. St. 367.

¹⁷⁵ *Hunter v. Duvall*, 4 Bush (Ky.) 438.

¹⁷⁶ *Lee v. Muggeridge*, 5 Taunt. 36.

¹⁷⁷ *Cleland v. Low*, 32 Ga. 458.

¹⁷⁸ *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575; *Perkins v. Rowland*, 69 Ga. 661; *Howard v. Simpkins*, 70 Ga. 322; *Venable v. Lippold* (Ga.) 29 S. E. 181. Even where it appears by recitals to be given for advances to her. *Laster v. Stewart*, 89 Ga. 181, 15 S. E. 42. But see, contra, *March v. Clark*, 9 Fed. 753. And see §§ 282, supra, 312, infra.

¹⁷⁹ *Haly v. Lane*, 2 Atk. 181; *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217; *Erwin v. Downs*, 15 N. Y. 575; *Archer v. Shea*, 14 Hun (N. Y.) 493; *Edmunds v. Rose*, 51 N. J. Law, 547, 18 Atl. 748; *Leitner v. Miller*, 49 Ga. 489. Nor can an indorser set up in defense against a subsequent holder that a note purporting to be made by an agent was void as to the maker because he had died before it was signed. *Burrill v. Smith*, 7 Pick. (Mass.) 291; although the holder took the note with knowledge of the fact, *Erwin v. Downs*, 15 N. Y. 575.

mortgaged for its security.¹⁸⁰ In like manner, the guarantor of a note cannot set up that the maker was a married woman;¹⁸¹ nor the second indorser, that the first indorser was a married woman.¹⁸² Nor can the drawer of a bill set up the incapacity of the indorser;¹⁸³ nor the acceptor, the incapacity of drawer or indorser.¹⁸⁴ So, the drawer of a bill made payable to a married woman cannot question her right to receive payment of it.¹⁸⁵

Wife's Liability While Living Separate.

§ 295. At common law a wife's liability is restricted to cases where her husband is civiliter mortuus, banished, or transported.¹⁸⁶ Unless so provided by statute, a wife living separate from her husband, although in another state, does not thereby become liable on her note.¹⁸⁷ And this is true, although she have a separate maintenance secured to her by deed.¹⁸⁸ And, while living separate, she cannot make a valid grant of an annuity out of such deed for her separate maintenance.¹⁸⁹ Nor can she be sued alone by reason of her living separate and having a separate maintenance.¹⁹⁰

¹⁸⁰ Purchaser, *Bennett v. Mattingly*, 110 Ind. 197, 10 N. E. 299, and 11 N. E. 792; *West v. Miller*, 125 Ind. 70, 25 N. E. 143; or later mortgagee, *Plant v. Storey*, 131 Ind. 46, 30 N. E. 886.

¹⁸¹ *Nabb v. Koontz*, 17 Md. 283, 291.

¹⁸² 1 Pars. Notes & B. 79; *Ogden v. Blydenburgh*, 1 Hilt. (N. Y.) 182; *Prescott Bank v. Caverly*; 7 Gray (Mass.) 217. So, the payee cannot hold a surety, discharged by an extension, on the ground that the extension was for the invalid signature of the maker's wife. *Donkle v. Miley*, 88 Wis. 33, 59 N. W. 586.

¹⁸³ This has been held in case of incapacity as a bankrupt, *Drayton v. Dale*, 2 Barn. & C. 293; *Pitt v. Chappelow*, 8 Mees. & W. 616; or as a government officer, *Knox v. Reeside*, 1 Miles, 294.

¹⁸⁴ *Byles, Bills*, 67; *Prestwich v. Marshall*, 4 Car. & P. 594, 7 Bing. 565; *Smith v. Marsack*, 6 C. B. 486. So, where the bill was both drawn and indorsed by the wife. *Prince v. Brunatte*, 1 Bing. N. C. 435.

¹⁸⁵ *Cathell v. Goodwin*, 1 Har. & G. (Md.) 468.

¹⁸⁶ *Edwards v. Davis*, 16 Johns. (N. Y.) 281.

¹⁸⁷ *Chouteau v. Merry*, 3 Mo. 182.

¹⁸⁸ *Byles, Bills*, 65; *Marshall v. Rutton*, 8 Term R. 545. But see *Jones v. Lewis*, 7 Taunt. 55, 2 Marsh. 385. And a wife has been held liable in such case on her acceptance. *Stuart v. Kirkwall*, 3 Madd. 387.

¹⁸⁹ *Hyde v. Price*, 3 Ves. 437.

¹⁹⁰ *Lean v. Schutz*, 2 W. Bl. 1195; *Hatchett v. Baddeley*, Id. 1079; *Lewis v. Lee*, 3 Barn. & C. 291.

And in England she is not liable on her contracts, even when living separate from her husband and divorced *a mensa et thoro*.¹⁹¹ But in America, if living separate and divorced, she is liable on her note, and may be sued alone.¹⁹²

Living Separate—And with Separate Estate.

§ 296. In England she is liable on her bond, if living separate from her husband and having a separate estate.¹⁹³ When so living and having a separate estate, her estate is liable in equity for the fees of a solicitor employed by her without any express agreement or charge of her separate property.¹⁹⁴ And a bill in equity will lie against her for moneys loaned to and used by her for necessities while deserted by her husband, she having a separate estate.¹⁹⁵ In Louisiana she is not liable on her note while living separate, unless it was made for her separate benefit.¹⁹⁶ But, in general, where she is living separate from her husband and has a separate estate, in a contract for work and labor done for her, an intention to charge such estate will be presumed from circumstances.¹⁹⁷

Living Separate and as Sole Trader.

§ 297. Where she is living separate from her husband and in adultery and carrying on a separate business, she will be liable for work done for her in such business.¹⁹⁸ And it has been held that where a wife is living in England apart from her husband, who is

¹⁹¹ *Lewis v. Lee*, 3 Barn. & C. 291, 5 Dowl. & R. 98. And in England a warrant of attorney given by a married woman divorced *a mensa et thoro*, and living separate from her husband, will be set aside. *Faithorne v. Blaguire*, 6 Maule & S. 73.

¹⁹² *Pierce v. Burnham*, 4 Metc. (Mass.) 303.

¹⁹³ *Corbett v. Poelnitz*, 1 Term R. 5.

¹⁹⁴ *Murray v. Barlee*, 3 Mylne & K. 209; *Coleman v. Wooley*, 10 B. Mon. (Ky.) 320.

¹⁹⁵ *Jenner v. Morris*, 3 De Gex, F. & J. 45; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83; *Kenyon v. Farris*, 47 Conn. 510.

¹⁹⁶ *Lee v. Cameron*, 14 La. Ann. 711.

¹⁹⁷ *Conlin v. Cantrell*, 64 N. Y. 217; *Coleman v. Wooley*, 10 B. Mon. (Ky.) 320.

¹⁹⁸ *Cox v. Kitchen*, 1 Bos. & P. 338.

an alien residing in France in the public service and detained by such disability in France, she is liable as a feme sole for wages of servants and for money lent her.¹⁹⁹ So, if her husband resides abroad and she is living in England and carrying on business there as a sole trader.²⁰⁰ And if her husband is an alien enemy in the enemy's country, and she is living separate from him in England, she is liable as a sole trader for wages and for money lent her.²⁰¹ So, where the husband is an alien residing abroad, and appears never to have been in the United States, and his wife is living separate from him in the United States, and carrying on business in her maiden name as a sole trader, she will be liable on her note.²⁰² So, she would be liable in like circumstances upon her indorsement, her husband's consent being presumed from the circumstances of the case.²⁰³

And, in general, where a married woman is living separate from her husband and doing business as a sole trader, an intention to charge her separate estate will be presumed,²⁰⁴ especially where she has been abandoned by her husband.²⁰⁵

Deserted by Husband.

§ 298. And where she was living separate from her husband, in Massachusetts, as a sole trader, on account of his cruelty, he living in New Hampshire, she was permitted, in Massachusetts, to sue alone on a note held by her as payee.²⁰⁶ So, the wife of a seaman, who has been absent for more than two years, has been held, in Pennsylvania, to have the rights of a sole trader and to be entitled to receive as such a distributive share of her parent's estate.²⁰⁷ In Georgia a married woman deserted by her husband may make a

¹⁹⁹ *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147.

²⁰⁰ *De Gaillon v. L'Aigle*, 1 Bos. & P. 357.

²⁰¹ *Deerly v. Mazarine*, 1 Salk. 116.

²⁰² *McArthur v. Bloom*, 2 Duer (N. Y.) 151.

²⁰³ *Roland v. Logan*, 18 Ala. 307.

²⁰⁴ *Johnson v. Gallagher*, 30 Law J. Ch. 298, 3 De Gex, F. & J. 513; *London Chartered Bank v. Lemprière*, L. R. 4 P. C. 593, disapproving *Shattock v. Shattock*, L. R. 2 Eq. 182.

²⁰⁵ *Rhea v. Rhenner*, 1 Pet. 105.

²⁰⁶ *Abbot v. Bayley*, 6 Pick. 89.

²⁰⁷ *Valentine v. Ford*, 2 Browne (Pa.) 193.

valid note.²⁰⁸ But in Vermont she is not liable on her note given under such circumstances even for necessities sold her on her own credit.²⁰⁹ If, while living separate, she be sued alone on her note, the burden of proving desertion is in all cases on the plaintiff.²¹⁰ In Colorado she has been held liable on a lease, where she was living separate from, and abandoned by, her husband, who had never been in the state.²¹¹ In Alabama, if living separate from, and abandoned by, her husband, who had left the state, she may sue alone on a note made payable to her.²¹² In South Carolina, if her husband has left the state and has not been heard from, she will be liable on her note.²¹³ But in Kentucky she will not be, unless especially empowered by the court to act as a feme sole, even though her husband have abandoned her and his whereabouts be unknown.²¹⁴ But at common law, if the husband has been transported for seven years, and has not afterwards returned, the wife may sue as an unmarried woman.²¹⁵ And where the husband has been absent for more than seven years, and the wife pleads her coverture in her defense, she must prove him to have been alive within that time.²¹⁶ In Louisiana, if a wife is separated from her husband by decree of court and is administering her own affairs, she is liable on her note as a feme sole.²¹⁷ And it has been held in the United States that a woman living separate from, and abandoned by, her husband, who is both nonresident and alien, may sue and be sued as an unmarried woman.²¹⁸ Although in the *Duchesse De Pienne's Case*, already referred to, the contrary was held in England.²¹⁹

²⁰⁸ *Clark v. Valentino*, 41 Ga. 143.

²⁰⁹ *Hayward v. Barker*, 52 Vt. 429.

²¹⁰ *Gregory v. Pierce*, 4 Metc. (Mass.) 478.

²¹¹ *Blumenberg v. Adams*, 49 Cal. 308.

²¹² *Mead v. Hughes*, 15 Ala. 141; *Arthur v. Broadnax*, 3 Ala. 557.

²¹³ *Bean v. Morgan*, 4 McCord, 148. And her conveyance is valid under like circumstances. *Boyce v. Owens*, 1 Hill, 8.

²¹⁴ *Hannon v. Madden*, 10 Bush, 664.

²¹⁵ *Carrol v. Blencow*, 4 Esp. 27.

²¹⁶ *Hopewell v. De Pinna*, 2 Camp. 113; *Lambert v. Atkins*, Id. 273.

²¹⁷ *Cormier v. De Valcourt*, 33 La. Ann. 1168.

²¹⁸ *Gregory v. Paul*, 15 Mass. 31; *Robinson v. Reynolds*, 1 Aiken (Vt.) 174. Especially where he has never been in the United States. *Levi v. Marsha* (N. C.) 29 S. E. 832. In this case, *Fairecloth, C. J.*, states the rule as follows:

²¹⁹ See note 219 on following page.

Separate Estate and Sole Trader.

§ 299. Where the wife is carrying on business for herself with her husband's consent, her separate estate will be liable.²²⁰ But in all such cases either her separate benefit or the fact of her separate business must appear.²²¹

If, however, she has separate property and is doing business as a sole trader, the want of separate benefit to her from the contract will be no defense.²²² If she is a sole trader, with a separate estate of her own, it will be liable for her debts contracted in the business.²²³ Thus, if she engage in the business of keeping a boarding house and purchase goods for it on her own credit, she will be liable.²²⁴

And the note of a sole trader given in her business will be binding upon her,²²⁵ especially where it has been given for goods purchased for her business on her sole credit.²²⁶ So, in Louisiana, where she is separated in matter of property from her husband by judgment of the court, and gives her note in her sole business as a public merchant.²²⁷ And in Colorado she is liable by force of the statute for goods bought for her business as a sole trader.²²⁸ So,

"As the wife's incapacity is not due to a natural cause, but is imposed by a rule of public policy, it ceases with the reason on which it is based, and she is then, like any other competent person, capable of transacting business."

²¹⁹ *Kay v. Duchesse de Pienne*, 3 Camp. 123. Although it is said that it would be otherwise if the husband had never been in England. *Id.* This case has since been questioned in *Barden v. Keverberg*, 2 Mees. & W. 61.

²²⁰ *Todd v. Lee*, 16 Wis. 480. And her stock in trade is her separate property, and liable as such for debts incurred in the business. *Partridge v. Stocker*, 36 Vt. 108. But where the husband's liability exists for the wife's debt, by reason of failure to file the statutory certificate, the creditor may lose his right to proceed against the husband by accepting a settlement from the wife in ignorance of the failure. *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037.

²²¹ *Bowles v. Turner*, 15 La. Ann. 352.

²²² *Levy v. Rose*, 17 La. Ann. 113.

²²³ *Todd v. Lee*, 15 Wis. 365.

²²⁴ *Tillman v. Shackleton*, 15 Mich. 447.

²²⁵ *Camden v. Mullen*, 29 Cal. 564; *Nispel v. Laparle*, 74 Ill. 306.

²²⁶ *Gillam v. Boynton*, 36 Mich. 236.

²²⁷ *Moore v. Rush*, 30 La. Ann. 1157.

²²⁸ *Barnes v. De France*, 2 Colo. 294; Colo. Rev. St. p. 455.

in New York, since the act of 1860, she is liable for her note given as a sole trader, although not for the benefit of her separate estate.²²⁹ And even for a note given after the passage of the act for goods purchased before as a sole trader, and still in her possession at the time of making the note.²³⁰ So, she would be liable upon her indorsement of a note made to her as a sole trader, even, it seems, though made by her husband.²³¹

But the mere fact of her doing business for herself will not render her liable upon her note for money loaned, not appearing to be in such business, and a subsequent divorce will not make such note valid.²³² And in Indiana it has been held that a wife, having a separate estate and doing business as a sole trader, will not be liable for goods purchased by her as such, where no intention to charge her separate estate appears.²³³ So, in Kentucky, where a married woman is part owner and proprietor of an hotel, and gives her note for supplies purchased for it, it is held that she will only be liable upon proof that such supplies are necessary to the business.²³⁴

Although the contracts of a sole trader are recognized as valid in London, she cannot as such bring an action in her own name without her husband, in the courts of Westminster, to recover for goods sold by her or other contracts made in her separate business.²³⁵ Nor is she liable to be sued alone in those courts as a sole trader.²³⁶ On the other hand, it was held long since, in Massachusetts, that a woman, living separate from her husband and doing business for herself as a sole trader, might sue alone upon a note or bill held by her.²³⁷

²²⁹ *Lewis v. Woods*, 4 Daly (N. Y.) 241; N. Y. St. 1860, c. 90.

²³⁰ *Barton v. Beer*, 35 Barb. (N. Y.) 78. 21 How. Prac. (N. Y.) 309.

²³¹ *Wilthaus v. Ludecus*, 5 Rich. Law (S. C.) 326.

²³² *O'Daily v. Morris*, 31 Ind. 111. Nor will she be liable as a sole trader on a note given for accommodation, and with no advantage to her separate business, to one having notice thereof. *Bell v. Ladd*, 14 Phila. (Pa.) 168.

²³³ *Hasheagen v. Specker*, 36 Ind. 413.

²³⁴ *Harris v. Dale*, 5 Bush, 61.

²³⁵ *Caudell v. Shaw*, 4 Term R. 361.

²³⁶ *Beard v. Webb*, 2 Bos. & P. 93.

²³⁷ *Abbot v. Bayley*, 6 Pick. 89.

II. WIFE'S SEPARATE ESTATE.

- § 300. Separate Estate in Equity.
- 301. Disposal of Separate Estate Restricted.
- 302. Express Charge of Separate Estate.
- 303. — Effect—Form.
- 304. Implied Charge.
- 305. — From Living Separate.
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- 310. — In Joint Notes.
- 311. — From Purchase of Separate Property.
- 312. Separate Benefit—Must Appear.
- 313. — Presumption Contra.

Separate Estate in Equity.

§ 300. Independent of recent statutes, the separate estate of a married woman has long been recognized and protected in courts of equity. And, in general, a wife is in equity treated, so far as regards her separate estate, as a *feme sole*.²³⁸ Where a note is indorsed to a wife, it is presumed, under the New York statute of 1849, to be her separate estate.²³⁹ And the fact that it was given to her in consideration of money loaned by her husband will not, of itself, amount to a rebuttal of such presumption.²⁴⁰ And in New York, since the acts of 1848 and 1849, a married woman may bring an action on a note made to her for a consideration proceeding from her husband.²⁴¹

The separate estate of a wife is, in general, not liable for her hus-

²³⁸ *Headen v. Rosher*, McClel. & Y. 90; *Cooke v. Husbands*, 11 Md. 492; *Burnett v. Hawpe's Ex'r*, 25 Grat. (Va.) 481. For a very full and able discussion of the liabilities attaching to and growing out of a married woman's separate estate, the reader is referred to the case of *Hulme v. Tenant*, 1 Brown, Ch. 16, and the English and American notes upon the case in 1 *White & T. Lead. Cas. Eq.* 679 et seq.

²³⁹ *Dillaye v. Parks*, 31 Barb. (N. Y.) 132.

²⁴⁰ *Tooke v. Newman*, 75 Ill. 215.

²⁴¹ *Rynders v. Crane*, 3 Daly, 339.

band's debts,²⁴² but is liable in equity for her own debts.²⁴³ In the latter case the separate estate of a married woman is liable in equity for the payment of her note,²⁴⁴ although this is not so, unless the requirements of existing local statutes are followed.²⁴⁵

Disposal of Separate Estate Restricted.

§ 301. The power of a wife to bind her separate estate is often limited, even in equity, by the instrument creating the estate.²⁴⁶ If, however, there are no restrictions in such creating instrument, she may dispose of her separate property in equity as an unmarried woman, but only in the manner, if any, prescribed by such instrument or by statute.²⁴⁷ Where she holds her separate estate with restrictions against anticipation or alienation, it will not be liable for the payment of a note given by her jointly with her husband and others.²⁴⁸ In some states, however, it is held that she has no power over her separate estate except such as is expressly given to her. Thus, where she has a separate estate created by will with express power to dispose of it by will, it has been held that her note, not being expressly authorized, will not bind her separate estate.²⁴⁹ So, where she gives a bill of exchange or obtains credit, with the intention of charging her separate estate, but does not charge it as provided by the marriage settlement creating the estate, it will not be

²⁴² *Wieman v. Anderson*, 42 Pa. St. 311.

²⁴³ *Aylett v. Ashton*, 1 Mylne & C. 105.

²⁴⁴ *Bullpin v. Clarke*, 17 Ves. 365. And is enforceable in equity to support a vendor's lien for the land purchased by it. *McClure v. Bigstaff* (Ky.) 37 S. W. 294; *Snodgrass v. Hyder*, 95 Tenn. 568, 32 S. W. 764.

²⁴⁵ *Franklin v. Beatty*, 27 Miss. 347.

²⁴⁶ *Miller v. Williamson*, 5 Md. 219; *Tarr v. Williams*, 4 Md. Ch. 68; *Williams v. Donaldson*, Id. 414; *Doty v. Mitchell*, 9 Smedes & M. (Miss.) 435; *Montgomery v. Bank*, 10 Smedes & M. (Miss.) 566; *Thomas v. Folwell*, 2 Whart. (Pa.) 11; *Wallace v. Coston*, 9 Watts (Pa.) 137; *Reid v. Lamar*, 1 Strob. Eq. (S. C.) 27; *Morgan v. Elam*, 4 Yerg. (Tenn.) 375; *Harris v. Harris*, 42 N. C. 111; *Williamson v. Beckham*, 8 Leigh (Va.) 20; *Marshall v. Stephens*, 8 Humph. (Tenn.) 159; *Metcalf v. Cook*, 2 R. I. 355.

²⁴⁷ *Cooke v. Husbands*, 11 Md. 492.

²⁴⁸ *Roberts v. Watkins*, 36 Law T. (N. S.) 799.

²⁴⁹ *Metcalf v. Cook*, 2 R. I. 355.

bound.²⁵⁰ But the better and more general opinion, at least in the United States, is that the wife's power over her separate estate is absolute, except where expressly restricted by the instrument creating it.²⁵¹

Separate Estate—Express Charge.

§ 302. The liability of the wife's separate estate to answer for her debts and contracts is more plain, where it is expressly charged by her with payment of them. And her separate estate will be liable in equity on her note given with her husband for his debts, if such estate be expressly charged,²⁵² at least in the absence of statutes to the contrary. And, even where the wife is prohibited by statute from binding herself for her husband's debts, she will be liable on a note given with her husband to pay off a mortgage on his lands, where she expressly charges her separate estate, the benefit to her dower interest in the land so relieved being held to be a sufficient independent consideration.²⁵³ So, a joint note of a hus-

²⁵⁰ Doty v. Mitchell, 9 Smedes & M. (Miss.) 435; Montgomery v. Bank, 10 Smedes & M. (Miss.) 567.

²⁵¹ Leaycraft v. Hedden, 4 N. J. Eq. 512; Jaques v. Trustees of Episcopal Church, 17 Johns. (N. Y.) 548, reversing 3 Johns. Ch. (N. Y.) 78; Kimm v. Weippert, 46 Mo. 535; Burnett v. Hawpe's Ex'r, 25 Grat. (Va.) 481. But in Nebraska a married woman's note must be given with reference to, and taken on the credit of, her separate estate. Barnum v. Young, 10 Neb. 309, 4 N. W. 1054. So, in Tennessee, her separate estate in a partnership, of which she is a member, will only become liable for a firm note by express charge. Theas v. Dugger, 93 Tenn. 41, 23 S. W. 135. A married woman's note is binding on her separate estate in California, Alexander v. Bouton, 55 Cal. 15; and such note will be construed to relate to her separate property generally, and not to that alone which is described in a collateral mortgage, Id. So, a married woman's note binds her separate property in Missouri (Boatmen's Sav. Bank v. Collins, 75 Mo. 280), but is otherwise null and void. Id. So, too, in Vermont, the joint note of husband and wife, given for a debt, created by her for the benefit and on the credit of her separate estate. Sargeant v. French, 54 Vt. 384.

²⁵² Bradford v. Greenway, 17 Ala. 797. Or on her note and mortgage, Cartan v. David, 18 Nev. 310, 4 Pac. 61; or on their joint note for his benefit, Smith v. Spaulding, 40 Neb. 339, 58 N. W. 952; Briggs v. Bank, 41 Neb. 17,

²⁵³ Perkins v. Elliott, 23 N. J. Eq. 526, reversing 22 N. J. Eq. 127. But, for a different rule in South Carolina, see section 291, supra.

band and wife, expressly binding "our separate and individual estates," has been held to bind a wife's separate estate in Maryland in equity, even prior to the statute of 1860.²⁵⁴ And it has been held in North Carolina that a sealed note by a husband and wife, referring to the wife's separate estate, will be binding on it in equity, though not at common law.²⁵⁵ So, where a married woman has by will charged her separate property with her debts generally, it will be liable for debts not expressly enumerated and charged.²⁵⁶

In New York it has been held that a wife's separate estate is liable for her note given, with intention to charge it, in payment of her husband's note originally given for clothing purchased for their children.²⁵⁷ So, it will be liable on her indorsement of a note of her husband with intention of charging it, although the estate be not described.²⁵⁸ And, if she make a promissory note payable "from my personal estate," this will be equivalent to a charge of her separate estate.²⁵⁹

A mortgage by the wife of her separate property is, of course, an express charge, and may bind the property, where the note secured by it would not have done so.²⁶⁰ But where contracts by her as surety for her husband or others are prohibited by statute, neither mortgage nor note secured by it will bind her separate estate.²⁶¹

59 N. W. 351; or on her note as surety for him, *Spatz v. Martin*, 46 Neb. 917, 65 N. W. 1063; *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488.

²⁵⁴ *Hall v. Eccleston*, 37 Md. 510.

²⁵⁵ *Pippen v. Wesson*, 74 N. C. 437.

²⁵⁶ *Owens v. Dickenson*, Craig & P. 48.

²⁵⁷ *Francis v. Ross*, 17 How. Prac. 561.

²⁵⁸ *Corn Exch. Ins. Co. v. Babcock*, 42 N. Y. 613.

²⁵⁹ *First Nat. Bank v. Hurlburt*, 22 Hun. 310. On the other hand, benefit to her separate estate will not of itself render it liable for a note executed by another without her authority. *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. 450.

²⁶⁰ *Martin v. Cauble*, 72 Ind. 67; *Gregory v. Van Voorst*, 85 Ind. 108; *Tipton v. Bank (Ky.)* 33 S. W. 205; *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73. Especially in the hands of a purchaser with notice. *Ogle v. Ogle*, 41 Ohio St. 359. So, a covenant in the mortgage to pay the debt may be upheld when a covenant to pay a certain note would not be. *Sperry v. Dickinson*, 82 Ind. 132. Conversely, the note may be valid by the *lex loci contractus*, and the mortgage invalid by the *lex loci rei sitæ*. *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418.

²⁶¹ *Jones v. Ewing*, 107 Ind. 313, 6 N. E. 819.

The burden of proving herself a surety will, however, be upon the wife in such case.²⁶²

Effect of Express Charge—Form.

§ 303. A charge of a wife's separate estate contained in a bill or note will not affect its negotiability.²⁶³ Nor, on the other hand, will an indorsement by her containing an express charge of her separate personal estate amount to a mortgage of personal security, within the meaning of the national bank act;²⁶⁴ and the note of a married woman, given under duress and falsely purporting to be for the benefit of her separate estate when it is not so, will not be binding upon her, even at suit of a bona fide holder for value.²⁶⁵ And, where a married woman has no separate estate, she cannot, by expressly charging her separate estate, become individually bound for the debt of another person.²⁶⁶

A memorandum upon a married woman's note charging her separate estate is a part of the note.²⁶⁷ And where a wife gives her note as surety for her husband or a third person, in order that her separate estate may be bound by it, an intention to charge it should appear in the instrument, or it must be shown to have been given for the direct benefit of such estate.²⁶⁸

In general, a married woman's note is not binding upon her in New York, unless made a charge on her separate estate.²⁶⁹ So, in

²⁶² Whether the note is her individual note, *Miller v. Shields*, 124 Ind. 166, 24 N. E. 670; or is signed by husband and wife, *Young v. McFadden*, 125 Ind. 256, 25 N. E. 284. And see section 280, *supra*.

²⁶³ *Loomis v. Ruck*, 14 Abb. Prac. N. S. (N. Y.) 385.

²⁶⁴ *Third Nat. Bank v. Blake*, 73 N. Y. 260.

²⁶⁵ *Loomis v. Ruck*, 56 N. Y. 462.

²⁶⁶ *Wilson Sewing Mach. Co. v. Fuller*, 60 How. Prac. (N. Y.) 480.

²⁶⁷ *Treadwell v. Archer*, 76 N. Y. 196.

²⁶⁸ *Yale v. Dederer*, 18 N. Y. 265, 22 N. Y. 450, and 68 N. Y. 329. In Upper Canada, under the statute of 1882, a married woman can bind her separate estate by a note given, with express reference to it, for the accommodation of her husband. *Consolidated Bank v. Henderson*, 29 U. C. C. P. 549. So, too, *Frazee v. McFarland*, 43 U. C. Q. B. 281, where credit was also given to such separate estate. But the charge created by a mortgage will not extend to other separate estate not mortgaged, *Grand Island Banking Co. v. Wright* (Neb.) 74 N. W. 82.

²⁶⁹ *Bloomington v. Lisberger*, 24 Hun, 355.

New Hampshire, if given for labor on the farm of her first husband and renewed after her second marriage, it will not be binding on her separate estate, unless it appears to have been made in respect to it.²⁷⁰ In Maryland the intention to charge her separate estate must appear in the instrument.²⁷¹ So, in Tennessee,²⁷² and in Illinois.²⁷³ So, in New York, a wife's separate estate will not be liable for antenuptial debts without an express charge.²⁷⁴

But it is not necessary that the intention to charge a wife's separate estate should appear in a note, if it be contained in a written declaration attached to the note and delivered with it as one instrument.²⁷⁵ And it has been held sufficient if shown by a collateral mortgage upon her separate property.²⁷⁶ And her separate estate not covered by the mortgage has been held liable in such case for a deficiency after sale of the mortgaged premises.²⁷⁷

Implied Charge of Separate Estate.

§ 304. It is necessary in many cases to the validity of a married woman's note, as has been already said, that there should be both a separate estate to charge and an intention to charge it.²⁷⁸ The intention to charge it will often be implied. Thus, where a husband signs a note as "acting trustee" for his wife by her authority, and with the intention of charging her separate estate, for necessities furnished to her while an infant and before her marriage, her separate estate will be liable for the payment.²⁷⁹ It

²⁷⁰ Shannon v. Canney, 44 N. H. 592.

²⁷¹ Koontz v. Nabb, 16 Md. 549.

²⁷² Kirby v. Miller, 4 Cold. 3; Cherry v. Clements, 10 Humph. 552.

²⁷³ Williams v. Hugunin, 69 Ill. 214.

²⁷⁴ Vanderheyden v. Mallory, 1 N. Y. 452.

²⁷⁵ Sherwood v. Archer, 10 Hun, 73.

²⁷⁶ Alexander v. Bouton, 55 Cal. 15. Especially if the note relates to her separate estate. Webb v. Hoselton, 4 Neb. 308. But in Texas, notwithstanding the mortgage on her separate estate, her note or other simple contract is only binding so far as given for necessities for herself or family, or for the benefit of her separate estate. Rhodes v. Gibbs, 39 Tex. 432.

²⁷⁷ Ballin v. Dillaye, 37 N. Y. 35.

²⁷⁸ Cobine v. St. John, 12 How. Prac. (N. Y.) 333. So, express charge and separate benefit are not dispensed with in North Carolina by the statute requiring consent of husband. Wilcox v. Arnold, 116 N. C. 708, 21 S. E. 434.

²⁷⁹ Baker v. Gregory, 28 Ala. 544.

has been held in New York that, to bind a wife's separate estate, the intention to charge it must be expressed or inferable from the direct benefit to her.²⁸⁰ And the intention to charge her estate, e. g. for goods purchased, must exist at the time of making the contract, and cannot be found first in some subsequent promise so to charge it.²⁸¹

But it is not in general necessary that the charge should be made in so many words. Thus, an agreement on the part of a wife to pay a debt out of her separate estate will amount in equity to a charge of the estate.²⁸² So, an intention to charge such estate may be presumed from her acknowledgment of the correctness of the account against her, for the payment of which the promise is made.²⁸³ On the other hand, no intention to charge a wife's separate estate will be implied from her mere agreement to pay for nursing and care of her father.²⁸⁴

Charge Implied from Living Separate.

§ 305. As has been said, where a wife has a separate estate and is living separate from her husband, she is liable at common law on a bond given by her.²⁸⁵ So, under like circumstances, for solicitor's fee, without either express agreement to pay or express charge.²⁸⁶ And especially where, under the same circumstances, the credit has been given to the wife, an intention on her part to charge her separate estate will be presumed.²⁸⁷ And, in general, where a wife has a separate estate and lives separate from her husband, an intention to charge her estate may be presumed from the circumstances of the case,²⁸⁸ especially where the wife is also doing business for herself as a sole trader.²⁸⁹

²⁸⁰ *Owen v. Cawley*, 36 Barb. (N. Y.) 52.

²⁸¹ *White v. Story*, 43 Barb. (N. Y.) 124.

²⁸² *Oakley v. Pound*, 14 N. J. Eq. 178; *Leayercraft v. Hedden*, 4 N. J. Eq. 542.

²⁸³ *Collins v. Rudolph*, 19 Ala. 616.

²⁸⁴ *Manchester v. Sahler*, 47 Barb. (N. Y.) 155.

²⁸⁵ *Corbett v. Poelnitz*, 1 Term R. 5.

²⁸⁶ *Murray v. Barlee*, 3 Mylne & K. 209.

²⁸⁷ *Coleman v. Wooley*, 10 B. Mon. (Ky.) 320.

²⁸⁸ *Conlin v. Cantrell*, 64 N. Y. 217.

²⁸⁹ *Johnson v. Gallagher*, 30 Law J. Ch. 298, 3 De Gex. F. & J. 513. In this case, however, the bill was dismissed because the separate estate had

Charge Implied from Giving Note or Bill.

§ 306. And, where a wife has a separate estate, an intention to charge it has been presumed in many cases merely from her giving a note or bill.²⁹⁰ But even in such case it has been held that the contract must be shown by the instrument itself and by that only.²⁹¹ The presumption is, however, not lessened by the fact that the note has been executed in blank.²⁹² It has, on the other hand, been denied that any such presumption is to be made from the mere note or bill of a married woman,²⁹³ although the weight

been disposed of. "It is perfectly clear," said Turner, L. J. (page 515), "that, when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate; and therefore the inference is conclusive that there was an intention, and a clear one, on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound." This language is cited with approval by James, L. J., in *London Chartered Bank v. Lemprière*, L. R. 4 P. C. 593, dissenting from *Shattock v. Shattock*, L. R. 2 Eq. 182, which restricted such implication to cases where the wife had an absolute interest in the property, with power to charge it in any manner she pleased.

²⁹⁰ *Coats v. Robinson*, 10 Mo. 757; *Dallas v. Heard*, 32 Ga. 604; *Batchelder v. Sargent*, 47 N. H. 262; *Barnes v. De France*, 2 Colo. 294; *Chapman v. Foster*, 6 Allen (Mass.) 136; *Pope v. Hooper*, 6 Neb. 178; *Whitesides v. Cannon*, 23 Mo. 473; *Lillard v. Turner*, 16 B. Mon. (Ky.) 374, approved in *Burch v. Breckinridge*, Id. 487. And this has been applied even to notes signed or indorsed as surety. *Jarman v. Wilkerson*, 7 B. Mon. (Ky.) 293; *Bell v. Kellar*, 13 B. Mon. (Ky.) 381; *Marshall, J.*, saying in this case: "If she has a separate estate, and does any specific act which directly involves and pledges her credit, it must be referred to her separate estate, which she can bind, and on which alone her credit rests. And such act must be considered as implying a charge upon her estate." So, where the note was for property purchased by her, although secured by mortgage by husband and wife of the property purchased. *Avery v. Vansickle*, 35 Ohio St. 270. In this case there had been a foreclosure of the mortgage and a judgment already against the husband on the note. So, in *Kansas*, although given in payment of the husband's debts. *Deering v. Boyle*, 8 Kan. 525; *Wicks v. Mitchell*, 9 Kan. 80.

²⁹¹ *Bank v. Taylor*, 62 Mo. 338.

²⁹² *Morrison v. Thistle*, 67 Mo. 596.

²⁹³ *Draper v. Jordan*, 58 N. C. 175; *Staley v. Hamilton*, 19 Fla. 275.

of authority appears to be in favor of the rule as first stated. And the same presumption of a charge has been made in the case of a married woman's indorsement.²⁹⁴ Under the statute of Wisconsin, her indorsement is not binding upon her at law, and is only binding in equity upon her separate estate in case of separate benefit, an express charge, or credit given directly to her.²⁹⁵ And, where her indorsement is placed for accommodation on her husband's note, an intention to charge her separate estate will not be presumed.²⁹⁶

But in equity, and in the absence of statutory requirements as to an express charge, a wife's separate estate will be liable, as we have seen, for the payment of her bond or other contract.²⁹⁷ In such case an intention to charge her estate is to be presumed from the instrument itself and the very fact of her giving it.²⁹⁸ And in England this has been held to be true in a contract for subscription to stock.²⁹⁹

So, in England, since the married woman's act of 1870, a wife's separate estate has been held liable without any express charge for the payment of a joint and several note given by herself and her husband, the husband being insolvent.³⁰⁰ And in the United

²⁹⁴ *Bell v. Kellar*, 13 B. Mon. (Ky.) 381; *Frank v. Lilienfeld*, 33 Grat. (Va.) 377.

²⁹⁵ *Flanders v. Abbey*, 6 Biss. C. C. 16, Fed. Cas. No. 4,851. See, too, Wisconsin statute of 1860; *Conway v. Smith*, 13 Wis. 125.

²⁹⁶ *Levi v. Earl*, 30 Ohio St. 147.

²⁹⁷ *Norton v. Turvill*, 2 P. Wms. 144; *Peacock v. Monk*, 2 Ves. 193; *Hulme v. Tenant*, 1 Brown, Ch. 16; 1 White & T. Lead. Cas. Eq. 679; *Leaycraft v. Hedden*, 4 N. J. Eq. 542.

²⁹⁸ *Burnett v. Hawpe*, 25 Grat. (Va.) 488; *Garland v. Pamplin*, 32 Grat. (Va.) 305; *Darnall v. Smith*, 26 Grat. (Va.) 884. In this latter case the order given was on a particular estate, which was held to be primarily, and not exclusively, liable.

²⁹⁹ *In re Leeds Banking Company (Matthewman's Case)* L. R. 3 Eq. 781. Here the decisive circumstances showing intention seemed to be her acceptance of shares allotted to "the executors of" her former husband, through whom she had other shares, and her making payment on them by check on a bank account kept in her individual name. But see, contra, *Rice v. Railroad Co.*, 32 Ohio St. 380, where it was held that such intention must appear in the instrument. In this case, however, there was no separate benefit to the wife or her estate.

³⁰⁰ *Davies v. Jenkins*, L. R. 6 Ch. Div. 728.

States it has been held in many cases that an intention to charge her separate estate is to be presumed from the wife's giving a joint note with her husband,³⁰¹ although such note has been given to pay off a judgment against the husband.³⁰² On the other hand, in an earlier case in England, such a note, given for advances to the husband, was held not to be a charge on the wife's separate estate, but to be an equitable appointment, to be satisfied out of the rents and profits of her estate.³⁰³

Implication from Giving Note—Restricted to Cases of Benefit.

§ 307. As in the case of her sole note, where the joint note is given for her husband's accommodation or in payment of his debts, no intention to charge her separate estate is to be presumed, if none is expressed.³⁰⁴ But a contract for her own benefit will bind her separate estate.³⁰⁵ The plaintiff, however, must either prove that such contract was for her separate benefit or that she charged her separate estate expressly for it.³⁰⁶

Where she purchased property and gave her note for it, her intention to bind her separate property by the note has been generally presumed in recent cases.³⁰⁷ And this presumption was held to be *conclusive* in a case where she gave a note and mortgage jointly with her husband for the purchase money of land

³⁰¹ Patton v. Kinsman, 17 Iowa, 428; Cowles v. Morgan, 34 Ala. 535; Avery v. Vansickle, 35 Ohio St. 270; Schaefroth v. Ambs, 46 Mo. 114; Whitesides v. Cannon, 23 Mo. 457; Ozley v. Ikelheimer, 26 Ala. 332; Caldwell v. Sawyer, 30 Ala. 283; Schaeffer v. Ivory, 7 Mo. App. 461. But, after divorce granted, a court of equity refused, in Missouri, to enforce such a note against the wife's separate property. Hooton v. Ransom, 6 Mo. App. 19. And the presumption arising from such a note may be rebutted. Harris v. Wilson, 40 Ohio St. 300.

³⁰² Nunn v. Givhan, 45 Ala. 370.

³⁰³ Field v. Sowle, 4 Russ. 112.

³⁰⁴ Frecking v. Rolland, 33 N. Y. Super. Ct. 499, 53 N. Y. 422; Knox v. Jordan, 58 N. C. 175; Johnson v. Malcom, 59 N. C. 120; Saulsbury v. Weaver, 59 Ga. 254; Bartington v. Bradley, 16 La. Ann. 310.

³⁰⁵ Van Allen v. Humphrey, 15 Barb. (N. Y.) 555. But see, contra, Jones v. Crosthwaite, 17 Iowa, 393.

³⁰⁶ White v. McNett, 33 N. Y. 371.

³⁰⁷ Huff v. Wright, 39 Ga. 41; Allen v. Fuller, 118 Mass. 402; Stevens v.

conveyed to her.³⁰⁸ But it was denied altogether in another and similar case, where it was held that no other security than that given was intended, and that the intention to charge her separate estate must either be expressed or implied *in the contract*.³⁰⁹ This has been also declared to be the rule in Tennessee, in the case of a joint note given by husband and wife for goods purchased.³¹⁰

Implied Charge—Where Credit Given Wife.

§ 308. The fact that, in the contract of a married woman, credit has been given only to her and her estate will be considered as an element of importance, and her separate estate is often held in equity on this ground to be charged with the debt contracted.³¹¹ This was held to be the rule in New York, before the act of 1860, where a note of the husband was guarantied by the wife and discounted by the plaintiff on the credit of her separate estate.³¹² It was held sufficient to bind a married woman's separate property for her contract, if either her separate benefit or a separate credit to her be shown.³¹³ And it has been held in New York, in a recent case, that the fact of a note being discounted on the credit of the wife's separate estate will render such estate liable, without

Reed, 112 Mass. 515; Stewart v. Jenkins, 6 Allen (Mass.) 300; Webb v. Hoselton, 4 Neb. 308.

³⁰⁸ Avery v. Vansickle, 35 Ohio St. 270. "Where a married woman," said Boynton, J. (page 276), "acquires the title to property by purchase, which becomes, by force of the statute, her separate estate, and executes her promissory note therefor, an implication arises, in the absence of proof showing a different understanding, that she thereby intended to charge her separate estate with its payment." Nor is this liability changed by her giving a mortgage as collateral, *Id.*; Rogers v. Ward, 8 Allen (Mass.) 387; Ballin v. Dillaye, 37 N. Y. 35; nor merged in a judgment on the note against the husband alone, Avery v. Vansickle, *supra*.

³⁰⁹ Kimm v. Weippert, 46 Mo. 546; Wagner, J., saying: "The intent, to be of any importance, must be a part of the contract; that is, the true meaning of the contract, when justly interpreted, must be that the debt which it creates should be a charge upon the estate."

³¹⁰ Cherry v. Clements, 10 Humph. 552; Litton v. Baldwin, 8 Humph. 209.

³¹¹ Noyes v. Blakeman, 3 Sandf. (N. Y.) 535. But the interest of a cestui que trust is not such an estate. Noyes v. Blakeman, 6 N. Y. 567.

³¹² Sexton v. Fleet, 2 Hilt. 477.

³¹³ Dickerman v. Abrahams, 21 Barb. (N. Y.) 551.

any intention to charge such estate or any proof of benefit to her or to it.³¹⁴ And this has been held to be true of a note given by husband and wife for family supplies sold to them on the credit of a farm, which belonged to the wife and was carried on jointly by both.³¹⁵ And, even where the wife has no other separate estate, she is liable for goods purchased by her on her own credit, at least in New York,³¹⁶ and in Massachusetts, under like circumstances, on a note given for the goods.³¹⁷ So, if a wife is living separate from her husband, he living abroad, her note discounted on her individual credit will be considered, in equity, as intending to bind her separate estate and will bind it.³¹⁸

Charge Implied from Separate Benefit.

§ 309. The benefit to a wife's separate estate is an element of great importance in equity in determining its liability. Her separate estate is liable in equity for money advanced or loaned for the separate benefit of herself or her estate,³¹⁹ even though the loan is made by her husband,³²⁰ and though her separate property is managed by her husband and the proceeds of the loan are paid to him.³²¹ So, her separate estate will be liable for work done on it for its benefit at her request,³²² or for goods purchased for its benefit,³²³ even though her husband has given his note for such purchases.³²⁴

³¹⁴ Quassaic Nat. Bank v. Waddell, 1 Hun, 125, 3 Thomp. & C. 680.

³¹⁵ Krouskop v. Shontz, 51 Wis. 204, 8 N. W. 241.

³¹⁶ Crisfield v. Banks, 24 Hun, 159.

³¹⁷ Allen v. Fuller, 118 Mass. 402.

³¹⁸ McHenry v. Davies, L. R. 10 Eq. 88. In this case the maker of the note, to whom credit was given by a banker in Paris, was to all appearance, and so far as he knew, unmarried. The master of the rolls adopts the expression of Turner, L. J., in Johnson v. Gallagher, 3 De Gex, F. & J. 521, that "the court is bound to impute to her the intention to deal with her separate estate unless the contrary is clearly proved."

³¹⁹ Pentz v. Simonson, 13 N. J. Eq. 232.

³²⁰ Gardner v. Gardner, 7 Paige (N. Y.) 112, affirmed 22 Wend. (N. Y.) 526.

³²¹ Smith v. Kennedy, 13 Hun (N. Y.) 9.

³²² Colvin v. Currier, 22 Barb. (N. Y.) 371.

³²³ North American Coal Co. v. Dyett, 7 Paige (N. Y.) 9, affirmed 20 Wend. (N. Y.) 570.

³²⁴ Cater v. Eveleigh, 4 Desaus. Eq. (S. C.) 19; Guion v. Doherty, 43 Miss.

So, a wife's separate estate will be liable on her covenants relating to it in a conveyance of it by her.³²⁵ But where she has sold land and taken back a mortgage for part of the purchase money, and assigned that with a guaranty, it has been held that her separate estate was not liable on such guaranty without evidence of an express charge or of separate benefit to her estate.³²⁶ On the other hand, liability of her separate estate in equity for the payment of a note given for her separate benefit remains unchanged in New York by the acts of 1848 and 1849.³²⁷ On the ground of separate benefit, a wife's estate has been held liable for her draft.³²⁸ So, for her note given for work on land held jointly by herself and husband as co-tenants;³²⁹ but not without proof of separate benefit or an intention to charge her separate estate for a note given in the joint business of herself and husband.³³⁰

Charge Implied from Benefit—Notwithstanding Joint Note with Husband.

§ 310. In equity, a wife's separate estate is liable for the joint bond of herself and husband given for the wife's debt,³³¹ or their joint note given for building or other improvements on the wife's land.³³² But in Kentucky it has been held that the wife's general estate will be liable on such a note without express charge, but

538; *Clopton v. Matheny*, 48 Miss. 285. And it seems that in Mississippi contracts for such supplies may be made by either husband or wife without consent of the other, and bind the wife's separate estate. *Clopton v. Matheny*, *supra*.

³²⁵ *Kolls v. De Leyer*, 41 Barb. (N. Y.) 208. But such liability is confined to covenants made for the separate benefit of herself or her estate. *Coakley v. Chamberlain*, 38 How. Prac. (N. Y.) 483.

³²⁶ *White v. McNett*, 33 N. Y. 371, Denio, C. J., dissenting.

³²⁷ *Coon v. Brook*, 21 Barb. 546.

³²⁸ *Brooks v. Wigginton*, 14 La. Ann. 676. Although given without the authorization of her husband. *Id.*

³²⁹ *Burr v. Swan*, 118 Mass. 588.

³³⁰ *Palen v. Lent*, 5 Bosw. (N. Y.) 713.

³³¹ *Forrest v. Robinson*, 4 Port. (Ala.) 44.

³³² *Parker v. Kane*, 4 Allen (Mass.) 346. And in Louisiana, on her own note, if authorized by her husband to give it. *Jordan v. Anderson*, 29 La. Ann. 749.

not her separate estate.³³³ Her separate estate is, however, liable for cattle or implements purchased for her farm and secured by the joint note of herself and husband,³³⁴ or by her individual note,³³⁵ or without any note.³³⁶ But in Texas, where the joint note of husband and wife was given for such supplies, it was held that they were not for the benefit of the wife's separate property, within the meaning of the statute.³³⁷

Charge Implied from Purchase of Separate Property.

§ 311. Where a wife has purchased land, and, in part payment for it, indorsed a note given by the vendor to a third person, and has afterwards reconveyed the land to the vendor, her agreement to pay the note is without any separate benefit to her, and will not bind her separate estate.³³⁸ Although, where she has purchased a farm and manages it as her own, her note given in payment for it is for her separate benefit, and renders her estate liable.³³⁹ But it has been held in New Hampshire that her separate estate will not be liable on her note given for money borrowed and used by her to purchase land for her separate property.³⁴⁰ So, in Iowa, it has been held that a contract for the purchase of real estate is not "in regard to her separate property," within the meaning of the statute.³⁴¹ On the other hand, a wife's separate estate has been held to be presumptively benefited and liable on her note given for the purchase of stock;³⁴² or of a piano;³⁴³ or, given with her husband, in payment of a store bill;³⁴⁴ or, by herself

³³³ *Marshall v. Miller*, 3 Metc. (Mass.) 333. The note in this case was given for necessary supplies to the wife's farm, on which husband and wife and their family lived.

³³⁴ *Mitchell v. Smith*, 32 Iowa, 484.

³³⁵ *Batchelder v. Sargent*, 47 N. H. 262.

³³⁶ *McCormick v. Holbrook*, 22 Iowa, 487.

³³⁷ *Wallace v. Finberg*, 46 Tex. 35.

³³⁸ *Atkinson v. Richardson*, 74 N. C. 455.

³³⁹ *Chapman v. Foster*, 6 Allen (Mass.) 136; *Stewart v. Jenkins*, Id. 300.

³⁴⁰ *Ames v. Foster*, 42 N. H. 381.

³⁴¹ *Jones v. Crosthwaite*, 17 Iowa, 393.

³⁴² *Williams v. King*, 43 Conn. 569.

³⁴³ *Phillips v. Graves*, 20 Ohio St. 371.

³⁴⁴ *Williams v. Urmston*, 35 Ohio St. 296.

alone, for family supplies.³⁴⁵ And, by force of the statute, in Iowa even for goods sold for family use to the husband.³⁴⁶ And in Texas for such goods sold to the husband, he being insolvent.³⁴⁷ But in New York such liability for goods purchased by her husband exists only where he has acted as her agent.³⁴⁸

Separate Benefit Must Appear.

§ 312. The mere fact that money has been paid at the wife's request will not be sufficient of itself to bind her separate estate without evidence that it was for such estate,³⁴⁹ or for her separate benefit.³⁵⁰ So, in Louisiana, her note is void unless it be shown that she has a separate estate, and that the note was given for her separate benefit.³⁵¹ So, in Michigan, though a note be expressed to be for money loaned her, it will not render her liable without evidence of its relating to or benefiting her separate property.³⁵² And the words "value received" will not relieve the holder from the burden of proving benefit to the wife.³⁵³ This is true especially in the case of a holder having notice of the actual state of things, and the payee's declarations to him are admissible as evidence of such notice.³⁵⁴

The defense to a married woman's note on the ground of want of separate benefit to her cannot now, it seems, be set up in Louisiana against a bona fide holder for value before maturity;³⁵⁵ although it was formerly held otherwise, as a principle of the Spanish law,

³⁴⁵ *Collins v. Lavenberg*, 19 Ala. 682.

³⁴⁶ *Finn v. Rose*, 12 Iowa, 565; Code 1851, § 1455.

³⁴⁷ *Brown v. Ector*, 19 Tex. 346; St. 1848; Hart. Dig. arts. 2423, 2424. But it is not sufficient for this purpose to aver that a joint note was made by a husband and wife for the purchase of family supplies by the wife. *Laird v. Thomas*, 22 Tex. 276.

³⁴⁸ *De Mott v. McMullen*, 8 Abb. Prac. (N. S.) 335; Act 1860, c. 90, § 1.

³⁴⁹ *Wright v. Dresser*, 110 Mass. 51; *Rood v. Willey*, 58 Vt. 474, 5 Atl. 409.

³⁵⁰ *Ledelle v. Powers*, 39 Barb. (N. Y.) 555, 25 How. Prac. (N. Y.) 240.

³⁵¹ *Graham v. Thayer*, 29 La. Ann. 75; *Urquhart v. Thomas*, 24 La. Ann. 95.

³⁵² *Johnson v. Sutherland*, 39 Mich. 579.

³⁵³ *Tracy v. Keith*, 11 Allen (Mass.) 214.

³⁵⁴ *Pilcher v. Kerr*, 7 La. Ann. 144.

³⁵⁵ *Reardon v. Moriarty*, 30 La. Ann. 120.

in the case of a joint note of the husband and wife, which acknowledged the borrowing of the money for her separate use, and was in the hands of a bona fide holder for value.³⁵⁶

But it is immaterial whether the funds borrowed for the avowed benefit of a wife's separate estate have been so used, if the note was given for such express purpose.³⁵⁷ Under the Pennsylvania statute, however, her separate estate will not be liable upon a note if the consideration borrowed expressly for such estate has been diverted.³⁵⁸

And, in general, where a wife's note is given for a loan, and the money has been paid to her husband, no separate benefit appearing, her separate estate will not be liable.³⁵⁹ So, if given for property purchased by the husband or by both.³⁶⁰ And in New York, as the law now stands, a married woman's note to her husband's order is presumptively void, and it must be proved that she had a separate estate and gave the note to benefit or charge it.³⁶¹ In Mississippi, even where the husband is his wife's agent managing her plantation, and gives notes as such, it must be proved that the money borrowed was actually used for necessary supplies, or otherwise for the benefit of her separate property, in order to render her lia-

³⁵⁶ *Beauregard v. Beauregard*, 7 La. Ann. 293; the court saying: "It is a principle that has come down to us from the laws of Spain."

³⁵⁷ *McVey v. Cantrell*, 70 N. Y. 295.

³⁵⁸ *Heugh v. Jones*, 32 Pa. St. 432. Her statutory liability for "debts contracted by herself" (Act of 1848) extends only to the following: "(1) Debts contracted before marriage, whilst she was competent to contract or afterwards as a feme sole trader. (2) Debts for necessities after her husband has deserted her, or neglected and refused to support her. (3) And possibly debts contracted for the improvement of her separate estate, where the money is so applied." *Id.*

³⁵⁹ *Pendergast v. Borst*, 7 Lans. (N. Y.) 489. So, a fortiori, where their joint note was given for the husband's debt without separate benefit to her estate. *Brent v. Mount*, 65 Ga. 92. Although the husband has represented to the lender that the loan was for the wife, *Deck v. Johnson*, *41 N. Y. 348. But a benefit to her indirectly by enhancement in value of her inchoate dower is sufficient, it seems, to support her note for a loan used in paying off a mortgage on her husband's land, *Beberdick v. Crevier*, 60 N. J. Law, 389, 37 Atl. 959.

³⁶⁰ *Caldwell v. Jones* (Mich.) 73 N. W. 129.

³⁶¹ *Second Nat. Bank of Watkins v. Miller*, 63 N. Y. 639.

ble.³⁶² And this is so in Louisiana, where the wife herself gives the note with her husband's authority, but without the statutory authorization of a judge.³⁶³ To make her notes valid, it must there be shown that she was authorized by her husband, and that the debt was for her separate benefit.³⁶⁴ And in Mississippi, to render her separate estate liable on a joint note given with her husband for money borrowed, her separate benefit must be clearly shown.³⁶⁵ This is also true in Louisiana, where she had authorization to give notes and to mortgage her separate property for certain purposes and amounts, and made notes and mortgages for other amount and purpose.³⁶⁶ In Texas she can only bind her separate property by simple contract, alone or jointly with her husband, for necessities for herself or her family or for her separate property.³⁶⁷

Separate Benefit—Presumption to Contrary.

§ 313. In New York, in the absence of proof of her separate benefit, a joint bond and mortgage with her husband will be presumed to be for his debt and benefit.³⁶⁸ And her separate estate will not be liable for such debt and benefit without benefit to herself.³⁶⁹ So, in Ohio, her separate estate will not be bound by her indorsement as surety for her husband;³⁷⁰ nor, in North Carolina,

³⁶² Wright v. Walton, 56 Miss. 1.

³⁶³ Adams v. Cuny, 15 La. Ann. 485; Hardin v. Wolf, 29 La. Ann. 333. And by Louisiana law a wife's separate property is liable for her proportion of the household expenses, and for the whole of such expenses, if her husband is unable to pay them. *Id.*

³⁶⁴ Thomson v. Chick, 19 La. Ann. 206.

³⁶⁵ Stokes v. Shannon, 55 Miss. 583.

³⁶⁶ Conrad v. Le Blanc, 29 La. Ann. 123.

³⁶⁷ Rhodes v. Gibbs, 39 Tex. 432.

³⁶⁸ Goodall v. McAdam, 14 How. Prac. 385. But see, contra, Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040. Especially if the mortgage recites a loan to both, Lane v. Bank (Ky.) 43 S. W. 442. Or if a note without mortgage was given by both and the money paid to the wife, who owned a farm which her husband managed, Feather v. Feather's Estate (Mich.) 74 N. W. 524.

³⁶⁹ Ledlie v. Vrooman, 41 Barb. (N. Y.) 109.

³⁷⁰ Levi v. Earl, 30 Ohio St. 147.

by her note as such surety without reference to her separate estate and without consent of her husband, she not being a sole trader.³⁷¹

And, in general, a wife's separate estate will not be bound by the joint note of husband and wife executed by her as surety;³⁷² nor, in the absence of proof of separate benefit, by her note and mortgage given for a loan to her husband.³⁷³ In Kansas, however, where a wife's note is given for her husband's debt, her intention to charge her separate estate will be presumed.³⁷⁴ But in general the burden of proof is upon the holder to charge the separate estate upon a married woman's note.³⁷⁵ And in New York, where she has given such a joint note with him, as a surety for him, expressly making it a "lien and claim" against her separate estate, such separate estate as she may have at the time judgment is rendered will be liable for its payment.³⁷⁶ But where there is no expression amounting to a charge, and no benefit to her or her estate, it will not be bound by such a note,³⁷⁷ even though the money, obtained on such note for the purpose of paying her husband's debts, be paid to and acknowledged by her.³⁷⁸ She may, however, be estopped by her fraud from availing herself of the presumption in her favor against the existence of a separate benefit to her.³⁷⁹

Under the Connecticut statute, a wife's separate estate has been held not to be liable on a joint note with her husband for his debts, although it contain the words, "each intending hereby to

³⁷¹ Webb v. Gay, 74 N. C. 447.

³⁷² Saulsbury v. Weaver, 59 Ga. 254; Bartington v. Bradley, 16 La. Ann. 310.

³⁷³ Taylor v. Carlile, 2 La. Ann. 579; La. Civ. Code, § 2412; Thomson v. Chick, 19 La. Ann. 206; Lee v. Cameron, 14 La. Ann. 700. Although the note may have been authorized by her husband. Perry v. Thompson, 3 La. Ann. 188; Bowles v. Turner, 15 La. Ann. 352.

³⁷⁴ Deering v. Boyle, 8 Kan. 525; Wicks v. Mitchell, 9 Kan. 80. So, on their joint note to pay off a judgment against him. Nunn v. Givhan, 45 Ala. 370.

³⁷⁵ Grand Island Banking Co. v. Wright (Neb.) 74 N. W. 82.

³⁷⁶ Todd v. Ames, 60 Barb. 454.

³⁷⁷ Coats v. McKee, 26 Ind. 223; Eylers v. Coen, 60 Hun (N. Y.) 356, 15 N. Y. Supp. 584.

³⁷⁸ Bisland v. Provosty, 14 La. Ann. 169.

³⁷⁹ Henry v. Gauthreaux, 32 La. Ann. 1103.

charge our individual estate.”³⁸⁰ And her joint note with her husband without any such expression is not presumptively within the statute which makes her liable on all contracts for “the benefit of herself, her family, or her separate or joint estate.”³⁸¹ So, in Michigan, the wife’s note made jointly with her husband, without any consideration to her except on the part of, and proceeding from, her husband, is not binding on her or her estate.³⁸² The burden is on the plaintiff to show a benefit to the wife, even where the money was paid to the husband at her request.³⁸³

³⁸⁰ *Smith v. Williams*, 43 Conn. 409.

³⁸¹ *Way v. Peck*, 47 Conn. 23; Gen. St. p. 417, § 9.

³⁸² *Reed v. Buys*, 44 Mich. 80, 6 N. W. 111. See, too, *Richards v. Proper*, 44 Mich. 96, 6 N. W. 115.

³⁸³ *Fisk v. Mills*, 104 Mich. 433, 62 N. W. 559.

III. RIGHTS OF HUSBAND.

- § 314. Contracts between Husband and Wife.
- 315. Husband and Wife in the United States.
- 316. Actions between Husband and Wife—By Indorsee.
- 317. Acquisition and Transfer—Before or after Marriage.
- 318. Wife or Husband as Agent for One Another.
- 319. Husband's Right to Choses in Action of Wife.
- 320. Actions by and against Married Woman.
- 321. Payment to Husband or Wife.
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- 323. Wife's Property—Liability for Husband's Debts.
- 324. Husband's Liability for Antenuptial Debts.
- 325. Rights of Survivorship.
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Contracts between Husband and Wife.

§ 314. At common law the personal identity of husband and wife rendered void all contracts between them. And this rule remains in many states unchanged, notwithstanding the recent statutes that have been referred to. According to this rule, a bill of exchange or note made by husband to wife, or vice versa, is void.³⁸⁴ A husband cannot indorse and deliver a note to his wife so as to pass a valid title to her as against his assignee.³⁸⁵ And it has been held that a note by husband to wife is so absolutely void that it cannot even be ratified by a subsequent promise of

³⁸⁴ *Roby v. Phelon*, 118 Mass. 541; *Hoker v. Boggs*, 63 Ill. 161; *Fuller v. Lumbert*, 78 Me. 325, 5 Atl. 183. And could not, under the common law, be enforced after the maker's death, *Wyman v. Whitehouse*, 80 Me. 257, 14 Atl. 68; although this is not the case, since 1871, in Maine, *Morrison v. Brown*, 84 Me. 82, 24 Atl. 672; *Sweat v. Hall*, 8 Vt. 187; *Garner v. Gay*, 26 La. Ann. 375. But such a note given for money borrowed at the time may be enforced in equity, *Huston v. Cone*, 24 Ohio St. 11; *Gould v. Gould*, *35 N. J. Law, 37; *Templeton v. Brown*, 86 Tenn. 50, 5 S. W. 441; against him and his surety, *Clark v. Clark*, 86 Mo. 114. But such a note for money borrowed by him is not provable against his insolvent estate. *Woodward v. Spurr*, 141 Mass. 283, 6 N. E. 521.

³⁸⁵ *Gay v. Kingsley*, 11 Allen (Mass.) 345; *Seyfert v. Edison*, 45 N. J. Law, 393.

payment made by the husband to a subsequent holder.³⁸⁶ So, a note made by a wife to her husband and the indorsement of it by him are both invalid.³⁸⁷ And, where a husband has given a note to his wife for a debt due her at the time of her marriage, she cannot, it is said, bring an action upon it against his executor.³⁸⁸ And it has even been held that if the wife has made advances for the payment of her husband's debts, and he has given his note for that consideration to an assignee of her claim, it will be void as against his estate.³⁸⁹ So, if the husband gives to his wife for a valuable consideration a note payable to her or bearer, no action can be brought on it by the bearer.³⁹⁰ In like manner, the husband will not be liable on a note given to his wife for her money used in building his house,³⁹¹ or for property received from her which had not been held for her separate use.³⁹²

But in equity such a note given for advances by the wife is equivalent to a declaration of trust.³⁹³ So, a note given to her for her distributive share of her father's estate which had been collected by her husband.³⁹⁴ And it seems that where the husband's creditors are not prejudiced by a gift made by him to his wife of a note, although such gift is legally void, the note will be enforced in equity in the wife's favor against the maker.³⁹⁵

³⁸⁶ *Sweat v. Hall*, 8 Vt. 187.

³⁸⁷ *Roby v. Phelon*, 118 Mass. 541. So, too, a husband's note payable to his wife, and indorsed by her. *Hoker v. Boggs*, 63 Ill. 161.

³⁸⁸ *Jackson v. Parks*, 10 Cush. (Mass.) 550.

³⁸⁹ *Phillips v. Frye*, 14 Allen (Mass.) 36. On the other hand, the husband's note to a third person, A., indorsed by A. to the wife, or vice versa, may be enforced by her against his estate, *Spooner v. Spooner*, 155 Mass. 52, 28 N. E. 1121; or against his attaching creditors, *Degnan v. Farr*, 126 Mass. 297; or by a subsequent holder against a collateral mortgage of the maker's property, *Butler v. Ives*, 139 Mass. 202, 29 N. E. 654.

³⁹⁰ *Ingham v. White*, 4 Allen (Mass.) 412.

³⁹¹ *Turner v. Nye*, 7 Allen (Mass.) 176.

³⁹² *Patterson v. Patterson*, 45 N. H. 164.

³⁹³ *Murray v. Glasse*, 23 Law J. Ch. 126; *Templeton v. Brown*, 86 Tenn. 51, 5 S. W. 441; *Hall v. Hall*, 52 Tex. 294. So, a note by several partners for a loan by the wife of one of them can be enforced against the separate insolvent estates of the partners, but not against the individual estate of the husband. *Clark v. Patterson*, 158 Mass. 388, 33 N. E. 589.

³⁹⁴ *McCampbell v. McCampbell*, 2 Lea (Tenn.) 661.

³⁹⁵ *Tullis v. Fridley*, 9 Minn. 79 (Gil. 68).

Husband and Wife in the United States.

§ 315. In some of the United States the husband's estate is held liable to the wife on a note made by the husband to her for money loaned.³⁹⁶ And, where the wife makes a note to her husband, it has been held sufficient to bind her separate estate in the hands of an indorsee.³⁹⁷ So, if a husband, with others, gives a note to his wife for money loaned by her as administratrix, it will survive to her on his death, and be valid against his estate.³⁹⁸ And a note transferred by a husband to his wife, in consideration of a previous loan by her, has been held to be valid against his creditors.³⁹⁹

In Alabama it has been held that an indebtedness by the husband to the wife for money used by him which belonged to her separate estate may be enforced as a debt against him or his estate.⁴⁰⁰ And in Pennsylvania, since the act of 1848, a note executed by the husband when solvent, to his wife, for her distributive share of her father's estate received by him, is a valid claim in her favor against his estate on his subsequent insolvency.⁴⁰¹ And in Mississippi, under similar circumstances, it was held that such a note was properly provable against the husband's estate in bankruptcy, and was discharged, like any other claim, after proof and dividend.⁴⁰² So, it has been held in New York that a note by a husband to his wife, subsequently paid by a bill of sale of property from him to her, will be valid against his creditors.⁴⁰³ So, in Louisi-

³⁹⁶ *Logan v. Hall*, 19 Iowa, 491; *Bryant's Adm'r v. Bryant*, 3 Bush (Ky.) 155. But see, contra, *Woodward v. Spurr*, 141 Mass. 283, 6 N. E. 521. And in Nebraska the validity of her note to her husband depends, like her other contracts, on separate benefit, and estate and intention to charge it; and the burden of proving these facts is on the holder. *Stenger Benev. Ass'n v. Stenger* (Neb.) 74 N. W. 846.

³⁹⁷ *Morrison v. Thistle*, 67 Mo. 596; *Kenworthy v. Sawyer*, 125 Mass. 28. But see, contra, *National Bank of Rahway v. Brewster*, 49 N. J. Law, 231, 12 Atl. 769.

³⁹⁸ *Richards v. Richards*, 2 Barn. & Adol. 447.

³⁹⁹ *Clough v. Russell*, 55 N. H. 280.

⁴⁰⁰ *Rowland v. Plummer*, 50 Ala. 182.

⁴⁰¹ *Ziegler's Appeal*, 84 Pa. St. 342.

⁴⁰² *Thoms v. Thoms*, 45 Miss. 263.

⁴⁰³ *Savage v. O'Neil*, 44 N. Y. 298.

ana, a note given by the husband's firm to his wife for a loan of her paraphernal property will sustain a recovery against the firm in a suit by the husband and wife.⁴⁰⁴ And in Massachusetts, since the act of 1874, a wife may indorse a partnership note of her husband's firm for accommodation of the firm, and such indorsement will be valid between the original parties.⁴⁰⁵

Action between Husband and Wife—By Indorsee.

§ 316. At common law no action could be brought by the wife against her husband during coverture. It seems, however, that after divorce a vinculo, she may sue her husband in Maine for money loaned to him and secured by his note to her during coverture.⁴⁰⁶ And in Nebraska she may by statute sue her husband pending coverture on his note given to her.⁴⁰⁷

Notwithstanding the recent changes in the law relating to this subject, a wife's note to her husband, where not otherwise provided by statute, is presumptively void; and, in order to render her separate estate liable in New York on such a note, her separate benefit and an intention to charge her separate estate must appear.⁴⁰⁸

If the note has been transferred by the husband's indorsement, it will be good between him and his indorsee, without regard to the question of the legality of the original contract between husband and wife.⁴⁰⁹ But a note made by the husband to the order of his wife for money due her comes to her indorsee subject to all equitable defenses, notwithstanding its indorsement after maturity by both husband and wife.⁴¹⁰

⁴⁰⁴ *Drake v. Hays*, 27 La. Ann. 256.

⁴⁰⁵ *Kenworthy v. Sawyer*, 125 Mass. 28.

⁴⁰⁶ *Webster v. Webster*, 58 Me. 139.

⁴⁰⁷ *May v. May*, 9 Neb. 16, 2 N. W. 221; Gen. St. p. 528, § 31.

⁴⁰⁸ *Second Nat. Bank v. Miller*, 63 N. Y. 639.

⁴⁰⁹ *Haly v. Lane*, 2 Atk. 182; *Robertson v. Allen*, 3 Baxt. (Tenn.) 233. *Binney v. Bank*, 150 Mass. 574, 23 N. E. 380. So, where the note was by husband and wife to the husband, and indorsed by him. *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037.

⁴¹⁰ *Beard v. Dedolph*, 29 Wis. 136.

Subsequent Marriage—Acquisition or Transfer after Marriage.

§ 317. The subsequent marriage of the maker and the payee of a note will not render it void, and in New York the wife, being the payee, can recover upon it at law.⁴¹¹ In Massachusetts, however, such subsequent marriage has been held to annul the note, and it cannot be revived by the death of the husband.⁴¹² And where the maker of a note afterwards marries, and the note is transferred subsequently to her husband, it is thereby extinguished, and cannot be revived by its subsequent transfer by him.⁴¹³ In Arkansas it has been held that where the maker and payee of a note subsequently marry, although by the antenuptial contract notes belonging to the wife do not pass to the husband, her right of action against her husband being lost by marriage destroys also her right to recover against the surety on the note.⁴¹⁴

Where a note made to the wife and indorsed by her comes afterwards into the possession of the husband by an indorsement in blank, he may bring suit upon it as the holder.⁴¹⁵ And it has been held that he may sue upon a note to his wife transferred to him after marriage by direct delivery from her.⁴¹⁶ And where a note made by the husband to a third person has been transferred by indorsement to the wife, and by her to the plaintiff, the husband is unquestionably liable upon it to the holder.⁴¹⁷ In New York it is held that a note which is the separate property of the wife may be transferred by her to her husband as if she were sole.⁴¹⁸ And equity will enforce an agreement made by the husband, in consideration of his wife's release of dower, to transfer to her a note received from the sale of land.⁴¹⁹ In Massachusetts it has been held that a good title to a bill of exchange will pass by the

⁴¹¹ Wright v. Wright, 59 Barb. 505.

⁴¹² Abbott v. Winchester, 105 Mass. 115.

⁴¹³ Chapman v. Kellogg, 102 Mass. 246.

⁴¹⁴ Goyan v. Moore, 30 Ark. 667.

⁴¹⁵ Ahrens v. Bank, 3 S. C. 401.

⁴¹⁶ White v. Callinan, 19 Ind. 43.

⁴¹⁷ Russ v. George, 45 N. H. 467.

⁴¹⁸ Sheldon v. Clancy, 42 How. Prac. 186.

⁴¹⁹ Ward v. Crotty, 4 Metc. (Ky.) 59.

wife's indorsement, notwithstanding that she had received the bill by indorsement and delivery from her husband.⁴²⁰ But his delivery of a note to her with authority to collect it will not transfer the title.⁴²¹ In Kentucky the transfer of a note by husband to wife as her separate property will be good except as against him.⁴²²

It has been held that if one who is indebted under a judgment transfers a note without indorsement to his wife, and she disposes of it in exchange for other property, such property will be chargeable in her hands with payment of the judgment.⁴²³ But, where the rights of creditors are not in question, the husband's direction to make a note for money due him payable to his wife will be a good gift to her.⁴²⁴ And such a gift will be supported in equity under an agreement made in consideration of her release of dower.⁴²⁵

Agency of Husband and Wife for One Another.

§ 318. Sometimes a bill or note is signed by the wife as her husband's agent. In such case her authority must be proved by the person seeking to recover on the paper.⁴²⁶ Without such proof, the husband will not be liable on a note signed by his wife; and where such signature has been prohibited, and the fact is known by the holder, he cannot recover.⁴²⁷ The same thing is true of the husband's liability on his wife's indorsement.⁴²⁸ Where, however, a draft, which is the property of the husband, is made to the order of the wife and indorsed by her by his authority, he will be liable.⁴²⁹

And his authority may be implied. Thus, he has been held liable, in New York, for the payment of her note given for furniture

⁴²⁰ *Slawson v. Loring*, 5 Allen, 340.

⁴²¹ *Carley v. Green*, 12 Allen, 104.

⁴²² *Martin v. Curd's Adm'r*, 1 Bush, 327.

⁴²³ *Brown v. Matthaus*, 14 Minn. 205 (Gil. 149).

⁴²⁴ *Reed v. Reed*, 52 N. Y. 651.

⁴²⁵ *Maraman v. Maraman*, 4 Metc. (Ky.) 84.

⁴²⁶ *Goldstone v. Tovey*, 6 Bing. N. C. 98, 8 Scott, 394. Although in purchases for domestic use a wife's agency for her husband will be presumed. *Dunn v. Raynor* (N. J. Sup.) 7 N. J. Law J. 82.

⁴²⁷ *Reakert v. Sanford*, 5 Watts & S. (Pa.) 164.

⁴²⁸ *Leeds v. Vail*, 15 Pa. St. 185.

⁴²⁹ *Hancock Bank v. Joy*, 41 Me. 568.

purchased by her for a boarding house kept by her, in which her husband and children lived;⁴³⁰ but not, in general, on her note given for goods purchased by her without his knowledge.⁴³¹ And, where the wife elopes from her husband, he cannot be held liable on her contract by reason of any implied agency.⁴³² But he may be held liable on a note given by her in the course of business carried on by her with his knowledge as a sole trader.⁴³³ In like manner, if payment of a draft is made to the wife of the payee's attorney, who had authorized his wife during his absence to receive certain other moneys, such payment will not be binding without proof of her authority in this particular case.⁴³⁴ So, in order to make a wife's payment, on account of her husband's note, available as a bar to the statute of limitations, her agency must be shown.⁴³⁵ The agency of the wife for her husband is ordinarily a question of fact for the jury.⁴³⁶ This has been held to be so in New York, where a wife gave a note in her own name for horses bought by her for a farm which she carried on.⁴³⁷

A general power of attorney to a husband to make notes and transact other business for his wife will not include authority to make accommodation paper.⁴³⁸ Nor will a general power of attorney in Louisiana authorize a husband to indorse a bill of exchange in his wife's name.⁴³⁹ And it has been held that an authority given by the husband to his wife to give a note will not

⁴³⁰ *Switzer v. Valentine*, 10 How. Prac. 109.

⁴³¹ *Moses v. Fogartie*, 2 Hill (S. C.) 335.

⁴³² *Hatchett v. Baddeley*, 2 W. Bl. 1079.

⁴³³ *Abbott v. Mackinley*, 2 Miles (Pa.) 220. And his authority to her to carry on business as a sole trader may be inferred from his conduct. *Prince v. Brunatte*, 1 Bing. N. C. 435.

⁴³⁴ *Day v. Boyd*, 6 Heisk. (Tenn.) 458.

⁴³⁵ *Butler v. Price*, 115 Mass. 578.

⁴³⁶ *Lord v. Hall*, 8 C. B. 627; she having indorsed in his name a note payable to him.

⁴³⁷ *Gates v. Brower*, 9 N. Y. 205.

⁴³⁸ *Nash v. Mitchell*, 8 Hun (N. Y.) 471. So, a power to collect rents for the wife will not authorize the husband to give a note, as "trustee for" her, for household supplies, and her separate estate will not be charged without clear proof of her intention to do it. *Dodge v. Knowles*, 114 U. S. 430, 5 Sup. Ct. 1108, 1197.

⁴³⁹ *Laplante v. Briant*, 13 La. Ann. 566.

cover a note given by her in her own name, without reference to such authority.⁴⁴⁰ Nor will a power given by a man to his wife, "for me and in my behalf to accept such bill of exchange as shall be drawn on me by my agents," include bills of exchange drawn by the husband's firm.⁴⁴¹ Where a bill of exchange drawn on a husband has been accepted by his wife in her own name, he may make the acceptance his by ratification, and he may do this by a subsequent acknowledgment of it and promise to pay it.⁴⁴² So, if the wife gives a note in her husband's name in consideration of the surrender of a previous note or bill, he will be bound by a subsequent ratification of the act.⁴⁴³

Husband's Right to Choses in Action of Wife.

§ 319. Bills of exchange and promissory notes and other negotiable instruments are *choses in action*, and subject to the rules of law governing such property.⁴⁴⁴ Thus, at common law, a bill or note made to the wife becomes the property of her husband,⁴⁴⁵ even though given to her for her distributive share of a deceased relative's estate.⁴⁴⁶ And even a note made to a wife as sole trader belonged at common law to the husband, although he was living apart from her and in adultery, and he might recover it after her death from her representatives.⁴⁴⁷ But where a note is made to a married woman as payee and retained by her, it belongs to her like other choses in action until reduced to possession by her husband.⁴⁴⁸ Even if made to her before her marriage, it will pass

⁴⁴⁰ *Minard v. Mead*, 7 Wend. (N. Y.) 68.

⁴⁴¹ *Attwood v. Munnings*, 1 Man. & R. 66.

⁴⁴² *Lindus v. Bradwell*, 5 C. B. 583. See, too, *Cotes v. Davis*, 1 Camp. 485.

⁴⁴³ *Shaw v. Emery*, 38 Me. 484.

⁴⁴⁴ *Gaters v. Madeley*, 6 Mees. & W. 423.

⁴⁴⁵ *Connor v. Martin*, 1 Strange, 516; *Greenleaf v. Hill*, 31 Me. 562; *Thrasher v. Tuttle*, 22 Me. 335; *Dunn v. Hornbeck*, 7 Hun (N. Y.) 629; *Tuttle v. Fowler*, 22 Conn. 58.

⁴⁴⁶ *Com. v. Manley*, 12 Pick. (Mass.) 173.

⁴⁴⁷ *Russell v. Brooks*, 7 Pick. (Mass.) 65. On the other hand, even where a note for her separate estate is made to her husband, she may sue on it at law in Alabama, as her property, without transfer or indorsement by him. *Grantham v. Payne*, 77 Ala. 584.

⁴⁴⁸ *Hoop v. Plummer*, 14 Ohio St. 448.

to her husband,⁴⁴⁹ if reduced by him to possession; and, although it be not reduced to possession by him, it will still survive to him on her death.⁴⁵⁰ Her liability, however, on a note made by her before marriage and barred by the statute of limitation, will not be revived by an acknowledgment of the debt by her husband.⁴⁵¹

Action by or against a Married Woman.

§ 320. A married woman's power to sue alone did not exist at common law, although she might be enabled to hold property in her own name. If, however, she holds a note in her own name, and as her sole property, she may in some states now bring suit upon it without joining her husband.⁴⁵² In other states, as at common law, the title being in her husband, she cannot bring a suit on the paper in her own name.⁴⁵³ Nor can she sue alone although her husband has been absent and not heard from for the period of more than seven years.⁴⁵⁴

Where a note or bill is made payable to the wife, both may join at common law in an action upon it,⁴⁵⁵ or the husband may sue alone.⁴⁵⁶ So, the husband may sue upon a note in his own name, although it was made to his wife in her maiden name and the marriage was unknown to the maker.⁴⁵⁷ And, where an action is brought by the husband on a note made to the wife, a debt of hers cannot be set off against the note.⁴⁵⁸ It has even been held that the husband may proceed in equity without joining his wife for an injunction against a third person to prevent his collecting

⁴⁴⁹ Rawlinson v. Stone, 3 Wils. 1; Evans v. Secrest, 3 Ind. 545; Holland v. Moody, 12 Ind. 170 (the marriage having in both of these cases taken place before the passage of the act of 1853); Tryon v. Sutton, 13 Cal. 490.

⁴⁵⁰ Jones' Adm'r v. Warren's Adm'r, 4 Dana (Ky.) 333.

⁴⁵¹ Moore v. Leseur, 18 Ala. 606.

⁴⁵² Hadley v. Brown, 2 Kan. 416.

⁴⁵³ Kimbro v. Bank, 1 MacArthur, 61.

⁴⁵⁴ Lake v. Ruffle, 6 Nev. & M. 684.

⁴⁵⁵ Byles, Bills, 67; 1 Daniel, Neg. Inst. 248; Philliskirk v. Pluckwell, 2 Maule & S. 393; Arnold v. Revoult, 1 Brod. & B. 443, 4 Moore, 70.

⁴⁵⁶ Byles, Bills, 67; 1 Daniel, Neg. Inst. 248; Burrough v. Moss, 10 Barn. & C. 558, 5 Man. & R. 296; Sutton v. Warren, 10 Mete. (Mass.) 451.

⁴⁵⁷ Templeton v. Cram, 5 Me. 417.

⁴⁵⁸ Burrough v. Moss, 10 Barn. & C. 558.

or disposing of a note belonging to the wife.⁴⁵⁹ And even where the wife, as an administratrix, takes a bond payable to herself and husband, it has been held that the husband may sue upon it alone.⁴⁶⁰ And this is true generally as to notes or bills which are the common property of husband and wife.⁴⁶¹ In Louisiana, where a note is made to the wife, and suit is brought on it by husband and wife together, there being no property in the husband, his authority to the wife to have and collect the note will be presumed.⁴⁶² At common law the husband and wife may bring an action jointly on a note made to the wife before marriage,⁴⁶³ or the husband may sue upon it alone.⁴⁶⁴ But it was held in New York, before the recent statute, that the husband must join the wife in such an action, and could not sue upon it alone.⁴⁶⁵

Payment to Husband or Wife.

§ 321. Where notes or bills made to the wife are regarded in law as the property of the husband, it is evident that payment should be made to him. And in such case payment to her will not constitute a sufficient defense.⁴⁶⁶ On the other hand, payment to him will be a complete defense to an action brought by her, even since the recent statutes, where the note paid was not the separate property of the wife, but was made payable to her by her husband's consent, having been given for the purchase money of land, standing in the wife's name because the husband was an alien and sold by her.⁴⁶⁷ So, if property belonging to a man and his wife jointly was sold by them, and the note given in payment was made payable to the husband and paid to him, such payment would bar a recovery by her heirs.⁴⁶⁸

⁴⁵⁹ *Clay v. Power*, 24 Tex. 304.

⁴⁶⁰ *Ankerstein v. Clarke*, 4 Term R. 616.

⁴⁶¹ *Crow v. Van Sickle*, 6 Nev. 146.

⁴⁶² *Raiford v. Wood*, 14 La. Ann. 116.

⁴⁶³ *Philliskirk v. Pluckwell*, 2 Maule & S. 393.

⁴⁶⁴ *McNeillage v. Holloway*, 1 Barn. & Ald. 221.

⁴⁶⁵ *Morse v. Earl*, 13 Wend. (N. Y.) 271.

⁴⁶⁶ *Thrasher v. Tuttle*, 22 Me. 335.

⁴⁶⁷ *Dunn v. Hornbeck*, 7 Hun (N. Y.) 629.

⁴⁶⁸ *Long v. Walker*, 47 Tex. 173.

So, where a note was made payable to the wife at the husband's request as a gift from him, his release of the maker would be a complete defense against her claim.⁴⁶⁹ And by the civil law, where the husband sells a piece of land of which he owns half in his right of community property, and in the other half of which he has a usufruct, and takes notes in payment, he may compromise and settle such notes.⁴⁷⁰ At common law, although a wife might sue and be sued as an unmarried woman after divorce *a mensa et thoro*, a note made to her might be reduced to possession by her husband after such divorce, and in such case payment to him would defeat an action by her.⁴⁷¹ But a payment made to the husband after a divorce *a vinculo* on a note to the wife, not reduced by him to possession before such divorce, may be recovered by her.⁴⁷² Where, however, by force of recent statute or otherwise, the law recognizes the sole property of the wife in a note or bill made payable to her, payment of it to her husband without her consent will be no defense to an action by her.⁴⁷³

Transfer by Husband or Wife—Insolvent Assignments.

§ 322. Under the rule of law which transfers to the husband on marriage a note or bill payable to the wife, he only can make a sufficient transfer of it.⁴⁷⁴ And it seems that he might transfer such a note notwithstanding a divorce.⁴⁷⁵ So, the husband might assign and dispose of a legacy made to his wife for the payment of

⁴⁶⁹ *Towle v. Towle*, 114 Mass. 167.

⁴⁷⁰ *Vinson v. Vives*, 24 La. Ann. 336.

⁴⁷¹ *Dean v. Richmond*, 5 Pick. (Mass.) 461.

⁴⁷² *Legg v. Legg*, 8 Mass. 99.

⁴⁷³ *Carver v. Carver*, 53 Ind. 241.

⁴⁷⁴ *Rawlinson v. Stone*, 3 Wils. 1; *Mason v. Morgan*, 2 Adol. & E. 30; *Evans v. Secrest*, 3 Ind. 545; *Holland v. Moody*, 12 Ind. 170, where the marriage was before 1853; *Tryon v. Sutton*, 13 Cal. 490; *Bayerque v. Haley*, McAll. 97, Fed. Cas. No. 1,135. In Alabama the Code provides for assignment in writing of such note by husband and wife in the presence of two witnesses without personal liability on her part. *Walker v. Struve*, 70 Ala. 167; Code 1876, § 2707. In Texas a note to the wife's order is not *prima facie* community property, and cannot be transferred by the husband. *Kempner v. Comer*, 73 Tex. 200, 11 S. W. 194.

⁴⁷⁵ *Tuttle v. Fowler*, 22 Conn. 58.

his debts.⁴⁷⁶ And, in general, all choses in action may be assigned by the husband, if he has the right to reduce them to possession.⁴⁷⁷ He may transfer his wife's bank share by delivery.⁴⁷⁸ He may assign her choses in action in trust.⁴⁷⁹

But an assignment in bankruptcy by the husband will not carry a note made to the wife before her marriage;⁴⁸⁰ although, in Massachusetts, the contrary has been held of a note made payable to the wife after her marriage.⁴⁸¹ It has also been held in the United States that the husband's assignment as an insolvent carries his wife's choses in action;⁴⁸² although in a later case in Pennsylvania the rule was limited to assignments which expressly include such property.⁴⁸³ And, notwithstanding an assignment by the husband as an insolvent, her right of survivorship to choses in action not reduced to possession by the husband remains unimpaired.⁴⁸⁴ So, an assignment by the husband of his wife's choses in action *as collateral* will not defeat her right of survivorship.⁴⁸⁵ It has, however, been held in Pennsylvania that an assignment by the husband will defeat the survivorship of the wife.⁴⁸⁶

It follows, from what has been said, that during coverture the wife cannot at common law transfer or indorse effectually a note made to her, inasmuch as the property in the note is vested in the husband.⁴⁸⁷ And, even if made to her as a sole trader and in-

⁴⁷⁶ Barnes v. Pearson, 41 N. C. 482.

⁴⁷⁷ Matheney v. Guess, 2 Hill, Eq. (S. C.) 63; Outcalt v. Van Winkle, 2 N. J. Eq. 513.

⁴⁷⁸ Forrest v. Warrington, 2 Desaus. Eq. (S. C.) 254.

⁴⁷⁹ Siter's Case, 4 Rawle (Pa.) 468.

⁴⁸⁰ Sherrington v. Yates, 12 Mees. & W. 855, reversing Yates v. Sherrington, 11 Mees. & W. 42.

⁴⁸¹ Smith v. Chandler, 3 Gray (Mass.) 392, holding a subsequent transfer by husband and wife to be invalid.

⁴⁸² Shuman v. Reigart, 7 Watts & S. (Pa.) 168; Davis v. Newton, 6 Mete. (Mass.) 537.

⁴⁸³ Eshelman v. Shuman's Adm'rs, 13 Pa. St. 561.

⁴⁸⁴ Van Epps v. Van Deusen, 4 Paige (N. Y.) 64; Slaymaker v. Bank, 10 Pa. St. 373.

⁴⁸⁵ Hartman v. Dowdel, 1 Rawle (Pa.) 279. But this is questioned in Siter's Case, 4 Rawle (Pa.) 472.

⁴⁸⁶ Richwine v. Heim, 1 Pen. & W. 373.

⁴⁸⁷ Connor v. Martin, 1 Strange, 516.

dorsed by her for her own debt, it will not be a valid transfer.⁴⁸⁸ The indorsement must be by the husband, and his indorsement in her name will be insufficient.⁴⁸⁹ But if the wife has purchased a note made by her husband before their marriage, and indorses it with his consent, the note never having been reduced by him to possession, an action will lie in favor of her indorsee.⁴⁹⁰

It seems that an attachment against the husband cannot reach a note made to the wife for a sale of the husband's property, and transferred by her before the attachment, especially where the transfer was to a creditor in consideration of necessities furnished.⁴⁹¹ Nor can the husband's creditors, after his death, reach a note made to the wife in consideration of her release of dower, and transferred by her indorsement in her husband's lifetime with his consent.⁴⁹² Where a note is made payable to a married woman or bearer, it may be transferred by the joint assignment of husband and wife.⁴⁹³ On the other hand, it has been held in Texas that a transfer by the husband without indorsement and as collateral of a note, made payable to the wife's order and given in payment for land which belonged to her, will convey no title without her authority to persons having notice of her rights.⁴⁹⁴ If, however, the wife's note has been transferred by her husband to his creditors, she can only defeat a recovery on it by them by evidence that it was her property, and that the purchasers knew that fact.⁴⁹⁵

Wife's Property—When Liable for Husband's Debts.

§ 323. Courts of equity have long protected the wife's separate property, as we have seen, against the husband's creditors. And similar protection is now afforded at law by many recent statutes. Thus, the fact that husband and wife joined in a note for money

⁴⁸⁸ *Barlow v. Bishop*, 1 East, 432. It would be otherwise, it seems, if indorsed by her in his name. *Id.*

⁴⁸⁹ *Savage v. King*, 17 Me. 301.

⁴⁹⁰ *Russ v. George*, 45 N. H. 467.

⁴⁹¹ *Way v. Pierce*, 51 Vt. 326.

⁴⁹² *Nims v. Bigelow*, 45 N. H. 343.

⁴⁹³ *Cobb v. Duke*, 36 Miss. 60.

⁴⁹⁴ *Hamilton v. Brooks*, 51 Tex. 142; *Rose v. Houston*, 11 Tex. 326; *Hemmingway v. Mathews*, 10 Tex. 207.

⁴⁹⁵ *Moye v. Waters*, 51 Ga. 13.

borrowed by her for her own use, and expended in purchase of goods for her as a sole trader, will not subject the goods to the claims of the husband's creditors.⁴⁹⁶

Apart from these, it has been held that a note payable to the wife is liable for her husband's debts and subject to an attachment issued against his property,⁴⁹⁷ especially where the note has been made to her without his consent.⁴⁹⁸ So, a wife's interest in her deceased father's estate has been held to be subject to an attachment against her husband.⁴⁹⁹ And, where a husband and wife have brought a joint action upon a chose in action of the wife, a debt of the husband may be set off against it.⁵⁰⁰ In Pennsylvania, however, it has been held that the wife's choses in action are not subject to an attachment against the husband.⁵⁰¹ And they will survive to her on the husband's death pending an attachment against him, notwithstanding such attachment.⁵⁰² So, it has been held that a note, made to the wife for her separate estate and never reduced to possession by him, cannot be reached by an attachment against him.⁵⁰³ And the court will not compel the husband to reduce such choses in action in order to subject them to an attachment brought against him.⁵⁰⁴

If a note is made payable to the wife, it is presumed, under the Alabama Code, to be for her separate estate, and will not be subject to such an attachment.⁵⁰⁵ And in Massachusetts it has been held that a note, given to a wife for partnership property of the husband sold by him, for which she had found the capital, is her separate property, and, in the absence of fraud, cannot be attached for his debts.⁵⁰⁶ And where a note has been made to a married woman for the rent of land assigned to her for her dower, and suit is brought on it by the husband and wife jointly, a debt of the husband cannot

⁴⁹⁶ *Martinez v. Ward*, 19 Fla. 175.

⁴⁹⁷ *Shuttlesworth v. Noyes*, 8 Mass. 229.

⁴⁹⁸ *Swann v. Gauge*, 2 N. C. 3.

⁴⁹⁹ *Vance v. McLaughlin*, 8 Grat. (Va.) 289.

⁵⁰⁰ *Wishart v. Downey*, 15 Serg. & R. (Pa.) 77.

⁵⁰¹ *Stoner v. Com.*, 16 Pa. St. 387.

⁵⁰² *Strong v. Smith*, 1 Mete. (Mass.) 476.

⁵⁰³ *Poor v. Hazleton*, 15 N. H. 564.

⁵⁰⁴ *Sayre v. Flournoy*, 3 Ga. 511.

⁵⁰⁵ *Saunders v. Garrett*, 33 Ala. 454; Code Ala. §§ 1982, 1985.

⁵⁰⁶ *Worthy v. Clapp*, 99 Mass. 561.

be used in defense as a set-off.⁵⁰⁷ And in Iowa a debt of the husband cannot be pleaded in set-off against a note subsequently assigned to the wife.⁵⁰⁸ So, in Indiana, a note made payable to the wife since 1853 is her separate property, and a debt of the husband constitutes no set-off against it.⁵⁰⁹ But a note made to the wife or for her use is subject to the set-off of her own antenuptial debts, as has been held in a recent action brought on such a note by the payee for the use of the wife.⁵¹⁰

Husband's Liability for Wife's Antenuptial Debts.

§ 324. The antenuptial debts of the wife become at common law the liability of the husband, but he cannot be sued for such a debt without the wife being joined as defendant.⁵¹¹ This liability is done away by statute in some states. Thus, in Texas, husband and wife may be sued together and judgment rendered against both for such debt, but execution for it can only be issued against the wife's property.⁵¹² At common law the husband's liability for such debts ends with the wife's lifetime,⁵¹³ although, so far as she has brought property to her husband, a recovery may still be had against him after her death for her antenuptial debt.⁵¹⁴ The husband's liability for such debts also ends in general with his life, and does not extend to his estate.⁵¹⁵ And after his death the original liability of the wife survives against her.⁵¹⁶

⁵⁰⁷ *Green v. Carson*, 4 Metc. (Ky.) 76. But her deposit in an insolvent bank, not being her separate property, may be set off by her husband against his note to the bank, even where the wife is authorized by statute to deposit and draw checks in her own name. *Hall v. Trustee* (Ky.) 32 S. W. 400.

⁵⁰⁸ *Stannus v. Stannus*, 30 Iowa, 448.

⁵⁰⁹ *McCarty v. Mewhinney*, 8 Ind. 514.

⁵¹⁰ *Gary v. Johnson*, 72 N. C. 68.

⁵¹¹ *Byles, Bills*, 68; 1 *Daniel, Neg. Inst.* 251; *Mitchinson v. Hewson*, 7 Term R. 348.

⁵¹² *Roundtree v. Thomas*, 32 Tex. 286.

⁵¹³ *Byles, Bills*, 68; 1 *Daniel, Neg. Inst.* 251; *Mitchinson v. Hewson*, 7 Term R. 348; *Morrow v. Whitesides*, 10 B. Mon. (Ky.) 411.

⁵¹⁴ *Heard v. Stamford*, 3 P. Wms. 409.

⁵¹⁵ *Cureton v. Moore*, 55 N. C. 204.

⁵¹⁶ *Woodman v. Chapman*, 1 Camp. 189.

Survivorship Rights.

§ 325. On the husband's death, as has been said, the wife's choses in action, which had not been reduced by him to possession, survive to her and are her property.⁵¹⁷ And her choses in action pass upon her death to her personal representatives, and may be sued for by them.⁵¹⁸ After his death a note or duebill surviving to her is not subject to any defense which existed against him in his lifetime.⁵¹⁹ Even an assignment by the husband of the wife's choses in action, without any reduction to possession by him or by his assignee, will not defeat the wife's survivorship, as we have already observed.⁵²⁰ So, where a wife has retained in her possession until her husband's death a note which was made payable to her, his executor cannot claim it.⁵²¹ And where a note is made to the wife, the husband's assent is to be presumed, and it will survive to her.⁵²² So, too, where a note is made to the wife by her husband's direction and intended for a gift to her, even though it may remain in his possession until his death.⁵²³ In like manner, under the rule of law governing joint property, a note or bill made to the husband and wife will survive to the wife after her husband's death.⁵²⁴

⁵¹⁷ Byles, Bills, 67; Richards v. Richards, 2 Barn. & Adol. 447; Betts v. Kimpton, Id. 273; Gaters v. Madeley, 6 Mees. & W. 423; Scarpellini v. Atcheson, 7 Q. B. 864; Hart v. Stephens, 6 Q. B. 937; Hayward v. Hayward, 20 Pick. (Mass.) 517; Story v. Baird, 14 N. J. Law, 262; Dare v. Allen, 2 N. J. Eq. 415. This is true of a legacy to the wife. Snowhill v. Snowhill, Id. 30; Revel v. Revel, 19 N. C. 272.

⁵¹⁸ Allen v. Wilkins, 3 Allen (Mass.) 321; Stearns v. Stearns, 30 Vt. 213. And a statement that it "became and was the sole property" of the husband is not a sufficient averment that it was reduced by him to possession. Id. See, too, Driggs v. Abbott, 27 Vt. 580; Wilson v. Bates, 28 Vt. 765. But the proceeds in such action belong to the husband, by right of survivorship. Story, Prom. Notes, § 88; 1 Daniel, Neg. Inst. 249.

⁵¹⁹ May v. Boisseau, 12 Leigh (Va.) 512.

⁵²⁰ Outcault v. Van Winkle, 2 N. J. Eq. 513.

⁵²¹ Phelps v. Phelps, 20 Pick. (Mass.) 556.

⁵²² Nash v. Nash, 2 Madd. 133; Borst v. Spelman, 4 N. Y. 284.

⁵²³ Scott v. Simes, 10 Bosw. (N. Y.) 314.

⁵²⁴ Philliskirk v. Pluckwell, 2 Maule & S. 393; Sanford v. Sanford, 5 Lans. (N. Y.) 486, 61 Barb. 293; Wilder v. Aldrich, 2 R. I. 518; Sanford v. Sanford, 45 N. Y. 723; Johnson v. Lusk, 6 Cold. (Tenn.) 113; Al-

Where a note to the wife is never reduced by the husband to possession, and both die, the wife dying first, his executor cannot bring suit upon it as on a note made to him.⁵²⁵ The general rule, however, is that a wife's chose in action on her death survives to her husband without any reduction to possession by him.⁵²⁶ And this rule applies to a note bequeathed to the wife and left at her death, but never reduced to possession by the husband.⁵²⁷

Reduction to Possession—What.

§ 326. It is hardly the province of this work to consider in detail the subject of what constitutes a sufficient reduction to possession by the husband. His indorsement amounts to such reduction,⁵²⁸ but not the mere act on his part of receiving interest.⁵²⁹ Nor is a legacy to the wife reduced to possession by appropriating a mortgage for its payment and by receipt of interest on it by the husband.⁵³⁰ Nor a bond payable to the wife, by a joint receipt by husband and wife.⁵³¹ Nor is a note made to a wife before marriage reduced to possession by the husband's pledging it as security and receiving it again on discharge of the debt.⁵³² But, where an award was made in the husband's favor of a legacy to the wife, it was held to be a good reduction to possession, defeating her survivorship.⁵³³ Where there is no reduction, the wife's choses in ac-

len v. Tate, 58 Miss. 585; Richardson v. Daggett, 4 Vt. 336; Draper v. Jackson, 16 Mass. 480. But a note made to them jointly for a debt due to him, while it raises a presumption of an intended gift to her, remains his property and under his control during his life. Pile v. Pile, 6 Lea (Tenn.) 508.

⁵²⁵ Howard v. Okes, 3 Exch. 136.

⁵²⁶ Lee v. Wheeler, 4 Ga. 541; Whitaker v. Whitaker, 6 Johns. (N. Y.) 112. So, a stock subscription made by the husband in the wife's name, Stanwood v. Stanwood, 17 Mass. 57.

⁵²⁷ Albee v. Carpenter, 12 Cush. (Mass.) 382.

⁵²⁸ Byles, Bills, 68; Story, Prom. Notes, § 88; 1 Daniel, Neg. Inst. 250.

⁵²⁹ Hart v. Stephens, 6 Q. B. 937. And see McNeilage v. Holloway, 1 Barn. & Ald. 218, criticised by Patterson, J., in this case (page 943).

⁵³⁰ Blount v. Bestland, 5 Ves. 515.

⁵³¹ Timbers v. Katz, 6 Watts & S. (Pa.) 290.

⁵³² Latourette v. Williams, 1 Barb. (N. Y.) 9. And in such case the husband and wife may sue jointly. Id.

⁵³³ Oglander v. Baston, 1 Vern. 396.

tion go by statute, in Vermont, to her next of kin, and not to her husband.⁵³⁴

Reduction to possession is, in general, a matter of intention, and belongs as a question of fact to the jury.⁵³⁵ And the absence of such intention may be proved by the admissions of the husband.⁵³⁶ So, the fact that a husband has sold after his wife's death, at a price that was suspiciously low, a promissory note which was her separate property, has been held to support a finding by the jury on the question of reduction in favor of her representatives.⁵³⁷ In New Jersey the husband's right to reduce to possession his wife's choses in action was taken away by the act of 1852.⁵³⁸

⁵³⁴ *Wilson v. Bates*, 28 Vt. 765.

⁵³⁵ *Hinds' Estate*, 5 Whart. (Pa.) 138.

⁵³⁶ *In re Gray's Estate*, 1 Pa. St. 327.

⁵³⁷ *Gill v. Cook*, 42 Vt. 140.

⁵³⁸ *Henry v. Dilley*, 25 N. J. Law, 302; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512.

CHAPTER X.

CAPACITY—CORPORATIONS AND GOVERNMENTS.

I. CORPORATIONS.

II. MUNICIPAL CORPORATIONS.

III. GOVERNMENTS.

I. CORPORATIONS.

§ 327. General Corporate Powers.

328. Commercial Paper—Power to Execute.

330. — Power to Receive and Transfer.

331. Ultra Vires—As a Defense.

332. Banking Laws.

333. Loans by Corporations.

334. Accommodation Paper.

335. Presumption of Validity.

General Corporate Powers.

§ 327. Up to this point only natural persons have been spoken of, but the law recognizes also artificial persons, such as corporations, created by law, and possessing in general the same powers as to contracts that natural persons possess. It is, however, a general rule that corporations possess only those powers which are expressly conferred by their charter, or which belong incidentally and by necessary implication to their very existence as corporations.¹ It was once held to be the rule of the common law that a corporation could only contract under its corporate seal, and could not, therefore, make a promissory note or bill of exchange.²

¹ Dartmouth College v. Woodward, 4 Wheat. 518.

² Byles, Bills, 70; Chit. Bills, 20; 1 Pars. Notes & B. 163, Story, Bills, § 79; Story, Prom. Notes, § 74; Slark v. Archway Co., 5 Taunt. 794; Broughton v. Waterworks Co., 3 Barn. & Ald. 8; Yarborough v. Bank, 16 East, 11; Ang. & A. Corp. § 236; Lamprell v. Guardians of Poor, 3 Exch. 306; Diggle v. Railway Co., 5 Exch. 442; Church v. Gas Co., 6 Adol. & E. 846; Mayor, etc., of Ludlow v. Charlton, 6 Mees. & W. 815; East London Water Co. v. Bailey, 4 Bing. 283; Arnold v. Mayor of Poole, 4 Man. & G. 861; Copper

The recent requirements of business have, however, greatly multiplied coupon and other corporate bonds of a negotiable form, which are often made payable to bearer; and it is now well established that where a bond is expressly negotiable in form, or is clearly intended to be so, it is equivalent, substantially, to a promissory note.³ It has also been held that a corporation may make a negotiable

Mines Co. v. Fox, 16 Q. B. 229. An exception has been made in favor of contracts of slight importance, *East London Water Co. v. Bailey*, supra; *Australian S. N. Co. v. Marzetti*, 11 Exch. 234; *Church v. Gas Co.*, supra; *Beverley v. Gaslight Co.*, 6 Adol. & E. 829; *London Gaslight Co. v. Nicholls*, 2 Car. & P. 365; and in favor of executed contracts, *Mayor, etc., of Stafford v. Till*, 4 Bing. 75; *East London Water Co. v. Bailey*, supra; *Beverley v. Gaslight Co.*, supra; *Dean of Rochester v. Pierce*, 1 Camp. 466; *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131; *Lowe v. Railway Co.*, 18 Q. B. 633; *Sanders v. Guardians of St. Neot's*, 8 Q. B. 810. But this latter distinction is questionable. *Paine v. Strand Union*, 8 Q. B. 340; *Church v. Gas Co.*, supra. A contract for salvage, directly connected with the object of incorporation, is binding, although not under seal. *Henderson v. Navigation Co.*, 5 El. & Bl. 409. So, the employ of an accountant to examine the accounts of a defaulting clerk, *Haigh v. Guardians of North Bierly Union*, 1 El. Bl. & El. 873; or of an engineer to erect an engine, *South Ireland Colliery v. Waddle*, L. R. 3 C. P. 463, affirmed L. R. 4 C. P. 617; or a contract for the use of a dry dock belonging to the contracting corporation, *Wells v. Mayor, etc., of Kingston*, L. R. 10 C. P. 402. See, also, § 74, supra.

³ *In re Blakely Ordnance Co.*, 3 Ch. App. 154; *Watson v. Railway Co.*, L. R. 2 C. P. 593; *Ex parte Chorley*, L. R. 11 Eq. 157; *Dickson v. Railway Co.*, L. R. 4 Q. B. 44; *General Estates Co.*, 3 Ch. App. 758; *In re Imperial Land Co.*, L. R. 11 Eq. 478. The company being held in these cases on the ground of estoppel arising out of its professed ability to issue negotiable paper under seal. And to like effect without question of estoppel, *City of Aurora v. West*, 22 Ind. 88; *Thomson v. Lee Co.*, 3 Wall. 327; *Hotchkiss v. Bank*, 21 Wall. 354; *Colson v. Arnot*, 57 N. Y. 253; *Evertson v. Bank*, 66 N. Y. 14; *Carr v. Le Fevre*, 27 Pa. St. 413; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 699. So, in general, of railroad bonds. *Commissioners of Knox County v. Aspinwall*, 21 How. 539; *White v. Railroad Co.*, Id. 575; *Moran v. Commissioners*, 2 Black, 722; *Murray v. Lardner*, 2 Wall. 110; *Chapin v. Railroad Co.*, 8 Gray (Mass.) 575; *Brainerd v. Railroad Co.*, 25 N. Y. 496, affirming 10 Bosw. (N. Y.) 332; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9; *Birdsall v. Russell*, 29 N. Y. 220; *Wickes v. Adirondack Co.*, 2 Hun (N. Y.) 112; *Grand Rapid & I. R. Co. v. Sanders*, 17 Hun (N. Y.) 552; *Junction R. Co. v. Cleaneay*, 13 Ind. 161; *Langston v. Railroad Co.*, 2 S. C. 248; *National Exch. Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375. The contrary case of *Jackson v. Railroad Co.*, 48 Me. 147, is disap-

bill or note under its corporate seal.⁴ But it has been held in England, in recent cases, that a corporate bond in negotiable form, which had come into the plaintiff's hands for value after having been stolen from the rightful owner, was subject to defense.⁵ Whatever may have been the rule originally as to contracts of corporations, it is now established beyond dispute, both in England and in the United States, that a corporation may make a simple contract without the use of a corporate seal.⁶

Power to Execute Bills and Notes.

§ 328. It is said, however, by Mr. Justice Byles, that the power of a corporation to execute commercial paper requires a special authority.⁷ And it has been held that where express authority has been given to execute such paper for a particular purpose, and the paper has been executed without any recital of the power, and actually used for another and unauthorized purpose, the corporation can avail itself of this defense.⁸ Where there is express power given to a corporation to execute a bill or note, the law implies that the corporation is thereby subjected to all ordinary remedies against it inci-

proved by *Evertson v. Bank*, 66 N. Y. 14. This has also been held recently in England of corporation debentures payable to bearer, *In re Imperial Land Co.*, L. R. 11 Eq. 478; *Ex parte City Bank*, 3 Ch. App. 758; but is not the case with debentures which are conditional in their form, *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

⁴ *Jackson v. Myers*, 43 Md. 452; *Muth v. Dolfield*, Id. 466; *Central Nat. Bank v. Charlottesville R. Co.*, 5 S. C. 156.

⁵ *Crouch v. Credit Foncier Co.*, L. R. 8 Q. B. 374; *In re Natal Inv. Co.*, 3 Ch. App. 355.

⁶ Byles, Bills, 71, note; 2 Daniel, Neg. Inst. 496; 1 Pars. Notes & B. 163; Story, Prom. Notes, § 74; 1 Dill. Mun. Corp. § 374; *Danforth v. Turnpike Co.*, 12 Johns. (N. Y.) 227; *Bank of Columbia v. Patterson*, 7 Cranch, 305; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 413; *Many v. Iron Co.*, 9 Paige (N. Y.) 188; *American Ins. Co. v. Oakley*, Id. 496; *Hamilton v. Insurance Co.*, 5 Pa. St. 339; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13; *Creswell v. Holden*, 3 MacArthur, 579; *Buckley v. Briggs*, 30 Mo. 452.

⁷ Byles, Bills, 71.

⁸ Byles, Bills, 9; *Slark v. Archway Co.*, 5 Taunt. 792.

dent to such contract.⁹ And it may now be regarded as the rule that all corporations organized and existing for the purposes of trade may, in the course of such trade, issue bills and notes, like natural persons.¹⁰ The statute of Anne confers this power expressly, as regards the making of notes, and the same power may be implied as to bills.¹¹

So far, then, as such bills and notes are incident to the business of the corporation, no express power or capacity is necessary.¹² But it has been held in England that a corporation organized for the erection of public works has no such power, unless expressly conferred,¹³ and that no such power is to be implied in favor of a railroad company,¹⁴ although this is not the American rule.¹⁵ And

⁹ Byles, Bills, 71; Chit. Bills, 23; 1 Pars. Notes & B. 167; *Murray v. East India Co.*, 5 Barn. & Ald. 204.

¹⁰ *Broughton v. Waterworks Co.*, 3 Barn. & Ald. 1; *Grommes v. Sullivan*, 26 C. C. A. 320, 81 Fed. 45; *Lucas v. Pitney*, 27 N. J. Law, 221. So, a state bank may make interest bearing certificates of deposit. *Francois v. Lewis* (Minn.) 71 N. W. 621.

¹¹ Chit. Bills, 21; Story, Bills, § 79; 6 Anne, c. 22.

¹² Story, Bills, § 79; Story, Prom. Notes, § 74; 1 Edw. Bills, § 55; *Moss v. Oakley*, 2 Hill (N. Y.) 265; *Kelley v. Mayor, etc., of Brooklyn*, 4 Hill (N. Y.) 263; *Bank of Chillicothe v. Chillicothe*, 7 Ohio (pt. 2, p. 31) 315; *Moss v. Averell*, 10 N. Y. 449; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13; *Hascall v. Association*, 5 Hun (N. Y.) 151; *Green's Brice, Ultra Vires*, 155, note; *Mott v. Hicks*, 1 Cow. (N. Y.) 510; *Came v. Brigham*, 39 Me. 35; *Davis v. Building Union*, 32 Md. 285; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Barry v. Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Olcott v. Railroad Co.*, 40 Barb. (N. Y.) 179; *McCullough v. Moss*, 5 Denio (N. Y.) 577; *Hamilton v. Railroad Co.*, 9 Ind. 359; *Smith v. Flour-Mills Co.*, 6 Cal. 1; *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248. And this is equally true of a municipal corporation, *Clarke v. School Dist.*, 3 R. I. 199; and of corporation bonds for money borrowed for corporate purposes, *Curtis v. Leavitt*, 15 N. Y. 9; *Leavitt v. Blatchford*, 17 N. Y. 521.

¹³ Byles, Bills, 71; *Broughton v. Waterworks Co.*, 3 Barn. & Ald. 1. Nor can a company which is organized for carrying on works abroad. *Peruvian Ry. Co.*, 2 Ch. App. 617. In this case, however, the broad language of the memorandum of incorporation was held to include the power.

¹⁴ *Overend v. Railway Co.*, L. R. 1 C. P. 499.

¹⁵ *Olcott v. Railroad Co.*, 40 Barb. (N. Y.) 179; *Smead v. Railroad Co.*, 11 Ind. 104; *Munson v. Railroad Co.*, 103 N. Y. 58, 8 N. E. 355. And so as to

it has been held in the United States that bills and notes may be made by a mill company,¹⁶ or a religious corporation,¹⁷ or an insurance company.¹⁸ And the same power has been declared to belong to mining companies, manufacturing companies, canal companies, building associations, etc.¹⁹

§ 329. But a corporation possesses no power to make a bill of exchange or note which is foreign to its business.²⁰ And, if the note of a corporation has been executed in the transaction of its corporate business, this will not be presumed, but must be shown by the holder.²¹ It has been said, with some reason, that the power of a corporation to make bills and notes is co-extensive with its power to contract debts.²² And a corporation may, in general,

receiving and transferring notes. *Frye v. Tucker*, 24 Ill. 180; *Goodrich v. Reynolds*, 31 Ill. 490.

¹⁶ *Smith v. Flour-Mills Co.*, 6 Cal. 1.

¹⁷ *Davis v. Society*, 8 Metc. (Mass.) 321.

¹⁸ *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 94. But not where express authority is given by its charter to lend money on certain enumerated securities, not including notes or bills. *Bacon v. Insurance Co.*, 31 Miss. 116. Nor where the discounting of the note in question was no part of the company's business. *New York Fire Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664. Nor where the bill was given in settlement of a claim against another company amalgamated with it by a void deed, although the payee supposed such deed to be valid. *Balfour v. Ernest*, 28 Law J. C. P. 170.

¹⁹ So held as to a mining company, *Mining Co. v. Anglo-California Bank*, 104 U. S. 192; *Moss v. Averell*, 10 N. Y. 449. So, a society for the erection of a public monument, *Hayward v. Society*, 21 Pick. (Mass.) 270; or a canal company, *McMasters v. Reed*, 1 Grant, Cas. (Pa.) 36; or a turnpike company, *Lebanon & R. Gravel-Road Co. v. Adair*, 85 Ind. 244; or a manufacturing company, *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282; *Bird v. Daggett*, 97 Mass. 494; *Auerbach v. Mill Co.*, 28 Minn. 291, 9 N. W. 799; or a building association, *Davis v. Building Union*, 32 Md. 285. But, to the effect that a building association cannot accept a draft, see *Towle v. Investment Co.*, 78 Fed. 688.

²⁰ Thus, it is not within the ordinary powers of a railroad company to consolidate itself with another line, and to give its note for the purchase of a steamboat, to be used as a means of connection between the lines. *Pearce v. Railroad Co.*, 21 How. 441.

²¹ *McCullough v. Moss*, 5 Denio (N. Y.) 580.

²² 1 Daniel, Neg. Inst. 356; 1 Pars. Notes & B. 164; 1 Edw. Bills, § 55; *Catton v. Society*, 46 Iowa, 108; *Pitman v. Kintner*, 5 Blackf. (Ind.) 253;

contract debts and borrow money incidentally to its corporate business, and not otherwise.²³ Its power to make a bill or note is in other respects subject to the same restrictions that apply to other contracts of the corporation.²⁴ And its bonds issued in violation of an express statutory prohibition are void.²⁵

The power to borrow money, it is said, includes the power to borrow, and therefore to transfer, a bill of exchange,²⁶ or to transfer as collateral a promissory note.²⁷ The power to borrow money implies power in a corporation to make an "obligation for its repayment in any form not expressly forbidden by law."²⁸

Moss v. Oakley, 2 Hill (N. Y.) 265; *Kelley v. Mayor, etc., of Brooklyn*, 4 Hill (N. Y.) 263; *Hamilton v. Railroad*, 9 Ind. 359; *Safford v. Wyckoff*, 4 Hill (N. Y.) 442; *Auerbach v. Mill Co.*, 28 Minn. 291, 9 N. W. 799. And authority to a corporation officer to control its business includes authority to purchase necessary materials, and give the corporation's note therefor. *Castle v. Foundry Co.*, 72 Me. 167.

²³ *Fay v. Noble*, 12 Cush. (Mass.) 1; *Barnes v. Bank*, 19 N. Y. 156; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Bank of Chillicothe v. Chillicothe*, 7 Ohio, 315; *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248, affirming 1 Colo. 532. Thus, an insurance company may borrow money to pay losses, or raise money for that purpose on a borrowed note. *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53.

²⁴ Thus, it cannot make a note to one of its officers for past services, rendered without claim for compensation. *Doe v. Transportation Co.*, 78 Fed. 62.

²⁵ *Com. v. Smith*, 10 Allen (Mass.) 448; *Merz v. Insulation Co.*, 87 Hun, 430, 34 N. Y. Supp. 215. To the effect that an issue of bonds in excess of statutory authority renders the directors liable, but does not render the bonds void, see *Beebe v. Power Co.*, 13 Misc. Rep. 737, 35 N. Y. Supp. 1.

²⁶ *Holbrook v. Basset*, 5 Bosw. (N. Y.) 176; *Central Bank v. Lang*, 1 Bosw. (N. Y.) 202; *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53. So, an insurance company may receive a note for a subscription to stock, without express power to do so, there being no statutory prohibition, *Hope Mut. Life Ins. Co. v. Perkins*, 38 N. Y. 404; and may transfer it, *McIntire v. Preston*, 10 Md. 48.

²⁷ *Clark v. Titcomb*, 42 Barb. (N. Y.) 122.

²⁸ *Stratton v. Allen*, 16 N. J. Eq. 229, applying this rule to a bond with warrant to confess judgment; *Com. v. City of Pittsburg*, 34 Pa. St. 496; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *McMasters v. Reed's Ex'rs*, 1 Grant, Cas. (Pa.) 36; *Hays v. Coal Co.*, 29 Ohio St. 330; *Barry v. Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *Mead v. Keeler*, 24 Barb. (N. Y.) 20; *Beers v. Glass Co.*, 14 Barb. (N. Y.) 358; *Attorney General v. Life & Fire Ins. Co.*, 9 Paige (N. Y.) 470. This is true, likewise, of municipal corporations. *Kelley v. Mayor, etc., of Brooklyn*, supra; *Bank of Chillicothe v. Chillicothe*, supra.

Power of Corporation to Take and Transfer Bills.

§ 330. A corporation may receive a bill of exchange for a debt due to it, and may, therefore, transfer such bill.²⁹ And the power to transfer a bill or note may be inferred from the possession of the paper by the corporation.³⁰ It has also been held that the power to "sell and convey" all of its property implies power to indorse a bill of exchange belonging to the corporation.³¹ And an indorsement by a corporation may be a good transfer of the instrument, although it is *ultra vires*, and therefore not binding, as an indorsement, upon the corporate indorser.³² So, it has been held that the trustees of an academy, authorized to procure subscriptions for its educational fund, may take a note for such subscription.³³ And it has even been held that a foreign corporation, having no power to transact business in the state, may receive a note there for a subscription to its stock.³⁴ And a corporation may transfer a note received by it for a stock subscription,³⁵ or for in-

²⁹ *McIntire v. Preston*, 10 Ill. 48; *Frye v. Tucker*, 24 Ill. 180; *Planters' Bank v. Sharp*, 6 How. 301; *Hardy v. Merriweather*, 14 Ind. 203. Notwithstanding a prohibition against trading in notes. *John v. Bank*, 2 Blackf. (Ind.) 367. So it may receive a note for a sale of land, and dispose of it, notwithstanding a statutory prohibition against dealing in commercial paper. *Buckley v. Briggs*, 30 Mo. 452. Or it may take a note from its treasurer in settlement of a misapplication by him of its funds. *United Protestant Congregation v. Stegner*, 21 Ohio St. 488. And if authorized to take notes which "may be used for the payment of loss and liabilities, and for any other purpose connected with the business of the Co.," it may transfer such note as security for its debts. *Great Western Ins. Co. v. Thayer*, 4 Lans. (N. Y.) 459.

³⁰ *Brown v. Donnell*, 49 Me. 421; *Nelson v. Eaton*, 26 N. Y. 410. And the transfer may be made by an agent without the use of the corporate seal. *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84.

³¹ *Savage v. Walshe*, 26 Ala. 631.

³² *Smith v. Johnson*, 3 Hurl. & N. 222; *Brown v. Donnell*, 49 Me. 421.

³³ *Trustees of Amherst Academy v. Cows*, 6 Pick. (Mass.) 427.

³⁴ *Bartlett v. Insurance Co.*, 18 Kan. 369. Such note is not, therefore, void, but the corporation cannot sue on it without first complying with the state laws. *American Ins. Co. v. Wellman*, 69 Ind. 413.

³⁵ *Clark v. Farrington*, 11 Wis. 321; *Cornell v. Hichens*, Id. 368; *Blunt v. Walker*, Id. 349. And this will be valid, although the stock may never have been delivered. *Clark v. Farrington*, *supra*.

insurance made by it.³⁶ An express statutory authority should, however, be strictly construed. Thus, if a corporation is authorized by statute to receive notes for insurance premiums, "payable within twelve months from date," this, it is held, will not authorize the taking of a note payable 12 months from date.³⁷

A bank which has discounted and owns a note may transfer it, even though it has been dishonored,³⁸ and although a subsequent statute prohibits such transfer.³⁹ And, by Massachusetts statute, a corporation may transfer a note within three years after the expiration of its charter; the corporate existence being continued for the purpose of settling its affairs.⁴⁰

Ultra Vires—As a Defense.

§ 331. In general, where a corporation retains the benefit of a transaction it cannot set up its ultra vires character against a bona fide holder of the paper.⁴¹

By the national banking act, no authority is given to national banks to use their funds in purchasing notes; and it seems that a national bank cannot acquire title to such paper by purchase, other than in the usual form of discount.⁴² But where a national bank

³⁶ *Brookman v. Metcalf*, 32 N. Y. 591; *Farmers' Bank v. Maxwell*, Id. 579.

³⁷ *Osgood v. Toplitz*, 3 Lans. (N. Y.) 184. But the defect may be cured by a valid renewal. *Osgood v. Toole*, 1 Hun (N. Y.) 167.

³⁸ *Marvine v. Hymers*, 12 N. Y. 223.

³⁹ *Planters' Bank v. Sharp*, 6 How. 301.

⁴⁰ *Folger v. Chase*, 18 Pick. (Mass.) 63.

⁴¹ *Towles Excelsior & Ginning Co. v. Inman*, 96 Ga. 506, 23 S. E. 418; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *German Nat. Bank v. Louisville Butchers' Hide & Tallow Co.*, 97 Ky. 34, 29 S. W. 882. So, it cannot set up as a defense that, as a foreign corporation, it had no authority to do business in the state, *Press Co. v. City Bank*, 7 C. C. A. 248, 58 Fed. 321, affirming 56 Fed. 260; *Kellogg v. Bank*, 58 Kan. 43, 48 Pac. 587; or had acted in violation of a restriction of its foreign charter, *Ellsworth v. St. Louis & C. R. Co.*, 98 N. Y. 553, reversing 33 Hun (N. Y.) 7. So, a national bank cannot avail itself of its own violation of the statute restricting the amount of its liabilities. *Weber v. Bank*, 12 C. C. A. 93, 64 Fed. 208, reversing 50 Fed. 735; although such liability could not be enforced in favor of one of its own directors, *Steelman v. Baker*, 53 N. J. Eq. 672, 33 Atl. 815; *Physick v. Baker*, 53 N. J. Eq. 673, 33 Atl. 815.

⁴² *Lazear v. Bank*, 52 Md. 78; *First Nat. Bank v. Pierson*, 24 Minn. 140. So, under the Minnesota banking act, a power to discount is a power, not to

has purchased a note, and brings suit upon it, it has been held that even a prior indorser cannot question the capacity and title of the bank.⁴³ So, one who gives his note to a company cannot question the authority of the company, as a matter of defense.⁴⁴ And the maker of such a note, which has been transferred to a bona fide holder for value, is estopped from denying the existence of the corporation.⁴⁵ So, the maker of a note to a foreign corporation cannot avail himself of the defense that it had no power to transact business in the state where the note was given.⁴⁶ And, under the rule making the indorser an implied warrantor, an indorser cannot set up that the corporation made the note in violation of the statute.⁴⁷

Banking Powers.

§ 332. It is to be observed that banking powers are not, in general, incident to the business of a corporation, but must be expressly conferred. Nor can such powers be inferred from an express gen-

buy, but to make loans on such securities at lawful discount. *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198. But only the United States can question the authority of a national bank to hold railroad aid bonds under the National Banking Act. *Town Council v. Union Nat. Bank* (Miss.) 22 South. 291.

⁴³ *National Pemberton Bank v. Porter*, 125 Mass. 333.

⁴⁴ *First Nat. Bank v. Gillilan*, 72 Mo. 77; *Gorrell v. Insurance Co.*, 11 C. C. A. 240, 63 Fed. 371; or its due organization, *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101. Especially if given in payment of a stock subscription, *Goodrich v. Reynolds*, 31 Ill. 490. And, conversely, one who has sued and recovered judgment against a corporation on its note cannot afterwards deny the incorporation, and sue the individual members. *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109, 68 N. W. 370.

⁴⁵ *Camp v. Byrne*, 41 Mo. 525; *Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48.

⁴⁶ *Shook v. Manufacturing Co.*, 61 Ind. 520. The taking of a note is not a doing business, within the meaning of the statute as to foreign corporations. *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559, 39 N. Y. Supp. 432. As to the power of a corporation of one state to buy and sell bills in another state, in the absence of statutory restrictions, see *Bank of Augusta v. Earle*, 13 Pet. 519.

⁴⁷ *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909; *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103. In like manner, the drawer of checks guaranteed by a bank beyond his deposits, under a special agreement, cannot allege the ultra vires character of the agreement. *Voltz v. Bank*, 158 Ill. 532, 42 N. E. 69.

eral authority to "hold, sell, grant, and dispose of" real or personal estate "by mortgage, or in such other manner as they shall deem most proper for the best interests of the corporation";⁴⁸ nor from an authority "to buy and sell drafts and bills of exchange."⁴⁹ And in New York certificates of deposit bearing interest and redeemable after 30 years fall within the prohibition of the statute as to banking powers.⁵⁰ So, post notes by New York banking associations, and securities transferred as collateral for their payment, are void.⁵¹ But certificates of deposit not used nor intended to circulate as money do not seem to be within the prohibition of the statute.⁵² On the other hand, the business of discounting notes, prohibited by the New York Revised Statutes, is not conferred upon a trust company by a charter authorizing it "to buy or receive all kinds of property, to hold the same in trust, * * * to receive merchandise upon storage and deposit, and to advance money upon property real or personal."⁵³ Nor has a savings bank power to discount commercial paper, under the New York Revised Statutes.⁵⁴ But the statute prohibiting the issue of circulating medium for money does not include nonnegotiable notes and drafts, which are not within the mischief guarded against by the statute.⁵⁵

The statutory prohibition of banking powers includes the power of discounting notes, or of taking a note for a loan, and deducting the interest in advance.⁵⁶ It has been held, however, that a savings-bank charter authorizing investments in public stocks and "other security" includes in its authority loans on commercial pa-

⁴⁸ *State v. Granville Alexandrian Soc.*, 11 Ohio, 1; *State v. Washington Social Library Co.*, Id. 96. But taking a note from the corporation treasurer in settlement of his misapplication of its funds is not within the prohibition of the banking act. *United Protestant Congregation v. Stegner*, 21 Ohio St. 488.

⁴⁹ *In re Ohio Life Insurance & Trust Co.*, 9 Ohio, 291.

⁵⁰ *New York Life Insurance & Trust Co. v. Beebe*, 7 N. Y. 364.

⁵¹ *Tylee v. Yates*, 3 Barb. 222.

⁵² *Tracy v. Talmage*, 18 Barb. (N. Y.) 456.

⁵³ *New York State Loan & Trust Co. v. Helmer*, 77 N. Y. 64, affirming 12 Hun (N. Y.) 35.

⁵⁴ *Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, Id. 449; 1 Rev. St. p. 712, §§ 3, 6.

⁵⁵ *Ontario Bank v. Schermerhorn*, 10 Paige (N. Y.) 109.

⁵⁶ *Philadelphia Loan Co. v. Towner*, 13 Conn. 249.

per.⁵⁷ The statutory prohibitions as to banking powers do not extend to foreign corporations acting in their own state. Thus, a New Jersey corporation purchasing in that state a New York note at a usurious rate of discount may recover on it in New York.⁵⁸

In England all corporations except the Bank of England were prohibited by the statute of Geo. III. from making bills or notes payable on demand, or within six months from date, as were also all partnerships of more than six persons.⁵⁹ But it has since been enacted that corporations and partnerships of more than six members, doing business more than 65 miles from London, may issue bills or notes payable on demand. And, if for more than £50, they may be payable in London or elsewhere at any period after date or after sight. And such corporations and partnerships may also discount bills of exchange not drawn on themselves.⁶⁰ And by the statute of Wm. IV., which is still in force, corporations and partnerships of more than six members may now do business as bankers in London, but may not issue bills or notes payable in less than six months from their date.⁶¹ It does not, however, follow that a corporation's bill or note, though prohibited by the English banking act, is therefore void. Such instrument is valid and binding on the corporation in the hands of a bona fide holder for value before maturity.⁶²

⁵⁷ *Duncan v. Institution*, 10 Gill & J. (Md.) 299.

⁵⁸ *Hackettstown Bank v. Rea*, 6 Lans. (N. Y.) 455.

⁵⁹ 39 & 40 Geo. III. c. 28, § 15. And see *Bank of England v. Anderson*, 3 Bing. N. C. 589; 4 Scott, 50; 2 Keen, 328. But this act does not apply to commercial firms of more than six partners. *Wigan v. Fowler*, 1 Starkie, 459.

⁶⁰ 7 Geo. IV. c. 46. And, as to the amount limited, see 3 & 4 Wm. IV. c. 83, § 2; 7 & 8 Vict. c. 32, § 26.

⁶¹ 3 & 4 Wm. IV. c. 98, § 3.

⁶² *Broughton v. Manchester Waterworks Co.*, 3 Barn. & Ald. 1; *Wigan v. Fowler*, 1 Starkie, 459; *Pickaway Co. Bank v. Prather*, 12 Ohio St. 497. "If there was an utter want of power in the corporation to make such a contract as the agreement upon its face purports to be, it is of no validity either in the hands of the corporation or of its assignee. The bank knew, and the assignee must be presumed to know, the law; and, as it appears upon the face of the contract that it is not warranted by the charter, the assignee cannot be presumed to have taken it in good faith, and without notice of its invalidity. But if a negotiable security given to or made by a corporation appears upon its face to be such as the corporation might make

Loans by Corporations.

§ 333. A corporation has, in general, no power to loan its funds, and receive bills of exchange or other commercial paper for payment.⁶³ But, where it is authorized by charter to advance money on goods, it may accept a bill of exchange drawn against a consignment to be made.⁶⁴ Where a corporation is authorized to receive notes in the course of its business, but forbidden to exercise any banking power, a note transferred to it will be presumed to have been taken lawfully in the course of business.⁶⁵ And one who borrows money from a corporation cannot, in his own defense, question its power to lend.⁶⁶ Nor can one who makes a note to a corporation at suit of the indorsee question its power to indorse.⁶⁷

or receive under its charter, and the assignee receives it before due and without notice, actual or constructive, of its real invalidity, it is an available security in his hands." *Peck, J., in Pickaway Co. Bank v. Prather*, 12 Ohio St. 512.

⁶³ *Waddill v. Railroad Co.*, 35 Ala. 323; *Grand Lodge v. Waddill*, 36 Ala. 319. So, in New York, of a savings bank. *Pratt v. Eaton*, 79 N. Y. 449. But the corporation may in such case recover the money loaned in an action for moneys had and received. *Waddill v. Railroad Co.*, supra. But, see, contra, *Grand Lodge v. Waddill*, supra, where the former case is distinguished incorrectly as turning on the officers' want of authority to bind the corporation.

⁶⁴ *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44.

⁶⁵ *Hart v. Insurance Co.*, 21 Mo. 91.

⁶⁶ 1 Daniel, Neg. Inst. 362, 397; *Green's Brice, Ultra Vires*, 619, note, 375, note; *Gold-Min. Co. v. National Bank*, 96 U. S. 640; *First Nat. Bank v. Gihilan*, 72 Mo. 77; *O'Hare v. Bank*, 77 Pa. St. 96; *Pooek v. Association*, 71 Ind. 357; *State Board of Agriculture v. Citizens', etc., Ry. Co.*, 47 Ind. 407; *Farmington Sav. Bank v. Fall*, 71 Me. 49; *Massey v. Association*, 22 Kan. 624. This is so, too, in case of a trust deed securing a loan on note in violation of the national bank act. *National Bank v. Matthews*, 98 U. S. 621; *Mills Co. Nat. Bank v. Perry*, 72 Iowa, 15, 33 N. W. 341.

⁶⁷ *Brown v. Donnell*, 49 Me. 421.

Accommodation Paper.

§ 334. Giving accommodation paper is never incident to the business of a corporation, and is therefore *ultra vires* and unlawful.⁶⁸ And such paper cannot afterward be ratified by the corporation,⁶⁹ and is not rendered valid by any indirect benefit to the company.⁷⁰ So, a national bank cannot become an accommodation indorser.⁷¹ Nor can a corporation, without express power, guaranty the debt of another.⁷² Where, however, a railroad company transfers prop-

⁶⁸ 1 Daniel, Neg. Inst. 361; 1 Pars. Notes & B. 166; Green's Brice, *Ultra Vires*, 252; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Morford v. Bank*, 26 Barb. (N. Y.) 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. (N. Y.) 421; *Smead v. Railroad Co.*, 11 Ind. 109; *National Park Bank v. Remsen*, 43 Fed. 226; *National Bank of Commerce v. Atkinson*, 55 Fed. 465; *McLellan v. File Works*, 56 Mich. 579, 23 N. W. 321; *Merchants' Nat. Bank v. Detroit Knitting & Corset Works*, 68 Mich. 620, 36 N. W. 696; *National Park Bank v. German-American Security Co.*, 116 N. Y. 281; 22 N. E. 537; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23; *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275; *Nat. Bank of Republic v. Young*, 41 N. J. Eq. 531. And such defense is available against holders with notice. *Trapp v. Bank (Ky.)* 41 S. W. 577.

⁶⁹ *Hall v. Turnpike Co.*, 27 Cal. 255; *Smead v. Railroad Co.*, 11 Ind. 109. But see, as to estoppel excluding defense, *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23; *Bremen Sav. Bank v. Branch-Crookes Saw Co.*, 104 Mo. 425, 16 S. W. 209; *Lyon, Potter & Co. v. First Nat. Bank*, 29 C. C. A. 45, 85 Fed. 120; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271.

⁷⁰ *Germania Safety-Vault & Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. 797; or usage, *Webster v. Howe Mach. Co.*, 54 Conn. 394; nor by the fact that in the first instance it received the proceeds for the party accommodated, *Fox v. Home Co.*, 90 Hun, 365, 35 N. Y. Supp. 896. But see *National Bank v. John G. Mattingly & Sons (Ky.)* 33 S. W. 415, where the firm accommodated and the corporation consisted of the same persons.

⁷¹ *National Bank of Gloversville v. Wells*, 79 N. Y. 498, and cases cited in previous notes.

⁷² *Commercial Nat. Bank v. Pine*, 27 C. C. A. 171, 82 Fed. 799; *Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co.*, 7 Wis. 59. But in *Madison & I. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457, it was held that the sale and guaranty of the bond of another company was within the general powers of a corporation, and that the fact that such power had been exercised by it for the accommodation of the other company could not

erty with a guaranty, and receives the proceeds, it has been held to be estopped from defense on the ground of its want of power.⁷³ So, it has been held that, in transferring securities held by it, a corporation may guaranty the bonds or notes.⁷⁴ In such cases, however, the guaranty is an original contract of the corporation for its own benefit; the consideration moving to itself, and not to the person whose debt is guarantied.

A corporation may exceed its powers in general, or in some special instance only, and the term "ultra vires" is not properly applicable to a corporation's abuse of the general power possessed by it.⁷⁵ Thus, where a corporation may take notes in its business, but exceeds its power by taking a note for a stock subscription, the note will be good in the hands of a bona fide holder, upon the principle that otherwise the general power of taking and transferring notes, abused in this case, would leave a bona fide holder without means of information as to the abuse or protection against it.⁷⁶ If the act, therefore, is within the usual and apparent scope of the corporation's ordinary business and powers, it is not technically ultra vires and defensible at suit of such holder for value. So, an accommodation bill or note, although executed ultra vires, is good in the hands of a bona fide holder for value.⁷⁷ But if a bill or note

be set up in defense against a bona fide holder for value. As to necessity for strict compliance with statute authorizing such guaranty, see *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. 381; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 22 C. C. A. 378, 75 Fed. 433; *Louisville, N. A. & C. R. Co. v. Ohio Valley Improvement & Contract Co.*, 69 Fed. 431.

⁷³ *Remsen v. Graves*, 41 N. Y. 471; *Arnot v. Railway Co.*, 5 Hun (N. Y.) 608.

⁷⁴ *Railroad Co. v. Howard*, 7 Wall. 392; *People's Bank v. National Bank*, 101 U. S. 181; *Thomas v. Bank*, 40 Neb. 501, 58 N. W. 943, affirmed 46 Neb. 861, 65 N. W. 895; *Tod v. Land Co.*, 57 Fed. 47; *Marbury v. Land Co.*, 10 C. C. A. 393, 62 Fed. 335.

⁷⁵ *Eastern Counties Ry. v. Hawkes*, 5 H. L. Cas. 331; *Bissell v. Railroad Co.*, 22 N. Y. 289; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57.

⁷⁶ *Willmarth v. Crawford*, 10 Wend. (N. Y.) 341; *Marbourg v. Lloyd*, 21 Kan. 545; *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419, 49 Pac. 524.

⁷⁷ *Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171; *National Bank of Republic v. Young*, 41 N. J. Eq. 531; *Blake v. Manufacturing Co.* (N. J. Ch.) 38 Atl. 241; *American Trust & Savings Bank v. Gluck* (Minn.) 70 N. W. 1085. And this is true though ren-

is executed by a corporation in violation of an express statute, e. g. of the banking act, it is void, even in the hands of a bona fide holder.⁷⁸ If, on the other hand, a corporation has exceeded its powers in drawing a check, its payment to the rightful holder would still be good, as between the bank paying and the corporation drawing it.⁷⁹ And, if a corporation issues bonds in excess of a statutory limit, it will still be liable for the consideration received.⁸⁰

Presumption of Validity.

§ 335. As has been said, where a corporation has power to take bills and notes in the course of its business, but not for banking purposes, it will be presumed to have taken the paper sued upon lawfully, until the contrary is made to appear.⁸¹ And, in general, where a corporation, having a general power to make bills or notes, executes such paper, it will be presumed to have been lawfully executed, and will be good in the hands of a bona fide holder for value.⁸² So, where a foreign corporation executes a note, it will be

dered unlawful by express statute, equivalent to common law. *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191; *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640, 34 S. W. 344. But where the holder with notice transfers the paper to a bona fide holder in order to fix the corporation indorser, he will be liable to the corporation. *Nashville Lumber Co. v. Fourth Nat. Bank* (Tenn. Sup.) 29 S. W. 368. But if a purchaser takes such note from the maker, he is not entitled to protection as a bona fide holder. *National Park Bank v. German-American Security Co.*, 116 N. Y. 281, 22 N. E. 547.

⁷⁸ *Root v. Godard*, 3 McLean, 102, Fed. Cas. No. 12,037; *Hayden v. Davis*, 3 McLean, 276, Fed. Cas. No. 6,259.

⁷⁹ *Mahoney v. Mining Co.*, L. R. 7 H. L. 869.

⁸⁰ *Peatman v. Power Co.*, 100 Iowa, 245, 69 N. W. 541; or up to the amount of the legal limit, *Kraniger v. Society*, 60 Minn. 94, 61 N. W. 904.

⁸¹ *Hart v. Insurance Co.*, 21 Mo. 91.

⁸² 1 Daniel, Neg. Inst. 361; 1 Edw. Bills, § 55; 1 Pars. Notes & B. 165; *Supervisors v. Schenck*, 5 Wall. 784; *Stoney v. Insurance Co.*, 11 Paige (N. Y.) 635; *Willmarth v. Crawford*, 10 Wend. (N. Y.) 343; *Nelson v. Eaton*, 26 N. Y. 410; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *McIntire v. Preston*, 10 Ill. 48. Thus, an overdraft on a bank account is presumptively an exercise of its express power of borrowing money and signing checks. *Mahoney Mining Co. v. Anglo-Californian Bank*, Am. L. Reg. 100. So, a promissory note is presumptively good execution of a power to "make contracts." *Mitchell v. Railroad Co.*, 17 Ga. 574. "If they can make a valid promissory note for any purpose, this note must be held good till some cause shall be shown why

presumed to be valid in the state where it was made.⁸³ If, however, it appears on the face of the paper that the powers of the corporation have been exceeded, this would be notice of that fact to all holders.⁸⁴

If the corporation has not properly exercised its power in making such paper, advantage may be taken of this by way of defense under the plea of general issue.⁸⁵ So, if it has exceeded its power by making an accommodation note, this defense is admissible under a plea of general issue, and need not be pleaded specially.⁸⁶ On the other hand, a surety cannot set up a want of corporate capacity on the part of his principal.⁸⁷

it is not so." *Savage, C. J., in Barker v. Insurance Co., 3 Wend. (N. Y.) 97.* But the payee who takes corporation checks for the individual debt of one of its officers assumes the burden of proving the authority of the corporation. *Mt. Verd Mills Co. v. McElwee (Tenn. Ch. App.) 42 S. W. 465.*

⁸³ *New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer (N. Y.) 648.* And see, as to a double incorporation with restrictions in one state only, *Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 22 C. C. A. 378, 75 Fed. 433.*

⁸⁴ 1 *Edw. Bills, § 55; 1 Pars. Notes & B. 166.* See *Broughton v. Manchester Waterworks Co., 3 Barn. & Ald. 9, Bayley, J.,* saying in this case: "Here, upon the face of the instrument, the acceptance appears to be by a corporation, and all corporations are prohibited from owing any money on a security of this description, unless it has more than six months to run. I think, * * * consequently, that this action cannot be supported."

⁸⁵ *Byles, Bills, 71; Hill v. Waterworks Co., 5 Barn. & Adol. 866.*

⁸⁶ *Hall v. Turnpike Co., 27 Cal. 255.*

⁸⁷ *Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102.*

II. MUNICIPAL CORPORATIONS.

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Corporate Purpose—Seal—Negotiability.

§ 336. Cities and other municipalities organized for purposes of local government have in many respects the powers and liabilities of private corporations. It is to be remembered, however, that they exist not for purposes of trade, but for objects of a political character only, and their powers are those which are incidental and necessary to the existence of such bodies.⁸⁸

⁸⁸ For enumeration of corporate purposes, see *Simonton, Mun. Bonds*, §§ 33 et seq.; *Dill, Mun. Corp.* § 66; 2 *Daniel, Neg. Inst.* 541. And for Illinois authorities as to public schools, draft bounties, and railroad aid, see *Livingston Co. v. Darlington*, 101 U. S. 407. See also, as to railroad aid, *Folsom v. Township Ninety-Six*, 159 U. S. 611, 16 Sup. Ct. 174; *Brown v. Hertford Com'rs*, 100 N. C. 92, 5 S. E. 178. As to gas supply, *Fellows v. Walker*, 39 Fed. 651. As to paving, *Jones v. City of Camden*, 44 S. C. 319, 23 S. E. 141. In general, bonds issued for private aid or relief, although authorized by statute, are unconstitutional and invalid; e. g. in aid of a private manufacturing concern, *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442; *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416; *Allen v. Inhabitants of Jay*, 60 Me. 124; or a private water power, *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361; *Blair*

It was formerly held in England that such bodies could only contract under their corporate seal.⁸⁹ As in the case of private corporations, however, it is now established in the United States, at least, that municipal corporations may bind themselves by simple contracts.⁹⁰

And a municipal corporation may also give a negotiable instrument under seal. This character of negotiability belongs to bonds, with or without interest coupons, which are in form and intention negotiable;⁹¹ and, apart from the questions of authority and reg-

v. Cuming Co., 111 U. S. 363, 4 Sup. Ct. 44; or to relieve citizens injured by fire. *Lowell v. City of Boston*, 111 Mass. 454; or for campaign expenses incurred in locating state capital, *Shannon v. City of Huron*, 9 S. D. 356, 69 N. W. 598. And it has been held that a municipal corporation cannot guaranty commercial paper, although authorized to receive or dispose of it. *Carter v. City of Dubuque*, 35 Iowa, 416. And such guaranty may be enjoined in equity, although it would be void even in the hands of a bona fide holder. *Lynchburg & R. St. Ry. Co. v. Dameron (Va.)* 28 S. E. 951. But see, as to private corporations, § 334, *supra*. But in some states the constitution permits municipal subscriptions by statutory authority for local improvements, *Neale v. Wood Co. Court (W. Va.)* 27 S. E. 370; or for private works of general utility. If, however, bonds voted under the statute in aid of a private mill are to be issued on certain conditions, they will be enjoined until the conditions are strictly performed. *George v. Cleveland (Neb.)* 74 N. W. 266.

⁸⁹ *Mayor, etc., of Ludlow v. Charlton*, 6 Mees. & W. 815. And where the bonds are refunded under a general refunding act, the invalidity of the original bonds (issued in aid of a private business) cannot be inquired into. *Brown v. Ingalls Tp.*, 81 Fed. 485.

⁹⁰ *Fourth School Dist. v. Wood*, 13 Mass. 199; *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 413; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Legrand v. Hampden Sydney College*, 5 Munf. (Va.) 324. So, as to unsealed coupons, *City of San Antonio v. Gould*, 34 Tex. 77; or municipal bonds, *Mercer Co. v. Hackett*, 1 Wall. 83.

⁹¹ *Green's Brice, Ultra Vires*, 177, note; 1 Dill. Mun. Corp. § 405; 1 Edw. Bills, § 48; *Gelpeke v. City of Dubuque*, 1 Wall. 175; *Thomson v. Lee Co.*, 3 Wall. 327; *Marion Co. Com'rs v. Clark*, 94 U. S. 278; *Ackley School Dist. v. Hall*, 113 U. S. 135, 5 Sup. Ct. 371; *Bank of Rome v. Village of Rome*, 19 N. Y. 20; *Gould v. Town of Sterling*, 23 N. Y. 464; *Marsh v. Town of Little Valley*, 1 Hun (N. Y.) 554, 4 Thomp. & C. 116; *Lindsley v. Diefendorf*, 43 How. Prac. 357; *Force v. City of Elizabeth*, 28 N. J. Eq. 406; *Boyd v. Kennedy*, 38 N. J. Law, 146; *Society for Savings v. City of New London*, 29 Conn. 174; *Town of Eagle v. Kohn*, 84 Ill. 292; *Craig v. City of Vicksburg*, 31 Miss. 216; *City of Aurora v. West*, 22 Ind. 88; *Board of Commissioners v. Bright*, 18 Ind. 93; *Durant v. Iowa Co.*, 1 Woolw. 72, Fed. Cas. No. 4,189;

ularity, a bona fide holder for value, before maturity, is entitled to hold and recover upon it clear of defenses existing against the original holder.⁹² Such bonds are to be regarded in the main as commercial paper, and holders of them are necessary parties to a suit in equity commenced by taxpayers to obtain an injunction against collection of taxes for their payment.⁹³ And they fall within the statute as to transfer of notes, etc., for the purpose of bringing them within the jurisdiction of the federal courts.⁹⁴

Municipal Warrants.

§ 337. Orders, drafts, and warrants which are drawn for payment of municipal debts by one public officer on another are not, however, negotiable, and are only transferable subject to defenses originally existing against them.⁹⁵ And the authority of the officer

Arents v. Com., 18 Grat. (Va.) 750; *Weith v. City of Wilmington*, 68 N. C. 24; *Belo v. Commissioners of Forsythe Co.*, 76 N. C. 489; *City of San Antonio v. Lane*, 32 Tex. 405; *Board v. Railway Co.*, 46 Tex. 316; *Dutchess Co. Ins. Co. v. Hachfield*, 1 Hun (N. Y.) 675; *Society for Savings v. City of New London*, 29 Conn. 174. Contra, *Diamond v. Lawrence Co.*, 37 Pa. St. 353. as to which see *Miller v. Race*, 1 Smith, Lead. Cas. 819; *Mercer Co. v. Hackett*, 1 Wall. 83.

⁹² *Grand Rapids & I. R. Co. v. Sanders*, 17 Hun (N. Y.) 552; *Cromwell v. Sac Co.*, 96 U. S. 51.

⁹³ *Board v. Railway Co.*, 46 Tex. 316.

⁹⁴ *New Providence Tp. v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764; *McLean v. Valley Co.*, 74 Fed. 389.

⁹⁵ 1 Dill. Mun. Corp. § 406; 1 Daniel, Neg. Inst. 393; 1 Edw. Bills, § 51; *Mayor v. Ray*, 19 Wall. 478. *Indiana v. Glover*, 155 U. S. 513, 15 Sup. Ct. 186; *Ouachita Co. v. Wolcott*, 103 U. S. 559; *Ohio v. Liberty Tp.*, 22 Ohio St. 144; *Hyde v. Franklin Co.*, 27 Vt. 185; *Smith v. Inhabitants of Cheshire*, 13 Gray (Mass.) 318; *Fox v. Shipman*, 19 Mich. 218; *Dana v. City and County of San Francisco*, 19 Cal. 486; *Emery v. Inhabitants of Mariaville*, 56 Me. 315; *Sturtevant v. Inhabitants of Liberty*, 46 Me. 457; *East Union Tp. v. Ryan*, 86 Pa. St. 459; *Ohio v. Liberty Tp.*, 22 Ohio St. 144; *State v. Hawes*, 112 Ind. 323, 14 N. E. 87; *Stanton v. Shipley*, 27 Fed. 498; *Goodwin v. Town of East Hartford (Conn.)* 38 Atl. 876; *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499; *State v. Huff*, 63 Mo. 288; *Directors of School Dist. No. 3 v. Fogleman*, 76 Ill. 189; *Newell v. School Directors*, 68 Ill. 514; *Clark v. City of Des Moines*, 19 Iowa, 199, 215; *School Dist. No. 2 v. Stough*, 4 Neb. 357; *Lane v. Hunt Co.*, 13 Tex. Civ. App. 315, 35 S. W. 10; *West Philadelphia Title & Trust Co. v. City of Olympia (Wash.)* 52 Pac. 1015. So, by statute,

giving such warrant is always open to examination, into whatever hands the warrant may come.⁹⁶ So, no purchaser can recover on such a warrant issued *ultra vires*, and known by the original holder to have been so issued.⁹⁷ If, however, the warrant be made expressly negotiable in form, it will be negotiable.⁹⁸ And, although such voucher may not be negotiable, it has been held that a payee who has given it to another as collateral, and lost it by fraudulent diversion, cannot recover it in replevin from a bona fide holder without payment of the full amount paid by him for it.⁹⁹ Such an order is equivalent to a note or acceptance, and the corporation drawing it may be sued as maker or acceptor.¹⁰⁰

Express Authority.

§ 338. A municipal corporation has, in general, no power to borrow money, or give a bill or note for its payment, without express statutory authority, and it cannot be held liable on such paper, although the money obtained has been expended for municipal purposes.¹⁰¹ Nor can such corporation issue bonds without express authority, in order to raise money for the payment of its lawful debts.¹⁰² The power in a municipal corporation to issue bills and

in Wisconsin, Rev. St. 1878, § 1675. And an assignee cannot sue on it in his own name. *Snyder Tp. v. Bovaird*, 122 Pa. St. 442, 15 Atl. 910.

⁹⁶ *Taft v. Town of Pittsford*, 28 Vt. 286.

⁹⁷ *Salamanca Tp. v. Jasper County Bank*, 22 Kan. 696.

⁹⁸ 1 Edw. Bills, § 51; *Kelley v. Mayor, etc., of Brooklyn*, 4 Hill (N. Y.) 265; *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 515; *Crawford Co. v. Wilson*, 7 Ark. 214. And payment of such warrant to the bearer is a good defense against the rightful owner, where it has been made in good faith. *Sweet v. County Com'rs*, 16 Minn. 107. And it has been held in Vermont that a holder of such warrant can sue on it in his own name. *Dalrymple v. Town of Whitingham*, 26 Vt. 355. But see, contra, *Klein v. Supervisors*, 54 Miss. 254; and as to negotiability, *Stanton v. Shipley*, 27 Fed. 498.

⁹⁹ *Talty v. Freedman's Trust Co.*, 1 MacArthur, 522.

¹⁰⁰ *Steel v. Davis County*, 2 G. Greene (Iowa) 469.

¹⁰¹ *Town of Hackettstown v. Swackhamer*, 37 N. J. Law, 191; *Bloomfield v. Bank*, 121 U. S. 122, 7 Sup. Ct. 865; *Wells v. Town of Salina*, 119 N. Y. 280, 23 N. E. 870.

¹⁰² 1 Edw. Bills, § 904; *Sutro v. Pettit*, 74 Cal. 332, 16 Pac. 7; *Ball v. Presidio Co.*, 88 Tex. 64, 29 S. W. 1042.

notes must be expressly given,¹⁰³ or clearly implied, in the exercise of express powers.¹⁰⁴ Even the constitutional authority to townships to subscribe to railroads on assent of two-thirds of the voters at an election presupposes provision therefor by statute, and an election held without statutory authority will not suffice to make an issue of bonds legal.¹⁰⁵ The statute will, however, be construed by the constitution in force at the time, importing into it the requirement of such assent, if omitted.¹⁰⁶

If the statute prescribes a particular course, no other can be lawfully pursued.¹⁰⁷ Thus, if a city comptroller's warrant has a particular form prescribed by charter, that form is necessary to its validity.¹⁰⁸ So, if authority is given to borrow and issue a note for payment, a bond for that purpose is unauthorized.¹⁰⁹ Or if the power is to issue "county orders," a bill or note will not be included.¹¹⁰ But a power to pay by "certificates of loan" is equivalent to a power to give coupon bonds.¹¹¹ So, engraved bonds may be issued under an authority for printed bonds.¹¹²

¹⁰³ 1 Daniel, Neg. Inst. 393; *Dively v. City of Cedar Falls*, 21 Iowa, 565; *Clark v. City of Des Moines*, 19 Iowa, 199; *Mayor, etc., of Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Gause v. City of Clarksville*, 5 Dill. 165. Fed. Cas. No. 5,276; *Wilson v. City of Shreveport*, 29 La. Ann. 673. And such bonds do not possess the qualities of negotiable paper unless they are issued under such authority. *Hopper v. Town of Covington*, 8 Fed. 777.

¹⁰⁴ *Mayor v. Ray*, 19 Wall. 468.

¹⁰⁵ *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785.

¹⁰⁶ *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562.

¹⁰⁷ *County of Hardin v. McFarlan*, 82 Ill. 138. So, where the requirements are in the ordinance. *Lehman v. City of San Diego*, 73 Fed. 105. But a provision fixing the size of the bonds has been held to be directory only, its breach constituting no defense against a bona fide holder. *Derby & Co. v. City of Modesto*, 104 Cal. 515, 38 Pac. 900. So, a requirement that the bonds should show their class on their face. *City of Gladstone v. Throop*, 71 Fed. 341, 18 C. C. A. 61. But a departure from the denomination of bond designated by the statute was held to render it void in *Livingston v. School Dist.*, 9 S. D. 345, 69 N. W. 15, even in the hands of a bona fide holder.

¹⁰⁸ *Lucas v. City of San Francisco*, 7 Cal. 463.

¹⁰⁹ *Mayor, etc., of Little Rock v. State Bank*, 8 Ark. 227.

¹¹⁰ *Goodnow v. Commissioners*, 11 Minn. 31.

¹¹¹ *Amey v. Mayor, etc., of Allegheny City*, 24 How. 364.

¹¹² And a county cannot repudiate such bonds after recognizing them by paying the interest. *McKee v. Vernon Co.*, 3 Dill. 210, Fed. Cas. No. 8,851.

A power to issue negotiable bonds will include their coupons,¹¹³ and will cover bonds payable in gold coin.¹¹⁴ A power to issue bonds authorizes negotiable bonds,¹¹⁵ and for a long term.¹¹⁶ An authority to issue bonds "for public improvements" is sufficient to authorize bonds for improving a local water power.¹¹⁷ So, "for municipal purposes" will include floating debt.¹¹⁸ So, authority by charter "to do all things for the benefit of the city" has been held to authorize a debt for waterworks and electric light plant and bonds in payment of it.¹¹⁹ But power to borrow a sum of money "to be expended in developing the natural advantages of the city for manufacturing purposes" will not support bonds issued in aid of a private water-power company.¹²⁰

If the statute limits the amount of the issue, it cannot be exceeded¹²¹ or duplicated by a second issue.¹²² If the statute fixes a max-

¹¹³ *Atchison Board of Education v. De Kay*, 148 U. S. 591, 13 Sup. Ct. 706.

¹¹⁴ *Woodruff v. State of Mississippi*, 162 U. S. 291, 16 Sup. Ct. 820; *Moore v. City of Walla Walla*, 60 Fed. 961; *Packwood v. Kittitas Co.*, 15 Wash. 88, 45 Pac. 640; *Ghiglione v. Marsh*, 23 App. Div. 61, 48 N. Y. Supp. 604. But see, contra, *Burnett v. Maloney*, 97 Tenn. 697, 37 S. W. 689. Also, contra, under a statute for bonds payable "in gold coin or lawful money of the United States." *Murphy v. City of San Luis Obispo (Cal.)* 48 Pac. 974.

¹¹⁵ *City of Cadillac v. Woonsocket Inst. for Savings*, 7 C. C. A. 574, 58 Fed. 935; *Mayor, etc., of Vicksburg v. Lombard*, 51 Miss. 111; *Andover v. Grafton*, 7 N. H. 298. But see *Knapp v. City of Hoboken*, 39 N. J. Law, 394.

¹¹⁶ *Ghiglione v. Marsh*, 23 App. Div. 61, 48 N. Y. Supp. 604.

¹¹⁷ *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. 44. And a limit of town indebtedness for "internal improvements" will not include bonds for a county court house, *Chilton v. Town of Gratton*, 82 Fed. 873. So, authority for one purpose cannot be used for another, e. g. to pay debt on court house from bridge bonds, *Mitchell Co. v. City Nat. Bank (Tex. Sup.)* 43 S. W. 880; or the diversion of a public park under statute for purchase of site and erection of market, *Tukey v. City of Omaha (Neb.)* 74 N. W. 613.

¹¹⁸ *Morris & Whitehead v. Taylor (Or.)* 49 Pac. 660.

¹¹⁹ *Heilbron v. City of Cuthbert*, 96 Ga. 312, 23 S. E. 206.

¹²⁰ *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361.

¹²¹ *Marshall v. Silliman*, 61 Ill. 218; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; *Sutro v. Pettit*, 74 Cal. 332, 16 Pac. 7. Or the amount necessary for the designated purpose. *Commissioners of Sinking Fund of Louisville v. Zimmerman (Ky.)* 41 S. W. 428.

¹²² *Northern Bank v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254.

imum time for the bonds to run, it cannot be exceeded,¹²³ although it may be reduced to a shorter term.¹²⁴ If the statute prescribes conditions,¹²⁵ or authorizes the voters at the popular election to prescribe conditions,¹²⁶ performance of them is a condition of the grant of authority, and cannot be put aside by an agreement between the bond commissioners and the beneficiary for future performance of acts which the statute required to precede the issue.¹²⁷ If the authorizing act is repealed, the power of issuing bonds will go with it.¹²⁸ A statute authorizing subscription in aid of a railroad is subject to repeal in like manner, and gives no vested right to the railroad company until the authorized subscription has been made.¹²⁹

Provision in a railroad charter that "it shall be lawful for the agent of any corporate body to subscribe," etc., gives no authority to a municipal corporation to subscribe for stock and issue its bonds in payment.¹³⁰ So, a power to subscribe in aid of a railroad is not

¹²³ *People v. Cook*, 148 U. S. 393, 13 Sup. Ct. 645; *Woodruff v. City of Okolona*, 57 Miss. 806.

¹²⁴ *Gilchrist v. Little Rock*, 1 Dill. 261, Fed. Cas. No. 5,421. But 20-year bonds cannot be issued under a statute providing for 30-year bonds. *Hoag v. Town of Greenwich*, 133 N. Y. 152, 30 N. E. 842.

¹²⁵ E. g. that new counties shall not issue bonds (which includes holding the preliminary election) until one year after their organization. *Rathbone v. Kiowa Co.*, 73 Fed. 395. So, a provision that the road shall be constructed between given points before bonds are issued. *Mercer Co. v. Provident Life & Trust Co.*, 19 C. C. A. 44, 72 Fed. 623. So, a provision that interest shall stop on tender at any time before maturity. *National Bank of Republic v. City of St. Joseph*, 31 Fed. 216. This is true even of a condition that the statute shall provide for a contemporaneous sinking fund. *Wade v. Travis Co.*, 72 Fed. 985. So, a condition relating to procedure, and making the jurisdiction of the county authorities dependent on the statement of certain jurisdictional facts in the original petition. *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. 610.

¹²⁶ *Town of Eagle v. Kohn*, 84 Ill. 292. But a recital in the notice of election for an issue of refunding bonds that the old bonds will be surrendered is not such a condition. *Sullivan v. Walton*, 20 Fla. 552.

¹²⁷ *Falconer v. Railroad Co.*, 69 N. Y. 491.

¹²⁸ *Lehman v. City of San Diego*, 73 Fed. 105; *Id.*, 27 C. C. A. 668, 83 Fed. 669.

¹²⁹ *State v. Garrouette*, 67 Mo. 445.

¹³⁰ *East Oakland Tp. v. Skinner*, 94 U. S. 255.

a power to issue and sell bonds,¹³¹ nor to make a donation to the road.¹³²

An authority to erect a court house and jail gives no power to a county to issue its negotiable notes or bonds.¹³³ Nor can such power be implied in a city from the authority to purchase property for street widening;¹³⁴ or from authority to light the streets;¹³⁵ or to construct an electric light plant.¹³⁶ But an authority "to establish and regulate markets" has been held to authorize bonds for the purchase of a market site.¹³⁷ So, an authority to purchase, build, and take stock in internal improvements has been held to authorize the giving of negotiable bonds in payment.¹³⁸

¹³¹ *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562; *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101; *Dodge v. City of Memphis*, 51 Fed. 165; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937. In these cases the statute plainly contemplated raising the money by tax. And even under a statutory authority to borrow money on bonds, and subscribe the proceeds in aid of a railroad, it cannot issue its bonds to the road in exchange for railroad stock. *Starin v. Town of Genoa*, 23 N. Y. 439.

¹³² *Sampson v. People*, 140 Ill. 466, 30 N. E. 689.

¹³³ *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489. But see, contra, *Chaska Co. v. Board of Sup'rs of Carver Co.*, 6 Minn. 204 (Gil. 130).

¹³⁴ *Bangor Sav. Bank v. City of Stillwater*, 46 Fed. 899; or for a school building, *Allen v. Intendant, etc.*, 89 Ala. 641, 8 South. 30.

¹³⁵ *Biddle v. Borough of Riverton*, 58 N. J. Law, 289, 33 Atl. 279; the bonds being issued for the purchase of an electric light plant.

¹³⁶ *Farr v. City of Grand Rapids (Mich.)* 70 N. W. 411. In this case the statute contained a proviso that no indebtedness should be incurred, except by vote, etc. (which was had), and other clauses of the charter provided expressly for issue of bonds for other specified purposes. And the authority to purchase an electric light plant gives no authority to the city to guaranty the bonds of a private corporation owning such a plant which the city used and had the option to purchase, *Lynchburg & R. St. Ry. Co. v. Dameron (Va.)* 28 S. E. 951.

¹³⁷ *Ketchum v. City of Buffalo*, 14 N. Y. 356.

¹³⁸ *Com. v. Select & Common Councils of City of Pittsburg*, 34 Pa. St. 496; *Com. v. Allegheny Co. Com'rs*, 37 Pa. St. 237; *Com. v. Pittsburg Councils*, 41 Pa. St. 278; *Curtis v. Butler Co.*, 24 How. 435; *Seybert v. City of Pittsburg*, 1 Wall. 272; *Bushnell v. Beloit*, 10 Wis. 195.

Implied Authority.

§ 339. It has been held that the validity of municipal bonds will be presumed in the absence of proof to the contrary, under the rule of *omnia rite acta*.¹³⁹ The rule seems, however, well established that the burden of proving authority, if questioned, rests upon the party claiming under it.¹⁴⁰

In the absence of express legislative authority, municipal corporations have no power to contract debts or issue securities in aid of extraneous objects.¹⁴¹ Thus, they cannot issue bonds to aid in the construction of a railroad,¹⁴² or to pay for a subscription to its stock,¹⁴³ or to build a plank road.¹⁴⁴

But it is said that the power to contract a debt implies the power to borrow money for like purpose,¹⁴⁵ and to make a bill of exchange or other negotiable instrument for its payment.¹⁴⁶ And this latter proposition, as well as the former, has been applied to municipal corporations.¹⁴⁷ This application is, however, condemned by Judge

¹³⁹ *City of Gladstone v. Throop*, 18 C. C. A. 61, 71 Fed. 341. So, where the selectmen of a town gave a note for the enlistment of soldiers during the war. *Shackford v. Town of Newington*, 46 N. H. 415.

¹⁴⁰ *Rathbone v. Kiowa Co.*, 73 Fed. 395; *School Dist. No. 7 v. Thompson*, 5 Minn. 280 (Gil. 221).

¹⁴¹ *Town of South Ottawa v. Perkins*, 94 U. S. 262; *Pendleton Co. v. Amy*, 13 Wall. 297; *Kenicott v. Supervisors*, 16 Wall. 452; *St. Joseph Tp. v. Rogers*, Id. 644; *Town of Coloma v. Eaves*, 92 U. S. 484; *Hawkins v. Board*, 50 Miss. 735.

¹⁴² *Sykes v. Mayor, etc., of Columbus*, 55 Miss. 115; *Colburn v. Railroad Co.*, 94 Tenn. 43, 28 S. W. 298.

¹⁴³ *Wells v. Supervisors*, 102 U. S. 625; *Hancock v. Chicot Co.*, 32 Ark. 575.

¹⁴⁴ *Chisholm v. City of Montgomery*, 2 Woods, 584, Fed. Cas. No. 2,686.

¹⁴⁵ *Mills v. Gleason*, 11 Wis. 470; *State v. Common Council of City of Madison*, 7 Wis. 688; *Lynde v. The County*, 16 Wall. 6.

¹⁴⁶ 1 Edw. Bills, § 55; 1 Pars. Notes & B. 164; *Stratton v. Allen*, 16 N. J. Eq. 233; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Mead v. Keeler*, 24 Barb. (N. Y.) 20; *Beers v. Glass Co.*, 14 Barb. (N. Y.) 358; *Attorney General v. Life Ins. Co.*, 9 Paige (N. Y.) 470; *Barry v. Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *McMasters v. Reed*, 1 Grant, Cas. (Pa.) 36; *Hays v. Coal Co.*, 29 Ohio St. 330; *Catiron v. Society*, 46 Iowa, 108; *Pittman v. Kintner*, 5 Blackf. (Ind.) 253; *Hamilton v. Railroad*, 9 Ind. 359; *Moss v. Oakley*, 2 Hill (N. Y.) 265; *Safford v. Wyckoff*, 4 Hill (N. Y.) 442.

¹⁴⁷ *Com. v. Select & Common Councils of City of Pittsburg*, 34 Pa. St. 496;

Daniel on the authority of Judge Dillon,¹⁴⁸ although it seems to be generally supported by the cases decided in the state courts.

Recent cases in the federal courts hold that an authority to borrow money is not an authority for the issue of negotiable bonds.¹⁴⁹ Neither is an authority "to borrow money on the faith and credit of the city";¹⁵⁰ nor a statute providing that in railroad aid subscriptions "no credit shall be given * * * except upon the consent of a majority" of the inhabitants.¹⁵¹ And the authority to issue bonds cannot be implied from a constitutional prohibition against doing so without the consent of a prescribed proportion of the taxpayers.¹⁵² So, the existence of a municipal debt implies no authority to issue refunding bonds for its payment.¹⁵³

But the authority in a city charter "to borrow money for any object in its discretion," coupled with another statute fixing a max-

Kelley v. Mayor, etc., 4 Hill (N. Y.) 263; Bank of Chillicothe v. Chillicothe, 7 Ohio, 315. And to their negotiable bonds. Holmes v. City of Shreveport, 31 Fed. 113. So, a fortiori, the power to borrow money to pay a debt implies the power to issue a negotiable bond for it. Merrill v. Town of Monticello, 22 Fed. 589. If bonds are invalid for want of compliance with the statute authorizing them, the city may still be liable for money had and received under a general power to borrow, Hoag v. Town of Greenwich, 133 N. Y. 152, 30 N. E. 842.

¹⁴⁸ 1 Daniel, Neg. Inst. 394; 1 Edw. Bills, § 48; Dill. Mun. Bonds, § 6.

¹⁴⁹ City of Brenham v. Bank, 144 U. S. 173, 12 Sup. Ct. 559, reversing German Am. Bank v. Brenham, 35 Fed. 185, and overruling Rogers v. Burlington, 3 Wall. 654, and Mitchell v. Burlington, 4 Wall. 270. So, too, Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. 441; Lehman v. City of San Diego, 27 C. C. A. 668, 83 Fed. 669. So, a power "to borrow such sums as may be necessary for temporary purposes, and to anticipate the current revenue only." Bangor Sav. Bank v. City of Stillwater, 46 Fed. 899. But see, contra, State v. Goshen Tp., 14 Ohio St. 569.

¹⁵⁰ Lehman v. City of San Diego, 73 Fed. 105. But in Indiana a statute authorizing a town "to borrow money for the use of the city" has been held to authorize city bonds. City of Evansville v. Woodbury, 9 C. C. A. 244, 60 Fed. 718, following Railroad v. Evansville, 15 Ind. 395; Portland Sav. Bank v. City of Evansville, 25 Fed. 389.

¹⁵¹ Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. 1101.

¹⁵² Allen v. Louisiana, 103 U. S. 80; People v. Supervisor and Clerk of Town of Waynesville, 88 Ill. 469.

¹⁵³ Village of Oquawka v. Graves, 27 C. C. A. 327, 82 Fed. 568.

imum rate of interest on city bonds in aid of railroads, has been held sufficient to authorize the issue of such bonds.¹⁵⁴

So, an incorporated school district, having express power to borrow money for the erection of a school building, has authority as a necessary incident to secure its payment by a promissory note.¹⁵⁵ Or it may give such note for a loan obtained and used for the purpose of paying a debt incurred for such building.¹⁵⁶ So, if a city can lawfully create a debt for paving and grading streets, it may, without express authority, issue bonds for the same object.¹⁵⁷ In like manner, it may lease rooms for the use of the common council and give its note in payment of the rent.¹⁵⁸

Negotiable Distinguished from Nonnegotiable Instruments.

§ 340. A distinction has been made between the power to issue negotiable and nonnegotiable evidences of debt as incidental to the power of contracting debt or borrowing money.¹⁵⁹ And it has been held that for the issue of a negotiable bond or note, which will be unassailable in the hands of a bona fide holder for value before maturity, authority must be either expressly given or clearly implied.¹⁶⁰ But a negotiable bond, issued without authority for a municipal debt, may be treated as a nonnegotiable bond, subject to the same defense as the original debt, and serving only as evidence of the

¹⁵⁴ *Meyer v. City of Muscatine*, 1 Wall. 384.

¹⁵⁵ *Montague v. Church School Dist.*, 34 N. J. Law, 218. But in New Hampshire school districts had no authority to borrow money on their note for such purpose prior to the act of 1855. *Weare v. School Dist.*, 44 N. H. 189. And, where the school district has authority to contract the debt for which its note is given, the burden of proving this lies on the holder of the note. *School Dist. No. 7 v. Thompson*, 5 Minn. 280 (Gil. 221).

¹⁵⁶ *Clarke v. School District*, 3 R. I. 199. *Baker v. Chambles*, 4 G. Greene (Iowa) 428; *Sheffield School Tp. v. Address*, 56 Ind. 157.

¹⁵⁷ *City of Williamsport v. Com.*, 84 Pa. St. 487.

¹⁵⁸ *Douglass v. Mayor, etc., of Virginia City*, 5 Nev. 147.

¹⁵⁹ In payment of a judgment debt, a town may issue its nonnegotiable bond. *Sioux City v. Weare*, 59 Iowa, 95, 12 N. W. 786.

¹⁶⁰ *Knapp v. Hoboken*, 39 N. J. Law, 394. And see *Town of Hacketts-town v. Swackhamer*, 37 N. J. Law, 198; *Mayor v. Ray*, 19 Wall. 478. But in New Hampshire the rule seems to be different, *Andover v. Grafton*, 7 N. H. 298; and in Mississippi, *City of Vicksburg v. Lombard*, 51 Miss. 111.

debt.¹⁶¹ And a distinction has been made in favor of a prohibition of all interest bearing obligations made without express authority by the agent of a municipal corporation.¹⁶² Neither can a city issue bills or notes intended to circulate as money without express authority,¹⁶³ especially where such issue is prohibited generally by statute to all persons and corporations.¹⁶⁴

It may now be regarded as the established rule that a municipal corporation may issue bonds without express authority for a debt lawfully contracted in the performance of its municipal duties.¹⁶⁵ And where, in the execution of powers expressly conferred, it becomes necessary to borrow money, this may be done by means of its commercial paper. But mere administration and taxing powers will not be sufficient.¹⁶⁶

Constitutional and Statutory Restrictions—General Principles.

§ 341. The prohibitions of a state constitution are not, in general, retroactive. Where there is no other express provision for it, the constitution is held to take effect at the close of the day on which it was adopted by the election of the people.¹⁶⁷ Questions as to the effect of a constitutional restriction upon subsequent municipal proceedings under earlier legislative authority have related principally to railroad aid bonds, in general, or to the popular majority required by the statute. Thus, a constitution prohibiting donations to railroads revokes the power granted by an earlier statute,¹⁶⁸ but

¹⁶¹ *Pacific Imp. Co. v. City of Clarksdale*, 20 C. C. A. 635, 74 Fed. 528.

¹⁶² *County of Hardin v. McFarlan*, 82 Ill. 138; *Andrews v. School Dist.*, 49 Neb. 420, 68 N. W. 631. So, as to attorney's fees included in a note. *Snoddy v. Wabash School Tp.* (Ind. App.) 46 N. E. 588.

¹⁶³ *Lindsey v. Rottaken*, 32 Ark. 619; *Rev. St. Ark.* cc. 24, 119.

¹⁶⁴ *Thomas v. City of Richmond*, 12 Wall. 349; *Va. Code*.

¹⁶⁵ *Lynde v. The County*, 16 Wall. 6; *Commonwealth v. City of Pittsburg*, 88 Pa. St. 66; *De Voss v. City of Richmond*, 18 Crat. (Va.) 338; *City of Galena v. Corwith*, 48 Ill. 423.

¹⁶⁶ 1 *Daniel*, *Neg. Inst.* 394; 1 *Edw. Bills & N.* § 48.

¹⁶⁷ *Schall v. Bowman*, 62 Ill. 321.

¹⁶⁸ *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625. And the later amendments to it. *Dodge v. Platte Co.*, 82 N. Y. 218, reversing 16 Hun (N. Y.) 285.

not acted on before the new constitution took effect.¹⁶⁹ This is so where the petition to the county court fixed conditions which were not performed.¹⁷⁰ So, if the election fixed a condition which was disregarded in the issuing of the bonds, they will not be protected as an issue "authorized under existing laws by a vote," etc., prior to the constitution.¹⁷¹ So, too, if the election failed to follow the provisions of the enabling act.¹⁷²

But it will not repeal the earlier statute by implication.¹⁷³ And, where the statutory election has been already held, the fact that the bonds were issued after the constitution went into effect will not render them invalid;¹⁷⁴ although the provisions of the constitution require a two-thirds vote instead of the majority required by the earlier statute,¹⁷⁵ or instead of a subscription without any popular consent.¹⁷⁶ So, too, although the constitution fixes a new limit of indebtedness.¹⁷⁷

¹⁶⁹ *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937; *Aspinwall v. Daviess Co.*, 22 How. 364; *Norton v. Brownsville Taxing Dist.*, 36 Fed. 99.

¹⁷⁰ *Falconer v. Railroad Co.*, 69 N. Y. 491.

¹⁷¹ *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Citizens' Savings & Loan Ass'n v. Perry Co.*, 156 U. S. 692, 15 Sup. Ct. 547. Notwithstanding an attempt to dispense with the condition by an agreement of the county commissioners, *Falconer v. Railroad Co.*, 69 N. Y. 491; or by a statute, subsequent to the constitution, *Richeson v. People*, 115 Ill. 450, 5 N. E. 121; *Choisser v. People*, 140 Ill. 21, 29 N. E. 546; *Post's Adm'x v. Pulaski Co.*, 9 U. S. App. 1, 1 C. C. A. 405, 49 Fed. 628. But, if the election makes a condition not authorized by statute, it will be no defense. *Taylor v. Ypsilanti*, 105 U. S. 60.

¹⁷² *People v. Village of Ft. Edward*, 70 N. Y. 28.

¹⁷³ *State v. Macon County Court*, 41 Mo. 453; *Kansas City, St. J. & C. B. R. Co. v. Alderman*, 47 Mo. 349.

¹⁷⁴ *Callaway Co. v. Foster*, 93 U. S. 567; *Scotland Co. v. Thomas*, 94 U. S. 688; *Henry Co. v. Nicolay*, 95 U. S. 619; *Cass v. Dillon*, 2 Ohio St. 607; *State v. Union Tp.*, 8 Ohio St. 394; *Knox Co. v. Nichols*, 14 Ohio St. 260; *State v. County Court of Sullivan Co.*, 51 Mo. 522; *State v. Town of Clark*, 23 Minn. 422. Even where the bond election and the constitutional adoption took place on the same day. *Louisville v. Savings Bank*, 104 U. S. 469.

¹⁷⁵ *Louisiana v. Taylor*, 105 U. S. 454; *Ralls Co. v. Douglass*, Id. 728.

¹⁷⁶ *Kansas City, St. J. & C. B. R. Co. v. Alderman*, 47 Mo. 349; *Schuyler Co. v. Thomas*, 98 U. S. 169.

¹⁷⁷ *McCreight v. Zemp*, 49 S. C. 78, 26 S. E. 984.

Limit of Indebtedness.

§ 341a. The constitutions of some of the United States place a limit on the amount of municipal indebtedness that may be lawfully contracted.¹⁷⁸ Except in Oregon, this limit is a percentage, varying generally from 2 to 10 per cent. of the "assessed value" of the taxable property, "to be ascertained by the last assessment," or otherwise referring to the formal and usual valuation or assessment. The constitutional limit does not apply to funding bonds for existing indebtedness;¹⁷⁹ nor to debts already concluded as to amount by judgment rendered on them;¹⁸⁰ nor to include existing debts that have no legal validity;¹⁸¹ nor to excessive debt contracted before the adoption of the constitution;¹⁸² nor to debts afterwards contracted in unavoidable public requirements.¹⁸³ So, the city, county, and state debt, affecting the same territory, will not be reckoned together, but the debt of each municipality will be reckoned separately.¹⁸⁴ If the statute prescribes no amount, and there is a constitutional limit, the statute will not be held to be unconstitutional,

¹⁷⁸ This is true in COLORADO (article 11, §§ 6, 8), GEORGIA (article 7, § 7), ILLINOIS (article 9, § 12), INDIANA (article 13, § 1), IOWA (article 11, § 3), KENTUCKY (section 158), MAINE (article 22), MINNESOTA (article 9, § 15), MISSOURI (article 10, § 12), MONTANA (article 13, § 6), NEW YORK (article 7, § 10), NORTH DAKOTA (article 12, § 183), OREGON (article 11, § 10), PENNSYLVANIA (article 9, § 8), SOUTH DAKOTA (article 13, § 4), WASHINGTON (article 8, § 3), WEST VIRGINIA (article 10, § 8), and WYOMING (article 16, §§ 3, 5). In the territories of the United States the limit is fixed at 4 per cent. by Rev. St. U. S. § 1888.

¹⁷⁹ *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Ætna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329; *Heins v. Lincoln*, 102 Iowa, 69, 71 N. W. 189; *Ætna Life Ins. Co. v. Lyon Co.*, 82 Fed. 929. But see, contra, *Birkholz v. Dinnie*, 6 N. D. 511, 72 N. W. 931. But an issue of bonds for outstanding contracts does not increase the debt. *Morris v. Taylor (Or.)* 49 Pac. 660.

¹⁸⁰ *Commissioners of Lake Co. v. Platt*, 25 C. C. A. 87, 79 Fed. 567; *Ætna Life Ins. Co. v. Lyon Co.*, supra.

¹⁸¹ *Ashuelot Nat. Bank v. Lyon Co.*, 81 Fed. 127.

¹⁸² *City of Ashland v. Culbertson (Ky.)* 44 S. W. 441.

¹⁸³ *Duryee v. Friars (Wash.)* 50 Pac. 583.

¹⁸⁴ *Adams v. East River Sav. Inst.*, 136 N. Y. 52, 32 N. E. 622; *Chilton v. Gratton*, 82 Fed. 873; *State v. Common Council of City of Tomahawk (Wis.)* 71 N. W. 86; *Kelly v. City of Minneapolis*, 63 Minn. 125, 65 N. W. 115. But see *Neale v. County Court of Wood Co. (W. Va.)* 27 S. E. 370.

but will be construed to authorize the amount limited by the constitution.¹⁸⁵ But this has been held not to be the case in Wisconsin, where the constitution simply required the legislature to provide for the incorporation of towns, and "to restrict their power of taxation, borrowing money, contracting debts, and loaning their credit."¹⁸⁶

The limit will be enforced in equity by an injunction against the issue of bonds in excess of it.¹⁸⁷ If issued at different dates, the bonds will be valid until the limit is reached.¹⁸⁸ If issued all at once, they will be invalid pro rata.¹⁸⁹ In the absence of evidence to the contrary, the law presumes, in favor of a bona fide holder, that a statutory limit of yearly issue was not exceeded.¹⁹⁰ The issue by authorized commissioners, in due form, has been held to be conclusive evidence of this fact, where the statute refers the ascertainment by implication to them,¹⁹¹ or fixes no other mode of ascertainment. If there is a statutory official record, he may rely on that.¹⁹² So, if the amount voted exceeds the limit, it will not affect the validity of an issue under it that does not exceed.¹⁹³ So, if the statutory limit is for the aggregate indebtedness of town and county, the city bonds, issued first and within the limit, will not become invalid by

¹⁸⁵ *Town of Darlington v. Atlantic Trust Co.*, 16 C. C. A. 28, 68 Fed. 849; *Atlantic Trust Co. v. Darlington*, 63 Fed. 76.

¹⁸⁶ *Fisk v. City of Kenosha*, 26 Wis. 23.

¹⁸⁷ *Reineman v. Railroad Co.*, 7 Neb. 310. After deducting cash balances, *Crogster v. Bayfield Co. (Wis.)* 74 N. W. 635; and sinking funds, *Kelly v. City of Minneapolis*, 63 Minn. 125, 65 N. W. 115.

¹⁸⁸ *Citizens' Bank v. City of Terrell*, 78 Tex. 456, 14 S. W. 1003; *Gibson v. Knapp*, 44 N. Y. Supp. 446. And this may be indicated by the numbers of the bonds. *Sutro v. Pettit*, 74 Cal. 332, 16 Pac. 7; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; or shown by the record of sales, *Daviess Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897.

¹⁸⁹ *Citizens' Bank v. Terrell*, supra; *Nolan Co. v. State*, 83 Tex. 182, 17 S. W. 823; *McPherson v. Foster*, 43 Iowa, 48. But see, contra, invalidating the entire issue, *Crogster v. Bayfield Co. (Wis.)* 74 N. W. 635.

¹⁹⁰ *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. 24.

¹⁹¹ *New Providence Tp. v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764; *Cotton v. New Providence*, 47 N. J. Law, 401, 2 Atl. 253; *Mutual Benefit Life Ins. Co. v. City of Elizabeth*, 42 N. J. Law, 235.

¹⁹² *Valley Co. v. McLean*, 25 C. C. A. 174, 79 Fed. 728, affirming 74 Fed. 389.

¹⁹³ *Rathbone v. Kiowa Co. Com'rs*, 73 Fed. 395.

the subsequent illegal issue of county bonds carrying the aggregate beyond the limit.¹⁹⁴

Popular Consent.

§ 341b. The state constitution may require the submission of the bond issue or other indebtedness to a popular election, and the consent of the inhabitants by a prescribed vote.¹⁹⁵ In Illinois, popular consent is required expressly in the constitution of 1870, and by implication in that of 1848.¹⁹⁶ In the absence of any constitutional requirement, the statutory requirement is a valid one.¹⁹⁷

Statutes providing for consent to an issue of railroad aid bonds are strictly construed. Thus, a statutory provision that a municipal corporation "may" obtain such consent is a requirement that it *shall* do so.¹⁹⁸ If the statute provide that a "strip" of the county through which a railroad may pass may vote to take stock and tax themselves for such road, this will not authorize the *county* to create a debt and issue its bonds therefor.¹⁹⁹

Such statutes are not an unconstitutional delegation of the law-making power.²⁰⁰ On the other hand, the legislature cannot com-

¹⁹⁴ *Ætna Life Ins. Co. v. City of Burrton*, 75 Fed. 962.

¹⁹⁵ This is true in CALIFORNIA (article 11, § 18), COLORADO (article 11, §§ 6, 8), GEORGIA (article 7, § 5191), IDAHO (article 8, § 3), KENTUCKY (section 157), MISSOURI (article 10, § 12), NEBRASKA (article 12, § 2), NORTH CAROLINA (article 7, § 7), WASHINGTON (article 8, § 3), WEST VIRGINIA (article 10, § 8), WYOMING (article 16, § 4); and as to city indebtedness in excess of 5 per cent., NORTH DAKOTA (article 12, § 183); and as to county indebtedness, MICHIGAN (article 10, § 10); and, in excess of \$10,000, MONTANA (article 13, § 5); and, in excess of 2 per cent., PENNSYLVANIA (article 9, § 8). So, as to loans of credit, in TENNESSEE (article 2, § 29).

¹⁹⁶ *Marshall v. Silliman*, 61 Ill. 218.

¹⁹⁷ *State v. Common Council of City of Tomahawk* (Wis.) 71 N. W. 86. And the statute is satisfied by an election for the original bonds and none for the refunding issue. *Town Council of Lexington v. Union Nat. Bank* (Miss.) 22 South. 291.

¹⁹⁸ 1 *Edw. Bills & N.* § 907; *Leavenworth & D. R. Co. v. County Court of Platte Co.*, 42 Mo. 171; *Steines v. Franklin Co.*, 48 Mo. 167.

¹⁹⁹ *Ogden v. County of Daviess*, 102 U. S. 634.

²⁰⁰ *Starin v. Genoa*, 23 N. Y. 439; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Clarke v. City of Rochester*, 28 N. Y. 605, affirming 24 Barb. (N. Y.) 446.

pel subscription by a town in aid of a railroad without the consent of the town.²⁰¹ The required consent is obtained where a previous vote has been had authorizing a larger indebtedness.²⁰² And, in general, the bondholder may rely for the result of the election on the certificate of the statutory canvassers,²⁰³ or on the bond commissioners where the determination has been left with them;²⁰⁴ and, after being once canvassed, it cannot be reconsidered or changed.²⁰⁵

Donations—Railroad Aid, Etc.

§ 341c. The state constitution may prohibit loans of credit, donations, subscriptions, or bonds in aid of railroads or other enterprises. In various forms, this restriction exists now in many states.²⁰⁶ With very few exceptions, the constitutional restriction is upon the power of the counties and towns themselves, and not upon the legislature. In Ohio, Michigan, Wisconsin, and Nevada the constitutional requirement is simply "that the legislature shall provide for the organization of cities and towns (or villages), and restrict their power of taxation, borrowing money, contracting debts

²⁰¹ *People v. Batchellor*, 53 N. Y. 128. A railroad being distinguished in this from a public highway.

²⁰² *Dudley v. Lake County*, 26 C. C. A. 82, 80 Fed. 672.

²⁰³ *Valley Co. v. McLean*, 25 C. C. A. 174, 79 Fed. 728, affirming 74 Fed. 389. But not on the decision of unauthorized canvassers. *Brown v. Ingalls Tp.*, 81 Fed. 485.

²⁰⁴ *Jefferson Co. v. Lewis*, 20 Fla. 980.

²⁰⁵ *First Nat. Bank of North Bennington v. Dorset*, 16 Blatchf. 62, Fed. Cas. No. 4,808.

²⁰⁶ This is true in ALABAMA (article 4, §§ 54, 55); ARKANSAS (article 16, § 1); CALIFORNIA (article 9, § 31); COLORADO (article 11, § 2); CONNECTICUT (article 25); FLORIDA (article 12, § 7); GEORGIA (article 7, §§ 5, 6); ILLINOIS (Rev. St. p. 75); INDIANA (article 10, § 6); LOUISIANA (article 56); MARYLAND (article 3, § 54); MINNESOTA (article 9, § 15), as to railroad aid in excess of 5 per cent. of taxable property; MISSISSIPPI (article 4, § 66; article 7, § 183; article 14, § 258); MISSOURI (article 4, § 47); NEBRASKA (article 12, § 2), as to donations on submission to voters; NEW HAMPSHIRE (article 2, § 5); NEW JERSEY (article 1, §§ 19, 20); NEW YORK (article 7, § 10); NORTH CAROLINA (article 7, § 7), "unless by a vote of the majority of the qualified voters"; OREGON (article 11, § 9); PENNSYLVANIA (article 9, § 7); TENNESSEE (article 2, § 31); TEXAS (article 3, § 52; article 11, § 3); WISCONSIN (article 11, § 3).

and loaning their credit." In New Hampshire it is provided that the legislature "shall not authorize any town to lend its credit," etc.; and in Minnesota a similar provision includes counties also. Where the constitution forbids a city to "become a stockholder or to loan its credit" without the consent of a two-thirds vote, it will be violated by a statute authorizing it to purchase lands and donate them by lease to the company with the consent of a majority vote.²⁰⁷ And the purchaser of bonds must take notice of the unconstitutional form of the statute.²⁰⁸

In the absence of constitutional prohibition, a statute authorizing the issue of railroad aid bonds by a town or county is valid.²⁰⁹ So, too, a statute for a bond issue to provide the inhabitants with gas,²¹⁰ or for other municipal purpose, but not for aid to any private corporation.²¹¹

Recovery for Invalid Bonds.

§ 342. If money has been received by a town for bonds, which are afterwards declared invalid, there may be a recovery against the corporation in an action for money had and received, where it had the power to borrow, but not to issue bonds,²¹² or not to issue bonds for so long a term;²¹⁴ or where the bonds were improv-

²⁰⁷ Jarrolt v. Moberly, 103 U. S. 580.

²⁰⁸ Commissioners of Stanly Co. v. Snuggs (N. C.) 28 S. E. 539.

²⁰⁹ Clarke v. City of Rochester, 28 N. Y. 605; Gelpcke v. City of Dubuque, 1 Wall. 175. But such bonds cannot be issued under the power to tax "for corporate purposes," Congaree Const. Co. v. Columbia Tp. (S. C.) 27 S. E. 570; Coleman v. Broad River Tp., 50 S. C. 321, 27 S. E. 774; although they may be ratified and tax provided for under the general taxing power, Coleman v. Broad River Tp., supra. So, bonds cannot be issued in aid of a foreign corporation under statutory provision for a domestic company, Johnson City v. Charleston, C. & C. R. Co. (Tenn. Sup.) 44 S. W. 670; or to the amount authorized by the statute under an election providing for a larger amount, Stebbins v. Perry Co. (Ill. Sup.) 47 N. E. 1048.

²¹⁰ Fellows v. Walker, 39 Fed. 651.

²¹¹ Allen v. Inhabitants of Jay, 60 Me. 124; Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416.

²¹² Paul v. City of Kenosha, 22 Wis. 256; Read v. City of Plattsburgh, 107 U. S. 568, 2 Sup. Ct. 208; Billings v. Inhabitants of Monmouth, 72 Me. 174; Bangor Sav. Bank v. Stillwater, 49 Fed. 721.

²¹⁴ Hoag v. Town of Greenwich, 133 N. Y. 152, 30 N. E. 842.

erly antedated to evade the registry law;²¹⁵ or were issued beyond the constitutional limit of indebtedness, in payment of existing and valid debts.²¹⁶ And such recovery may be by a holder, who was not the immediate party to the loan, if he is entitled by the form of the instrument and the conditions of his purchase to be subrogated for the lender.²¹⁷

But no recovery can be had where the bonds were for an original loan, and were issued in violation of a plain constitutional restriction, either as to limit of debt,²¹⁸ or as to provision for raising the money by taxation,²¹⁹ or as to vote requisite for consent,²²⁰ or as to loan of municipal credit or donation to railroads,²²¹ or where the town had no authority to borrow money.²²² And there can be no relief against the city, even in equity, where it has not received the proceeds on the bonds.²²³

Defenses—Unlawful Issue.

§ 343. It may be laid down as a general principle that debts unlawfully contracted by a municipal corporation are not binding up-

²¹⁵ *Louisiana v. Wood*, 102 U. S. 294.

²¹⁶ *Rainsburg Borough v. Ryan*, 127 Pa. St. 74, 17 Atl. 678. Or, if other bonds were surrendered, he may sue on the original bonds. *Deyo v. Otoe Co.*, 37 Fed. 246.

²¹⁷ *Union School Tp. v. First Nat. Bank of Crawfordsville*, 102 Ind. 464, 2 N. E. 194; *Bangor Sav. Bank v. City of Stillwater*, 49 Fed. 721. But in the case of invalid railroad aid bonds, purchased without a guaranty from the railroad company, there is no right of subrogation, and the purchaser cannot recover from the town on the common counts. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625; *Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107.

²¹⁸ *McPherson v. Foster*, 43 Iowa, 48. Although the money was actually used by the town for its waterworks. *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820.

²¹⁹ *Berlin Iron-Bridge Co. v. City of San Antonio*, 62 Fed. 882. Although the proceeds of the bonds went into the treasury for a sinking fund.

²²⁰ *Morton v. City of Nevada*, 41 Fed. 582.

²²¹ *Morton v. City of Nevada*, *supra*; *Dodge v. City of Memphis*, 51 Fed. 165.

²²² Although the money was used for municipal purposes. *Town of Hackettstown v. Swackhamer*, 37 N. J. Law, 191.

²²³ *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71.

on it.²²⁴ Thus, county warrants issued without legal authority, or not in the form prescribed by law, are not binding upon the county.²²⁵ So, a municipal bond issued without authority is invalid, although it may be negotiable in form.²²⁶

And the defense of original want of authority to issue the bond is available against all holders.²²⁷ The fact that the holder is a purchaser in good faith and for value before the maturity of the bond does not preclude the town from making such defense, unless the acts of its officers or agents are by statute made conclusive upon it.²²⁸ Thus, if the bond is without recitals, it may be shown to exceed the statutory limit,²²⁹ or that it was fraudulently reissued after cancellation,²³⁰ or was never delivered as prescribed by the statute.* So, if the statute provide that, before any municipal bond shall be valid as a negotiable security, it shall be registered, and the certificate of such registry be indorsed on it, the bonds without such indorsement are void in the hands of any holder.²³¹ But, if the authority is sufficient, it is not competent to set up against a bona fide holder that the proceeds have been used for unauthorized purposes;²³² or that the assessment under the statute was made in an informal manner.²³³ And, where there is a statutory authority in

²²⁴ *Bradley v. Ballard*, 55 Ill. 413.

²²⁵ *Supervisors of Jefferson Co. v. Arrighi*, 54 Miss. 668; *Commissioners of Leavenworth Co. v. Keller*, 6 Kan. 510.

²²⁶ *Hancock v. Chicot Co.*, 32 Ark. 575.

²²⁷ *Chisholm v. City of Montgomery*, 2 Woods, 584, Fed. Cas. No. 2,686; *City of Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. 559; *Hancock v. Chicot Co.*, 32 Ark. 575; *Lindsey v. Rottaken*, Id. 619; *McPherson v. Foster*, 43 Iowa, 48. If the bonds were issued after repeal of the authorizing act, and without the municipal resolution prescribed by the statute, and were executed by unauthorized officers, these facts can be set up against a bona fide holder. *Lehman v. City of San Diego*, 27 C. C. A. 668, 83 Fed. 639.

²²⁸ *Cagwin v. Town of Hancock*, 84 N. Y. 532, reversing 22 Hun (N. Y.) 201.

²²⁹ *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 6 Sup. Ct. 88.

²³⁰ *District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. 694.

**Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107.

²³¹ *Anthony v. Jasper Co.*, 101 U. S. 693, 4 Dill. 136, Fed. Cas. No. 488; *Hoff v. Jasper Co.*, 110 U. S. 53, 3 Sup. Ct. 476.

²³² *Jones v. City of Camden*, 44 S. C. 319, 23 S. E. 141; *Clifton Forge v. Brush Electric Co.*, 92 Va. 289, 23 S. E. 288; *Clifton Forge v. Allegheny Bank*, 92 Va. 283, 23 S. E. 284. And see § 238, *supra*.

²³³ *City of Gladstone v. Throop*, 18 C. C. A. 61, 71 Fed. 341.

general terms, the nonperformance of conditions, which are not recited in the bond, cannot be set up in defense against a bona fide holder.²³⁴

If a town has no authority to issue its bond or commercial paper, there can be no "bona fide holder" of it, in the commercial sense of the term.²³⁵ One who purchases such bond in good faith is not bound to look any further than to see that there is legislative authority for its issue, and that, so far as appears by official certificates, all conditions precedent to its issue have been performed.²³⁶ But he is chargeable with knowledge of the law authorizing the issue of the bond,²³⁷ especially if this appears on the face of the instrument,²³⁸ and also with knowledge of the construction given to such statute by the courts.²³⁹ He is also chargeable with knowledge of all public records affecting the authority to issue the bond.²⁴⁰ So, where the authority to issue bonds in aid of a railroad is given

²³⁴ *Wood v. Allegheny County*, 3 Wall, Jr. 267, Fed. Cas. No. 17,939; *Danielly v. Cabaniss*, 52 Ga. 211; *Chilton v. Town of Gratton*, 82 Fed. 873.

²³⁵ *Township of East Oakland v. Skinner*, 94 U. S. 255; *Marsh v. Fulton Co.*, 10 Wall. 676; *School directors v. Fogleman*, 76 Ill. 189; *Cecil v. Board*, 30 La. Ann. 34.

²³⁶ *Bond Debt Cases*, 12 S. C. 200; *Block v. Commissioners*, 99 U. S. 686; *Mercer Co. v. Hackett*, 1 Wall. 83; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *S. C. & St. P. R. Co. v. County of Osceola*, 45 Iowa, 168; *Grand Chute v. Winegar*, 15 Wall. 355; *Meyer v. City of Muscatine*, 1 Wall. 384; *Gelpcke v. City of Dubuque*, Id. 175.

²³⁷ *Town of South Ottawa v. Perkins*, 94 U. S. 260; *County of Bates v. Winters*, 97 U. S. 83; *Ogden v. County of Daviess*, 102 U. S. 634; *Williamson v. City of Keokuk*, 44 Iowa, 88; *State v. Macon Co. Ct.*, 68 Mo. 29; *Halstead v. New York*, 3 N. Y. 430, affirming 5 Barb. (N. Y.) 218; *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819. See, too, section 345, *infra*. But see, as to a general recital applicable to two statutes, of which one is valid, *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613.

²³⁸ *McClure v. Township of Oxford*, 94 U. S. 429; *Commonwealth of Virginia v. State of Maryland*, 32 Md. 501; *Fisk v. City of Kenosha*, 26 Wis. 23; *Town of Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *Silliman v. Railroad Co.*, 27 Grat. (Va.) 119; *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294; *Slifer v. Howell's Adm'r*, 9 W. Va. 391.

²³⁹ *Commonwealth of Virginia v. State of Maryland*, 32 Md. 501.

²⁴⁰ *Starin v. Town of Genoa*, 23 N. Y. 439; *Gould v. Town of Sterling*, Id. 456; *Bissell v. City of Kankakee*, 64 Ill. 249; *Veeder v. Town of Lima*, 19 Wis. 280; *Clark v. City of Des Moines*, 19 Iowa, 199. See, too, *Backman v. Charlestown*, 42 N. H. 125.

to counties through which the road runs, the holder of a bond issued under such authority is chargeable with knowledge of the location of the road, and that it did not run through the county giving the bond.²⁴¹ But he is not chargeable with knowledge of the fact that a suit is pending to restrain the issue of such bonds.²⁴² "A party will not be charged with constructive notice unless the circumstances are such that the court can say that it was his duty to acquire the knowledge in question, and that his failure to obtain it was the result of culpable negligence. It is not enough that he should, from want of prudent caution, have neglected to make inquiries, but he must have designedly abstained from such inquiries for the purpose of avoiding knowledge. There must be a willful blindness, and not mere want of caution."²⁴³

Irregular Execution.

§ 344. If the defense is merely one of irregularity in the manner of executing the instrument, the corporation may be estopped from setting up such defense against a holder in good faith and for value.²⁴⁴ This is so where the facts in question have been already determined by the common council, and the bonds have been issued and delivered in exchange for railroad stock, and have come into the hands of a bona fide holder.²⁴⁵ So, where the subscription to

²⁴¹ State v. Commissioners of Hancock Co., 11 Ohio St. 183.

²⁴² Bailey v. Town of Lansing, 13 Blatchf. 424, Fed. Cas. No. 738; Durrant v. Iowa Co., 1 Woolw. 69, Fed. Cas. No. 4,189; Macon Co. v. Shores, 97 U. S. 272; Cass Co. v. Gillett, 100 U. S. 585; County of Warren v. Marcy, 97 U. S. 96; Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358; Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539.

²⁴³ Joynes, J., in De Voss v. City of Richmond, 18 Grat. 338. In this case the bonds in question were issued by the city of Richmond for other bonds that had been confiscated by the Confederate government, without notice to the holders, and the city was held liable on the new bonds to a bona fide holder for value.

²⁴⁴ Steines v. Franklin Co., 48 Mo. 167; Barrett v. Schuyler Co., 44 Mo. 197; Hannibal & St. J. R. Co. v. Marion Co., 36 Mo. 294; State v. Trustees of Goshen Tp., 14 Ohio St. 569; Rogers v. Burlington, 3 Wall. 654. So, where the bonds were actually executed outside of the limits of the municipality, but were dated in the county and recognized by long-continued payment of interest, State v. Board of Com'rs of Scott Co., 58 Kan. 491, 49 Pac. 663.

²⁴⁵ Bissell v. City of Jeffersonville, 24 How. 299.

stock was authorized to be made to one railroad company, but the railroad was transferred and the subscription made and bonds issued to another company, with the consent of the county, which afterwards paid interest on the bonds for several years;²⁴⁶ or where the company was not incorporated within the prescribed time;²⁴⁷ or was then incorporated as a narrow-gauge road, the terms of subscription being for the standard gauge.²⁴⁸ Where a statute authorizes the issue of bonds in aid of a railroad company, provided that the ordinance for their issue, specifying the time, terms, and conditions of the bonds to be issued, shall first be submitted to a popular vote, the city council cannot afterwards alter the time, terms, or conditions prescribed in the ordinance submitted.²⁴⁹ But it will be presumed, in favor of a bona fide holder, that the bonds have been issued under the circumstances prescribed by the enabling statute.²⁵⁰

On the other hand, if the statute requires that the bonds be attested by the town clerk, the want of his signature will be a fatal objection, even in the hands of a bona fide holder.²⁵¹

Estoppel by Recitals—General Principles.

§ 345. The principles of estoppel are applied only where bonds are in the hands of a bona fide holder for value before maturity. And as to obligations like municipal bonds, which owe their legal existence in large part to statute law, it is to be remembered that the requirements and provisions of a statute are notice to purchasers of bonds issued under it,²⁵² as well as the provisions of the con-

²⁴⁶ *County of Ray v. Vansycle*, 96 U. S. 675. So, too, *New Buffalo v. Iron Co.*, 105 U. S. 73; *Morrill v. Smith Co.*, 89 Tex. 529, 36 S. W. 56; *Menasha v. Hazard*, 102 U. S. 81.

²⁴⁷ *Ralls Co. v. Douglass*, 105 U. S. 728. But, contra, if it was a pretended company, with no incorporation, *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784.

²⁴⁸ *Kingman Co. Com'rs v. Cornell University*, 6 C. C. A. 296, 57 Fed. 149.

²⁴⁹ *Hodgman v. Railway Co.*, 20 Minn. 48 (Gil. 36).

²⁵⁰ *Gelpeke v. City of Dubuque*, 1 Wall. 175.

²⁵¹ *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 3 Sup. Ct. 555.

²⁵² *McClure v. Oxford Tp.*, 94 U. S. 429; *Crow v. Oxford Tp.*, 119 U. S. 215, 7 Sup. Ct. 180; *Mercer Co. v. Provident Life & Trust Co. of Philadelphia*, 19 C. C. A. 44, 72 Fed. 623; *National Bank of the Republic v. City of St.*

stitution that control it.²⁵³ But the general recital of an act will not be notice of an unconstitutional amendment to a sufficient and valid act, but will be presumed to state compliance with both act and amendment.²⁵⁴ The particular recital of an ordinance is, in like manner, notice of its provisions;²⁵⁵ but not a reference to it by mere date, without recital of its title or object.²⁵⁶ So, the existence, without recital, of corporation records showing the illegal agreement, in furtherance of which the bonds were issued, is not of itself notice to purchasers of the bonds.²⁵⁷

And, in general, no recital can preclude a denial of the execution of the bond;²⁵⁸ or of the authority of the officer executing it;²⁵⁹ especially where the statute particularly designated the officials who should sign it.²⁶⁰

Joseph, 31 Fed. 216; Rathbone v. Kiowa Co. Com'rs, 73 Fed. 395; Cagwin v. Town of Hancock, 84 N. Y. 532, reversing 22 Hun, 201; Dixon Co. v. Field, 111 U. S. 83, 92, 4 Sup. Ct. 315. See, too, § 343, supra.

²⁵³ Nesbit v. Independent District, 144 U. S. 610, 12 Sup. Ct. 746; Shaw v. School Dist., 62 Fed. 911; McPherson v. Foster, 43 Iowa, 48.

²⁵⁴ Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613; Moulton v. City of Evansville, 25 Fed. 382.

²⁵⁵ If, however, the bond recites that it is issued in pursuance of a statute and ordinance, it has been held to be equivalent to a recital that the ordinance complies with the statute, and to relieve the purchaser from further inquiry as to it. Wesson v. Saline Co., 20 C. C. A. 227, 73 Fed. 917.

²⁵⁶ Risley v. Village of Howell, 12 C. C. A. 218, 64 Fed. 453, reversing 57 Fed. 544. In this case the statute gave full authority, and was particularly recited.

²⁵⁷ West Plains Tp. v. Sage, 16 C. C. A. 553, 69 Fed. 943.

²⁵⁸ Singer Mfg. Co. v. City of Elizabeth, 42 N. J. Law, 249. Although it may shut out objection to want of prescribed form. Washington Tp. v. Coler, 2 C. C. A. 272, 51 Fed. 366.

²⁵⁹ Hudson v. Inhabitants of Winslow, 35 N. J. Law, 437; Lehman v. City of San Diego, 27 C. C. A. 668, 83 Fed. 669. But see, contra, where the bond recited that the signers were authorized by the common council, German Ins. Co. v. City of Manning, 78 Fed. 900. Where the coupons are referred to in the bond, it is not necessary that they should be signed in the same manner, or by the same officer, as the bond. Blair v. Cuming Co., 111 U. S. 363, 4

²⁶⁰ Bissell v. Spring Valley Tp., 110 U. S. 162, 3 Sup. Ct. 555, the statute requiring the clerk's signature, which was wanting; Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720, where the ex mayor, by authority of an ordinance, signed for the mayor, which the statute required.

The recitals in the bond apply, in general, to the interest coupons that belong to it, and will inure to the benefit of a bona fide holder of the coupons as well as to the holder of the bonds.†

And, finally, "the estoppel does not arise except upon matters of fact which the corporation officers had authority by law to determine and to certify. * * * A general statement that the bonds have been issued in conformity with the law will suffice so as to embrace every fact which the officers making the statement are authorized to determine and certify."²⁶¹

Recitals—As to Corporate Authority.

§ 345a. No recital will create or dispense with the requisite authority to issue the bond. "Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority by declaring that its assumption was within the law."²⁶² This is true, whether the recital is, in general, of law which does not exist;²⁶³ or has been repealed;²⁶⁴ or is unconstitutional and invalid for that reason;²⁶⁵ or of a particular enabling

Sup. Ct. 44. Especially where the coupons are afterwards recognized in a refunding act. *Town Council of Lexington v. Union Nat. Bank* (Miss.) 22 South. 291. Judgment on coupons separated from their bonds is not conclusive as to the validity of the bonds, *Shell v. Carter Co.* (Tenn. Ch. App.) 42 S. W. 78.

† *Knox Co. Com'rs v. Aspinwall*, 21 How. 539; *Wilson v. Salamanca*, 99 U. S. 490.

²⁶¹ *Matthews, J., in Dixon Co. v. Field*, 111 U. S. 92, 4 Sup. Ct. 315. *Id.*, where the statute required, as a condition precedent to a subscription by bonds in aid of a railroad, that a certain amount should be "first subscribed to the capital stock," as to which the bond commissioners were to file a certificate, their certificate was held to be conclusive as to the fact certified. *Bank of Rome v. Village of Rome*, 19 N. Y. 20. So, in refunding bonds, recital of compliance with the refunding act is sufficient, although the refunding procedure was a mere device to save bonds originally void. *Brown v. Ingalls Tp.*, 81 Fed. 485.

²⁶² *Matthews, J., in Dixon Co. v. Field*, 111 U. S. 83, 92, 4 Sup. Ct. 315.

²⁶³ *Dixon Co. v. Field*, *supra*.

²⁶⁴ *Lehman v. City of San Diego*, 73 Fed. 105; *Id.*, 27 C. C. A. 668, 83 Fed. 669; the recital being merely an antedating, which made the bond appear to have been issued before the repealing act took effect.

²⁶⁵ *Travelers' Ins. Co. v. Oswego Tp.*, 55 Fed. 361; *Quaker City Nat. Bank v. Nolan Co.*, 59 Fed. 660. But as to absence of the constitutional provision

act which does not enable;²⁶⁶ or of such act and an election held under it;²⁶⁷ or of an ordinance and election held under laws and constitution, which made no provision for them;²⁶⁸ or of an ordinance only, where the statute required a recital of the purpose for which the bonds were issued.²⁶⁹

On the other hand, where there are two statutes, under one of which the bonds could be legally issued, they will not be rendered invalid by a misrecital of another and insufficient act.²⁷⁰

Recitals—As to Popular Consent.

§ 345b. Where the constitution or statute requires submission of the bond issue to the vote of the people, the corporation will not be estopped from setting up the want of such election by a recital in

for raising the money by taxation, where the bonds recite, not only the statute, but the full performance of all conditions, see *National Life Ins. Co. of Montpelier v. Board of Education of Huron*, 10 C. C. A. 637, 62 Fed. 778, distinguishing "the inadequate exercise of ample power, and the total absence of power." *Sanborn J., supra*. The constitution did not, in this case, require the provision to be in the act itself.

²⁶⁶ *Manhattan Co. v. City of Ironwood*, 20 C. C. A. 642, 74 Fed. 635. E. g. a statute which required the consent of inhabitants to appear as a jurisdictional fact in the petition, *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. 610; or which had not gone into effect for want of the prescribed publication, *McClure v. Oxford Tp.*, 94 U. S. 429; *Crow v. Oxford Tp.*, 119 U. S. 215, 7 Sup. Ct. 180; or until one year (not yet expired) after the organization of the county, *Coffin v. Kearney Co. Com'rs*, 6 C. C. A. 288, 57 Fed. 137.

²⁶⁷ *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254; the original authority having been exhausted in this case by a previous issue.

²⁶⁸ *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785.

²⁶⁹ *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819; merely the date of the ordinance, and neither its title nor object, being recited.

²⁷⁰ *Smith v. Clark Co.*, 54 Mo. 58; *Johnson Co. Com'rs v. January*, 94 U. S. 202. So, too, *Brownell v. Greenwich Tp.*, 114 N. Y. 518, 22 N. E. 24, where the act recited required a majority consent, which had not been obtained, and there was a later act before the issue of the bonds, but not applicable to them, and bona fide holders were held entitled to presume a valid issue, under the general powers of the later act, which did not require a majority consent.

the bond that it was issued in pursuance of, or in accordance with, the statute.²⁷¹

On the other hand, any defense resting on failure to comply with statutory requirements as to manner, and ascertainment of result, of the election will be barred by a recital that the bond was issued in pursuance of, or accordance with, the act;²⁷² or in compliance with an election held under authority of the act;²⁷³ or in pursuance of a vote at such election;²⁷⁴ or of the election and the ordinance providing for it.²⁷⁵ Such estoppel is also created by a recital of the act, together with the facts of the election, where such facts have been left to the municipal officers to determine;²⁷⁶ or by a recital, in such case, of the facts alone.²⁷⁷ So, too, objections to the regularity of the procedure will be barred by a recital of the act and the election and its result. "Where the bonds recite the circumstances, which bring them within the power, the corporation is estopped to deny the truth of the recital."²⁷⁸ So, by a recital of

²⁷¹ *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539.

²⁷² *Humboldt Tp. v. Long*, 92 U. S. 642 (too short notice); *Supervisors of Cumberland Co. v. Randolph*, 89 Va. 614, 16 S. E. 722 (insufficient notice); *City of Clarksdale, Miss., v. Pacific Imp. Co.*, 26 C. C. A. 434, 81 Fed. 329. But see, contra, as to want of statutory notice, *Springfield Safe-Deposit & Trust Co. v. City of Attica*, 29 C. C. A. 214, 85 Fed. 387.

²⁷³ *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704. But see *Lippincott v. Pana*, 92 Ill. 24. And see *Heed v. Commissioners*, 82 Fed. 716, where the recital excluded the defense that the bonds were made payable in 30 years instead of in installments within 30 years.

²⁷⁴ *Anderson Co. Com'rs' v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433; insufficient notice of election.

²⁷⁵ *Meyer v. City of Muscatine*, 1 Wall. 384.

²⁷⁶ *Grenada Co. Sup'rs v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Town of Coloma v. Eaves*, 92 U. S. 484; *Dill. Mun. Corp.* § 419.

²⁷⁷ *Andes v. Ely*, 158 U. S. 313, 15 Sup. Ct. 954. So, by the recital of a subscription and an order made pursuant to the statute. *Moran v. Miami Co.*, 2 Black, 722. Although the bonds were payable, at option of the county, within 30 years, and after 10 years, and the vote was for 30-year bonds. *Heed v. Commissioners*, 82 Fed. 716.

²⁷⁸ *Hunt, J., in Orleans v. Platt*, 99 U. S. 676 (sufficiency of petition); *Town of Coloma v. Eaves*, *supra* (as to requisite majority); *Chilton v. Town of Gratton*, 82 Fed. 873 (as to qualification of petitioners). So, *Moulton v. City of Evansville*, 25 Fed. 382.

the act and the subscription made "in conformity" to it;²⁷⁹ or of the act and the resolution of the municipal council;²⁸⁰ or of a subscription made "in pursuance to an order of the court";²⁸¹ or of an order of the commissioners, in whom the determination of the facts was vested.²⁸²

But the recital of an ordinance, which was not published according to the statute, will not raise an estoppel.²⁸³ Nor the recital of an act, which was unsupported by the ordinance that it required.²⁸⁴ Nor the recital of an election, which did not appear by the recital itself or by the commissioners' record to have resulted in the statutory majority.²⁸⁵ Nor, in general, a recital of the result of election, where the canvassing is expressly referred by the statute to the determination of other officers.²⁸⁶ Nor the affidavit of a town officer as to result of election, which the statute required to be filed as proof, but did not make conclusive.²⁸⁷

In like manner, the recital may bar defenses arising out of a failure to comply with conditions fixed by the popular vote and authorized by the statute, the municipal officers having been intrusted ex-

²⁷⁹ *Moultrie Co. v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631; as to facts of subscription.

²⁸⁰ *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613; sufficiency of petition. So, *Moulton v. City of Evansville*, 25 Fed. 382, where the recital was supported by long acquiescence and payment of interest by the corporation.

²⁸¹ *Dalles Co. v. McKenzie*, 110 U. S. 686, 4 Sup. Ct. 184.

²⁸² *Jefferson Co. v. Lewis*, 20 Fla. 980, the recital being supported in this case by the record of the commissioners. But the county would be estopped as to the commissioners' actions by a mere recital of the act, without putting purchasers to an examination of the record. *Mitchell Co. v. City Nat. Bank* (Tex. Civ. App.) 39 S. W. 628. Where the statute made them the canvassers, their record alone was conclusive. *Township of Rock Creek v. Strong*, 96 U. S. 271; *City of Clarksdale v. Pacific Imp. Co.*, 26 C. C. A. 434, 81 Fed. 329.

²⁸³ *National Bank of Commerce v. Town of Granada*, 4 C. C. A. 212, 54 Fed. 100.

²⁸⁴ *Swan v. City of Arkansas City*, 61 Fed. 478; *Hinkley v. City of Arkansas City*, 16 C. C. A. 395, 69 Fed. 768.

²⁸⁵ *Deland v. Platte Co.*, 54 Fed. 823.

²⁸⁶ *Faulhenstein Tp. of Stanton Co. v. Fitch*, 2 Kan. App. 193, 43 Pac. 276.

²⁸⁷ *Cagwin v. Town of Hancock*, 84 N. Y. 532, reversing 22 Hun (N. Y.) 201; *Town of Springport v. Bank*, 75 N. Y. 397.

pressly or by implication with the determination as to the fact. This has been held as to a condition for the completion of a railroad within a certain time,²⁸⁸ or up to a required grade,²⁸⁹ or between certain points.²⁹⁰ And this is true, although the enabling act provided that the bonds should be invalid until such conditions were performed.²⁹¹ So, the issue of the bonds as required by statute, after the president of the road had certified that the conditions were performed, creates, with such certificate, an estoppel on that point.²⁹² Or the condition may be waived by a refunding bond reciting the original debt as "binding, subsisting, and legal."²⁹³ And, in general, such a recital in a refunding bond will cure the defect or illegality of the original issue,²⁹⁴ and will be conclusive as to the fact that they were issued as such refunding bonds.²⁹⁵

But where the condition is fixed by the enabling act itself, with no reference for determination to the municipal officers, the failure to perform it may be set up, notwithstanding a recital in the bond that it was issued pursuant to the statute.²⁹⁶ And this is true also where the condition was fixed by the popular vote, and after the vote, and

²⁸⁸ The recital in the bond being that it was issued under the authority of the statute. *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124. See, too, *Chilton v. Town of Gratton*, 82 Fed. 873; *Marshal v. Town of Elgin*, 8 Fed. 783.

²⁸⁹ *Board of Com'rs of Kingman Co. v. Cornell University*, 6 C. C. A. 296; 57 Fed. 149, the bond reciting fact of performance.

²⁹⁰ *Lewis v. Commissioners*, 105 U. S. 739; the delivery itself, without recitals, implying the performance of the statutory condition, and raising the estoppel.

²⁹¹ *Insurance Co. v. Bruce*, 105 U. S. 328; the bond reciting the act, the election, and full compliance with the act.

²⁹² *Menasha v. Hazard*, 102 U. S. 81.

²⁹³ *Graves v. Saline Co.*, 161 U. S. 359, 16 Sup. Ct. 526; the original condition being for completion of road in a fixed time.

²⁹⁴ *Howard v. Kiowa Co.*, 73 Fed. 406; *City of Cadillac v. Woonsocket Inst. for Savings*, 7 C. C. A. 574, 58 Fed. 935; *Brown v. Ingalls Tp.*, 81 Fed. 485. Especially where the statute committed the determination of the question to the bond commissioners. *Meyer v. Brown*, 65 Cal. 583, 26 Pac. 281.

²⁹⁵ *Mutual Ben. Life Ins. Co. v. Elizabeth*, 42 N. J. Law, 235; that fact being peculiarly within the knowledge of the municipal officers.

²⁹⁶ *Mercer Co. v. Provident Life & Trust Co. of Philadelphia*, 19 C. C. A. 44, 72 Fed. 623.

before issue of the bond, a new constitution prohibited all such bonds, except where already authorized by vote under existing laws, and the bonds were afterwards issued in disregard of the condition.²⁹⁷

Recitals—As to Limit of Indebtedness.

§ 345c. Where the limit of indebtedness is fixed by the constitution, and bonds are issued in excess of the limit, the defense will not be cut off by a recital that they are issued under the authority of the statute,²⁹⁸ or statute and ordinance;²⁹⁹ nor by a judicial certificate that they were issued "as authorized" by the statute and by order of the county court;³⁰⁰ nor by the state auditor's certi-

²⁹⁷ *Citizens' Saving & Loan Ass'n v. Perry Co.*, 156 U. S. 692, 15 Sup. Ct. 547. In this case the bond recited the wrong act, but there was a judicial certificate filed stating full compliance with the conditions. And registration by the state auditor will not render such bonds valid. *Id.*; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159.

²⁹⁸ *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651 (county warrants); *Sutliff v. Lake County Com'rs*, 147 U. S. 230, 13 Sup. Ct. 318; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746. So, where the limit was statutory, but the municipal officers were not charged with the determination of the fact, *Broadway Sav. Inst. of City of New York v. Town of Pelham*, 83 Hun, 96, 31 N. Y. Supp. 402; or where the statute referred to the assessment for its ascertainment, *School Dist. of Steamboat Rock v. Stone*, 106 U. S. 183, 1 Sup. Ct. 84.

²⁹⁹ "Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not at the time exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiffs, dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness." *Harlan, J.*, in *Buchanan v. Litchfield*, 102 U. S. 278, 292.

³⁰⁰ "Neither the statute, nor the vote of the people, nor the order of the county court empowered him to make such a certificate, or to determine the question whether the county court had exercised the power conferred on it. An officer's certificate of a fact which he has no authority to determine is of no legal effect." *Gray, J.*, in *Davless Co. v. Dickinson*, 117 U. S. 657, 664, 6 Sup. Ct. 897.

cate of validity.³⁰¹ This is so, a fortiori, where the statute itself refers to the assessment on other record for ascertainment of the limit.³⁰² Where the holder knows the void character of original indebtedness or bonds by reason of overstepping the constitutional limit, it is not cured by refunding them;³⁰³ nor by a recital of their being issued in accordance with the statute.³⁰⁴

On the other hand, where the limit of indebtedness is a statutory one, of which the determination is referred by implication to the commissioners, and bonds are issued by them in excess of the limit, the defense may be barred by a recital that the bonds were issued in accordance with the act;³⁰⁵ especially where this is supported by the commissioners' record reciting an amount of indebtedness which was within the statutory limit.³⁰⁶ And, even where the constitutional limit was exceeded, the defense was held to be barred by a recital of the contrary fact, without any recital of the enabling statute;³⁰⁷ or, in the case of refunding bonds, where the unconstitutional defect was in the original debt, by a recital of the statute and that the bonds were issued in conformity to it and did not exceed the constitutional limit.³⁰⁸ So, too, in recent cases, by the

³⁰¹ *Prickett v. City of Marceline*, 65 Fed. 469. The constitution provided that the amount of debt should be ascertained by the assessment, and the statute provided that the auditor's certificate should be prima facie evidence only of the facts therein stated.

³⁰² "The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." *Gray, J., in Sutliff v. Lake County Com'rs*, 147 U. S. 230, 237, 13 Sup. Ct. 318.

³⁰³ *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, reversing 42 Fed. 644.

³⁰⁴ *Shaw v. School Dist.*, 62 Fed. 911, affirmed 23 C. C. A. 169, 77 Fed. 277; *Francis v. Howard Co.*, 4 C. C. A. 460, 54 Fed. 487. In this case the purchaser's bonds alone exceeded the limit of indebtedness.

³⁰⁵ *Humboldt Tp. v. Long*, 92 U. S. 642; *Marcy v. Township of Oswego, Id.* 637; *Wilson v. Salamanca*, 99 U. S. 499; *Chilton v. Town of Gratton*, 82 Fed. 873. In these cases, and many others, the implication of a reference to the bond commissioners for determination seems shadowy, and dependent on the pleasure of the court. It seems to be a safer rule to ignore all such implications, and recognize only express statutory authority.

³⁰⁶ *Sherman Co. v. Simons*, 109 U. S. 735, 3 Sup. Ct. 502.

³⁰⁷ *Dudley v. Board of Com'rs*, 26 C. C. A. 82, 80 Fed. 672.

³⁰⁸ *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216; the recital stating

official record of the municipality showing an amount of indebtedness within the prescribed limit.³⁰⁹

The cases do not in terms recognize a distinction between constitutional and statutory restrictions, although they seem sometimes tacitly to have followed such a line. There appears, however, to be no sound reason for the distinction.

Recitals—As to Object—Railroad Aid, Etc.

§ 345d. The form of railroad aid bonds is generally such as to show their character on their face, and prevent any estoppel arising from their recitals. Where, however, the railroad originally contemplated has, by consolidation or otherwise, changed its name after the enabling act and the subscription vote, the county or town may be estopped from defending on this ground by a recital in the bonds that they were issued under the authority of the statute and the election held under it,³¹⁰ or of the order of the county court and the election and requisite vote.³¹¹ So, in general, the corporation cannot defend on the ground that the bonds were really issued for a purpose not authorized by law,³¹² or that the proceeds were misappropriated to an unlawful or unauthorized object,³¹³ or that the sale of the bonds was made unlawfully and fraudulently by the

that "the total amount of this issue does not exceed the limit prescribed," and nothing to the contrary appearing on the face of the bond. No emphasis was laid upon the fact that the bonds were issued in funding a debt which exceeded the constitutional limit. The force of such refunding action as a waiver of previous illegality is noticed later, in *Graves v. Saline Co.*, 161 U. S. 359, 16 Sup. Ct. 526, on a statutory defect.

³⁰⁹ *Second Ward Sav. Bank of Milwaukee v. City of Huron*, 80 Fed. 660; *Rollins & Sons v. Board of Com'rs of Gunnison Co.*, 26 C. C. A. 91, 80 Fed. 692.

³¹⁰ *Harter v. Kernochan*, 103 U. S. 562; *Bonham v. Needles*, Id. 648; *Wilson v. Salamanca*, 99 U. S. 499. But see, contra, where aid to domestic corporations was authorized, and the bonds were in aid of a foreign corporation. *City of Johnson City v. Charleston, C. & C. R. Co. (Tenn.)* 44 S. W. 670.

³¹¹ *Livingston Co. v. First Nat. Bank of Portsmouth*, 128 U. S. 102, 9 Sup. Ct. 18.

³¹² *Second Ward Sav. Bank of Milwaukee v. City of Huron*, 80 Fed. 660; a valid purpose of issue being recited in this case.

³¹³ *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778; the bonds reciting, also, the perform-

municipal officers,³¹⁴ where the bonds recite that they are issued in accordance with the statute. So, where the bonds recite an ordinance "for municipal purposes," under a general statutory power, the town cannot allege that the proceeds were used in aid of a private manufacturing company.³¹⁵

Estoppel by Corporate Acts.

§ 346. If the bond has been antedated in order to evade a law requiring such bonds to be registered, and the corporation has received the proceeds of the bond, it will be liable to the holder for the amount received.³¹⁶ And, in general, receiving the proceeds of the bonds will amount to a waiver of irregularities in their issue.³¹⁷ And so will the levy of a tax for them and payment of interest on them for a term of years;³¹⁸ or receiving railroad stock for the bonds and paying interest on them.³¹⁹ The town will not, however, be estopped from defending on the ground of original want of authority, either by levying a tax for payment of the bonds or by paying interest on them;³²⁰ nor by reporting at the annual town

ance of all conditions. So, *West Plains Tp. v. Sage*, 16 C. C. A. 553, 69 Fed. 943. So, where the bond recited act and ordinance by date only and the ordinance itself misapplied the proceeds. *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453, reversing 57 Fed. 544. So, where they recited the statutory purpose of their issue. *Nolan Co. v. State*, 33 Tex. 182, 17 S. W. 823; *Portland Sav. Bank v. City of Evansville*, 25 Fed. 389.

³¹⁴ *Mercer Co. v. Hackett*, 1 Wall. 83. So, where a subscription in form became in effect a donation by contract for surrender of the railroad stock on return of a small portion of the bonds, the city was held to be concluded by the statutory registry of the bonds. *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803. But see, contra, *Post's Adm'r v. Pulaski Co.*, 9 U. S. App. 1, 1 C. C. A. 405, and 49 Fed. 628, where the bond recited the order of the county court, which confirmed, and gave notice of, the illegal agreement.

³¹⁵ *Hackett v. Ottawa*, 99 U. S. 86; *Ottawa v. Bank*, 105 U. S. 342.

³¹⁶ *Louisiana v. Wood*, 102 U. S. 294; *Wood v. Louisiana*, 5 Dill. 122, Fed. Cas. No. 17,948.

³¹⁷ *Pendleton Co. v. Amy*, 13 Wall. 297.

³¹⁸ *Supervisors v. Schenck*, 5 Wall. 784. See, too, *Dudley v. Board of Com'rs*, 26 C. C. A. 82, 80 Fed. 672.

³¹⁹ *Commissioners of Johnson Co. v. January*, 94 U. S. 202.

³²⁰ *Weismer v. Village of Douglas*, 4 Hun (N. Y.) 201, affirmed 64 N. Y. 91; *Marshall Co. v. Cook*, 38 Ill. 44. And to the same effect, as to the distinction

meeting money received "on town notes";³²¹ nor by authorizing the receipt of the coupons for taxes.³²²

So, where a county, giving its bonds for a subscription to the stock of a railroad company, consents to an extension of the time limited for the completion of the road, and its officers within such extended period declare the road completed to their satisfaction and deliver the bonds and receive the stock, the county cannot afterwards set up in defense to the bonds that the road was not completed within the time specified.³²³

Where the election, prescribed as a means of obtaining the consent of taxpayers, has been ordered by the board of supervisors instead of the county court prescribed by the statute, and the bonds issued have been subsequently validated by statute, and afterwards, under another statute, exchanged for new bonds authorized by a popular vote, as prescribed by statute, the last vote will amount to a ratification curing all original irregularity in the bonds.³²⁴ It is sufficient if there is reasonable certainty in the manner of voting on such bonds, the other requirements of the statute being complied with.³²⁵ And the regularity of a bond issued under an old statute will be presumed after 28 years.³²⁶

Proof of Compliance—Ratification by Statute.

§ 347. So, if any proof is made as to obtaining the consent of taxpayers, it will be presumed to be sufficient;³²⁷ and, if made according to the requirements of the statute, it will be conclusive in

between want of power and irregularity in execution of it, as affecting the question of estoppel or ratification, see, also, *State v. Trustees of Goshen Tp.*, 14 Ohio St. 569. As to the effect of paying interest as an estoppel, see, also, *Brown v. Ingalls Tp.*, 81 Fed. 485; *State v. Board of Com'rs of Scott Co.*, 58 Kan. 491, 49 Pac. 663 (where, in addition to long payment of interest, old bonds had been surrendered, and entries made in the county journal); *Heed v. Commissioners*, 82 Fed. 716.

³²¹ *Bloomfield v. Bank*, 121 U. S. 122, 7 Sup. Ct. 865.

³²² *Shell v. Carter Co. (Tenn. Ch. App.)* 42 S. W. 78.

³²³ *Randolph Co. v. Post*, 93 U. S. 502.

³²⁴ *County of Jasper v. Ballou*, 103 U. S. 745.

³²⁵ *Ranney v. Baeder*, 50 Mo. 600.

³²⁶ *Hamlin v. Board of Liquidators*, 30 La. Ann. 443.

³²⁷ *Van Hostrup v. Madison City*, 1 Wall. 291.

favor of a bona fide holder.³²⁸ The judgment exercised by the official executing the bond is in such case conclusive upon the corporation.³²⁹

And, in general, the legislature may ratify any contract of a municipal corporation, which is irregular or ultra vires, if it could originally have authorized it.³³⁰ Thus, where the statute originally authorized an election for the issue of bonds with interest payable annually, and the bonds voted on and issued bore interest payable semiannually, this defect was cured in the hands of a bona fide holder by subsequent legislation.³³¹ So, the legislature may legalize bonds which were issued, and might have been authorized by statute, before the constitutional requirement as to popular vote, but could not have been so authorized at the time they were legalized;³³² or it may remit conditions created originally by it, and not complied with;³³³ or it may authorize bonds in payment of a debt which was not legally contracted.³³⁴

On the other hand, the legislature cannot legalize bonds which were unconstitutional and void at the time of their issue;³³⁵ or

³²⁸ *Howland v. Eldredge*, 43 N. Y. 457. The statute may in terms make it conclusive, *Duanesburgh v. Jenkins*, 57 N. Y. 177.

³²⁹ *Bissell v. City of Jeffersonville*, 24 How. 287; *Dill. Mun. Corp.* § 418; *Commissioners of Douglas Co. v. Bolles*, 94 U. S. 104; *Town of Coloma v. Eaves*, 92 U. S. 484; *Town of Venice v. Murdock*, Id. 494; *City of Vicksburg v. Lombard*, 51 Miss. 111.

³³⁰ 1 *Edw. Bills & N.* § 914; *Thompson v. Perrine*, 103 U. S. 806; *Town of Queensbury v. Culver*, 19 Wall. 83; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *People v. Mitchell*, 35 N. Y. 551; *Williams v. Town of Duanesburgh*, 66 N. Y. 129; *Alexander v. Commissioners*, 70 N. C. 208; *Deyo v. Otoe Co.*, 37 Fed. 246; *Jonesboro City v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67; *Grenada County Sup'rs v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. 736; *Read v. City of Platts-mouth*, 107 U. S. 568, 2 Sup. Ct. 208; *Springfield Safe-Deposit & Trust Co. v. City of Attica*, 29 C. C. A. 214, 85 Fed. 387.

³³¹ *Cutler v. Board of Sup'rs*, 56 Miss. 115.

³³² *Otoe Co. v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265.

³³³ *Williams v. Town of Duanesburgh*, 66 N. Y. 129.

³³⁴ *Mutual Ben. Life Ins. Co. v. City of Elizabeth*, 42 N. J. Law, 235.

³³⁵ E. g. for want of required popular consent, *Horton v. Town of Thompson*, 71 N. Y. 513, reversing 7 Hun (N. Y.) 452; *People v. Batchellor*, 53 N. Y. 128; or for omitting to provide for the necessary tax, *Quaker City Nat. Bank v. Nolan Co.*, 59 Fed. 660; or for exceeding the limit of indebtedness,

without statutory authority for election or bonds.³³⁶ And, after a constitutional prohibition of bonds of a given character, saving only such as were already "authorized under existing laws," the legislature cannot relieve from the condition on which the popular consent was originally given;³³⁷ or validate an issue which was illegal before the adoption of the constitution, and unconstitutional afterwards.³³⁸

The corporation may itself ratify its bonds, where they are not invalid for want of original authority, but for nonperformance of a condition made by the electors themselves;³³⁹ but not where they are void for want of original authority.³⁴⁰

Mitchell Co. v. City Nat. Bank of Paducah, Ky. (Tex. Civ. App.) 39 S. W. 628; or for not expressing the limit in the statute, as required by the constitution, *Fisk v. Kenosha*, 26 Wis. 23; or for attempting an unconstitutional donation in the form of a subscription, *Choisser v. People*, 140 Ill. 21, 29 N. E. 546; *Post's Adm'r v. Pulaski Co.*, 9 U. S. App. 1, 1 C. C. A. 405, and 49 Fed. 628; *Morton v. City of Nevada*, 41 Fed. 582.

³³⁶ *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785.

³³⁷ *Richeson v. People*, 115 Ill. 450, 5 N. E. 121; *Marshall v. Silliman*, 61 Ill. 218.

³³⁸ *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947.

³³⁹ *Graves v. Saline Co.*, 161 U. S. 359, 16 Sup. Ct. 526, where the defective bonds were funded as "subsisting and legal" debt under a funding statute. It could not, however, fund bonds which were already adjudged to be invalid. *Hills v. Bank*, 101 N. Y. 490, 5 N. E. 327.

³⁴⁰ *Lewis v. City of Shreveport*, 108 U. S. 282, 2 Sup. Ct. 634.

III. GOVERNMENTS.

§ 348. Governments as Parties.

349. Bills of Credit.

350. Authority of Public Officers.

351. Actions by and against Public Agents.

Governments as Parties.

§ 348. There is nothing in the nature of commercial paper to render its execution by a state or government impossible, although instruments issued by governments as security for public debts generally take the form of bonds, either with or without coupons. Government bonds, payable to bearer or otherwise negotiable in form, are negotiable instruments, and may be transferred as such.³⁴¹ If, however, their negotiability is restricted, e. g. by a special indorsement, their transfer is from that time subject to defense, and, if stolen after such indorsement, the bond may be recovered in trover, even from a bona fide purchaser for value.³⁴² In order to constitute a valid security, any bond or negotiable obligation of the state must be issued under the authority of the constitutional and statute law.³⁴³

³⁴¹ So held as to United States treasury notes in *Vermilye v. Express Co.*, 21 Wall. 138; *Morgan v. U. S.*, 113 U. S. 476, 5 Sup. Ct. 588; *Dinsmore v. Duncan*, 57 N. Y. 573; *Seybel v. Bank*, 54 N. Y. 288; *Frazer v. D'Invilliers*, 2 Pa. St. 200; *Murray v. Lardner*, 2 Wall. 118. And as to state bonds in *Delafield v. State of Illinois*, 2 Hill (N. Y.) 177; *Finnegan v. Lee*, 18 How. Prac. (N. Y.) 186; *Bond Debt Cases*, 12 S. C. 200; *Railroad Co. v. Schutte*, 103 U. S. 118. And as to detached government coupons, *Spooner v. Holmes*, 102 Mass. 503; and as to indorsement by a state of a negotiable railroad bond, *State v. Cobb*, 64 Ala. 128. As to making state bonds payable in gold coin, see *Woodruff v. State of Mississippi*, 162 U. S. 291, 16 Sup. Ct. 820. As to recitals in state bonds, see *Bond Debt Cases*, supra. As to fraudulent issue of state bonds, see *Pugh v. Moore*, 44 La. Ann. 209, 10 South. 710; *Herwig v. Richardson*, 44 La. Ann. 703, 11 South. 135; *State v. Hart*, 46 La. Ann. 40, 14 South. 507.

³⁴² *Myers v. Friend*, 1 Rand. (Va.) 12.

³⁴³ *Bond Debt Cases*, 12 S. C. 200.

Bills of Credit.

§ 349. The constitution of the United States provides that "no state shall emit bills of credit."³⁴⁴ And the original draft contained a clause, which was stricken out in convention, giving to congress power "to emit bills on the credit of the United States."³⁴⁵ Bills of credit have been variously defined. The evil aimed at was the issue of paper money, and the phrase was, without doubt, intended to designate such money.³⁴⁶ Under this section of the constitution state certificates issued in small denominations were held to be void as bills of credit, although they were not a legal tender, and were made payable with interest and receivable for taxes and

³⁴⁴ Article 1, § 10.

³⁴⁵ 2 Curt. Const. 328. This clause, if adopted, would have expressly authorized what are now known as the "greenbacks."

³⁴⁶ Thus, Chief Justice Marshall says in *Craig v. State of Missouri*, 4 Pet. 410, 432: "To emit bills of credit conveys to the mind the idea of issuing paper intended to circulate through the community as money, which paper is redeemable at a future day. * * * Bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purpose of society." In the same case, McLean, J., says (page 454): "To constitute a bill of credit, within the meaning of the constitution, it must be issued by a state, and its circulation as money enforced by statutory provisions. It must contain a promise of payment by the state generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the state,—not that it would be paid on presentation, but that the state at some future period, on a time fixed, or resting in its own discretion, would provide for the payment." But Thompson, J., says: "If being used as a circulating medium or substitute for money makes these certificates bills of credit, bank notes are more emphatically such. * * * And if they [the states] can issue bank notes because they are bills of credit, they cannot authorize others to do it." And in *Briscoe v. Bank*, 11 Pet. 257, 314, McLean, J., defines a bill of credit to be a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money; and so, obiter, *Woodruff v. Trapnall*, 10 How. 205. In *Craig v. State of Missouri*, supra, Thompson, J., defines a bill of credit to be "a bill drawn and resting merely upon the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill." Page 447.

debts due to the state.³⁴⁷ But state bank bills have been held not to be bills of credit.³⁴⁸ So, too, interest coupons attached to state bonds are not bills of credit, although negotiable in form and issued on the credit of the state and receivable in payment of taxes.”³⁴⁹

Authority of Public Officers.

§ 350. The government of the United States, it has been held, may, by its authorized officers, become a party to negotiable paper, with all the rights and liabilities of an individual party except the liability to be sued.³⁵⁰ It is doubtful, however, whether there is any officer so authorized to bind the government by his drawing or accepting of a bill of exchange, or his execution of a promissory note in the name of the government. Thus, it has been held that the acceptance of a bill of exchange, drawn on the secretary of war for supplies needed by, and furnished to, the war department, and accepted by him in the words, “John B. Floyd, Secretary of War,” will not render the government liable as acceptor.³⁵¹

³⁴⁷ *Craig v. State of Missouri*, *supra*; *Thompson, McLean, and Johnson, JJ.*, dissenting,—the latter on the ground that the certificate drew interest, and was received for taxes. And in *City Nat. Bank v. Mahan*, 21 La. Ann. 753, Louisiana state certificates, issued in small denominations, payable to bearer, “in the similitude of ordinary bank bills, and actually circulated as money” (Ludeling, J.), under a statutory authority “to issue on behalf of the state, from time to time, for the purpose of paying the current expenses of the state, * * * a sum not exceeding two million dollars, in certificates of indebtedness,” were held to be unconstitutional bills of credit.

³⁴⁸ *Briscoe v. Bank*, 11 Pet. 257; *Darrington v. Bank*, 13 How. 12. Notwithstanding the suggestion of Thompson, J., *contra*, in *Craig v. State of Missouri*, 4 Pet. 449, and notwithstanding that the state held all the stock, and pledged its faith for the redemption of the notes. *Darrington v. Bank*, *supra*.

³⁴⁹ *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903.

³⁵⁰ *U. S. v. Bank of Metropolis*, 15 Pet. 377. And if the government pays a check on a forged indorsement, and fails to give reasonable notice on discovery of the fraud, it will lose its right of action for the recovery of the money, like a private holder. *U. S. v. Central Nat. Bank of Philadelphia*, 6 Fed. 134. So, a state may become liable as an indorser of negotiable railroad bonds. *State v. Cobb*, 64 Ala. 127; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903.

³⁵¹ *Floyd Acceptances*, 7 Wall. 666; *Nelson, Grier, and Clifford, JJ.*, dissenting.

The authority of government agents is matter of public notoriety and must be strictly construed. An agent, for instance, who is authorized to borrow money for a state by a sale of its bonds, cannot, without express authority, make such sale on credit.³⁵²

Where the government has become the holder of a bill of exchange, the indorsers will be discharged by negligence on its part in the same manner as by negligence on the part of an individual holder.³⁵³ But, as has been said, the state cannot be sued upon its obligations, except where provision is made therefor by the constitution of the United States. It cannot be sued upon a warrant given by the state auditor.³⁵⁴ Nor can it be compelled, by bill in equity, to suffer the allowance of a set-off against a claim due to it.³⁵⁵ On the other hand, if it has issued its obligations with a provision that they should be received in payment of debts due the state, it cannot, without violation of the United States constitution, repeal such provision so as to affect obligations so issued and then in circulation.³⁵⁶

³⁵² *State v. Delafield*, 8 Paige (N. Y.) 527.

³⁵³ *U. S. v. Barker*, 12 Wheat. 559.

³⁵⁴ *Green v. State*, 53 Miss. 148; *State v. Dubuclet*, 23 La. Ann. 267. If it has provided by statute for formal suit to ascertain validity of certain bonds, the court will be controlled by the provisions of the statute. *Wright v. Board*, 49 La. Ann. 1213, 22 South. 361.

³⁵⁵ *Raymond v. State*, 54 Miss. 562.

³⁵⁶ *Woodruff v. Trapnall*, 10 How. 190. Under the Virginia statute of 1881, making coupons of state bonds receivable for taxes, and the acts of 1882 (called the "Coupon Killers"), the latter acts were held to be unconstitutional, so far as they impaired the original contract of the bonds, *Poin-dexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903; and constitutional so far as they merely provided difficult formalities in presentation and proof of coupons, *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972; leaving an "adequate remedy" to the taxpayers, and excluding the allowance of a mandamus against the collector, *Moore v. Greenhow*, 114 U. S. 338, 5 Sup. Ct. 1020; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91. And it was finally settled that a proceeding could not be brought in the federal courts against a state officer to restrain him by injunction, or punish him for contempt, being, in effect, a suit against the state, *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; although the supreme court at first entertained suits against such officer for damages, *Carter v. Greenhow*, 114 U. S. 317, 5 Sup. Ct. 928, 962; and injunction, *Marye v. Parsons*, 114 U. S. 325, 5 Sup. Ct. 932, 962; and by mandamus, *Sands v. Edmunds*, 116 U. S. 585, 6 Sup. Ct. 516.

Actions—By and against Public Agents.

§ 351. If a bill or note is made to an agent of the United States for money due to the government, it may bring suit upon it in its own name without indorsement.³⁵⁷ On the other hand, a tax collector, taking a note in his own name for taxes due to the state, cannot sue on it in such name.³⁵⁸ So, a land agent of the government, taking a note in his official capacity for public timber sold by him, cannot sue upon it.³⁵⁹

But while, in general, an agent cannot render his government liable on a note or bill of exchange for want of authority, he will not, on the other hand, make himself individually liable on such paper, if it appear to be executed in his official capacity only.³⁶⁰ Thus, an Indian agent will not become individually liable on an official contract for transportation.³⁶¹ So, the indorsement of a note by "A. B., Sheriff," is notice of his official capacity to all takers, and will not render him personally liable.³⁶²

³⁵⁷ *Dugan v. U. S.*, 3 Wheat. 172; *U. S. v. Boice*, 2 McLean, 352, Fed. Cas. No. 14,619.

³⁵⁸ *Dickson v. Gamble*, 16 Fla. 687.

³⁵⁹ *State v. Boies*, 11 Me. 474. Even though the note be nonnegotiable. *Irish v. Webster*, 5 Me. 171.

³⁶⁰ *Balcombe v. Northup*, 9 Minn. 172 (Gil. 159). So held, also, of a bill drawn on the French government by the French consul general. *Jones v. Le Tombe*, 3 Dall. 384.

³⁶¹ *Parks v. Ross*, 11 How. 362.

³⁶² *Renshaw v. Wills*, 38 Mo. 201.

CHAPTER XI.

CAPACITY—PRINCIPAL AND AGENT.

- I. LIABILITY OF PRINCIPAL.
 - II. LIABILITY OF AGENT.
 - III. DEFENSES.
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I. LIABILITY OF PRINCIPAL.

- § 352. General Principles.
- 353. Parol Appointment.
- 354. Joinder of Principals.
- 355. — Of Agents—Subagents.
- 356. Express Authority.
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- 361. Accommodation and Pledge—Not Included in General Powers.
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- 365. — From Relation of Parties.
- 366. — From Official Employment.
- 367. — For Corporations.
- 368. — From Official Character—President.
- 370. — From Official Character—Cashier.
- 371. — From Official Character—Teller—Secretary—Treasurer.
- 372. — From Official Character—Municipal Officers.
- 373. — From Blanks.
- 374. Ratification—General Principles.
- 375. — What Acts Amount to.
- 376. — By Acquiescence.
- 377. Termination of Agency.

General Principles.

§ 352. Questions of authority to execute commercial paper are similar to questions of the capacity of a maker or indorser. Many states provide expressly by statute for the execution of bills and

notes by an agent.¹ The proper form and manner of execution of such instruments has been already considered in an earlier part of this work.

It is not necessary that an agent should be capable of contracting in his own right. Thus, an infant, a married woman, or an alien may be competent to act as an agent.² So, in times when a slave could not make a contract for himself, he could be the agent of another.³ An agent must, however, have sufficient intelligence to know what he is about. An idiot or insane person cannot, therefore, be an agent.

Parol Appointment.

§ 353. For the purpose of executing such an instrument it is not necessary that the agent's authority should be given in any particular form. His appointment may be a verbal one.⁴ And even the agent of a corporation may be appointed in this manner,⁵ and

¹ Express provision is made for notes executed by an agent in MICHIGAN (1 How. Ann. St. § 1578); NEVADA (1 Comp. Laws 1873, c. 5, § 10); NEW JERSEY (2 Gen. St. p. 2604, § 1); NEW YORK (2 Rev. St. 1875, p. 1160, § 2; 1 Rev. Laws 1813, p. 151); OREGON (Hill's Ann. Laws, § 3189).

In SOUTH CAROLINA a note executed for the maker by an agent, and negotiated by the agent within nine months after his principal's death, is binding on the principal's estate in the hands of a bona fide holder. Rev. St. 1873, p. 319, § 9. See, also, section 356, *infra*.

² Byles, Bills, 32; Chit. Bills, 36; Co. Litt. 52a; 1 Daniel, Neg. Inst. 260; 1 Pars. Notes & B. 91.

³ Governor v. Daily, 14 Ala. 469; Bryant v. Sheely, 5 Dana (Ky.) 530.

⁴ Byles, Bills, 32; Chit. Bills, 36; 1 Daniel, Neg. Inst. 262; 1 Pars. Notes & B. 100; Davison v. Robertson, 3 Dow. 229; Porthouse v. Parker, 1 Camp. 82; Harrison v. Jackson, 7 Term R. 209; Rex v. Bigg, 3 P. Wms. 432; Trundy v. Farrar, 32 Me. 225; Forsyth v. Day, 46 Me. 176; Turnbull v. Trout, 1 Hall (N. Y.) 374; Handyside v. Cameron, 21 Ill. 588; Humphreys v. Wilson, 44 Miss. 328. In Handyside v. Cameron, *supra*, the agent signed the principal's name at his request, in his presence.

⁵ Bank of Columbia v. Patterson, 7 Cranch, 305; Fleckner v. Bank, 8 Wheat, 338, 357; Bank of Washington v. Pierson, 2 Cranch, C. C. 685, Fed. Cas. No. 953; Odd Fellows v. First Nat. Bank of Sturgis, 42 Mich. 461, 4 N. W. 158. Or he may be appointed by a resolution of the directors not reduced to writing and provable by parol. Preston v. Lead Co., 51 Mo. 43.

may, under parol authority, make bills and notes which will be binding upon it.⁶

A verbal authority is not, however, sufficient for the making of a sealed note, except where all distinction between sealed contracts and others has been abolished.⁷ But where verbal authority has been given to an agent to make purchases on credit, and he has given a sealed note in payment, his principal might be liable for the consideration, though not for the note.⁸ And in Tennessee it has been held that a general parol authority to give and transfer notes will render the principal liable on an assignment of a negotiable instrument, although made under seal.⁹

It is evident that an indorsement by an agent in his principal's name and presence, and by his consent, is sufficient to bind the principal.¹⁰ So, where an indorsement is made by one of two payees who are not partners, in the name of both, when the consent of the other, it will be sufficient to bind both, although authorized only by parol.¹¹ But where there is express authority "to draw checks, indorse notes, and generally to do all and every act and deed towards the execution" of the principal's business at a certain bank, the principal cannot limit his liability, so as to exclude any indorsement negotiable at such bank within the language of the power, by showing that the power had been declared verbally by him to relate only to the renewal of certain accommodation paper in a particular transaction.¹²

⁶ Chit. Bills, 36; Co. Litt. 94b; 1 Salk. 191; 1 Edw. Bills, § 62; *Rex v. Bigg*, 3 P. Wms. 432; *Bank of Columbia v. Patterson*, 7 Cranch, 305; *Union Bank of Maryland v. Ridgely*, 1 Har. & G. (Md.) 324. And, in general, neither corporate seal nor resolution of directors is necessary to the validity of a corporation contract. *Hoag v. Lamont*, 60 N. Y. 101.

⁷ *Delius v. Cawthorn*, 13 N. C. 90.

⁸ *Ruffin v. Mebane*, 41 N. C. 507.

⁹ *Bailey v. Rawley*, 1 Swan, 295.

¹⁰ *Woodbury v. Woodbury*, 47 N. H. 11; *Morse v. Green*, 13 N. H. 32; *Haven v. Hobbs*, 1 Vt. 238; *Handyside v. Cameron*, 21 Ill. 588.

¹¹ *Cooper v. Bailey*, 52 Me. 230.

¹² *Mann v. King*, 6 Munf. (Va.) 428.

Joinder of Principals.

§ 354. Where, however, power to execute such paper "for us" is given by several, it extends only to paper executed for them jointly.¹³ But one of several partners may authorize a clerk of the firm to accept bills or make or indorse notes in its name.¹⁴ If, however, the authority is given by one to make notes or bills for him, it will not include bills or notes made for his firm.¹⁵

Nor will a power to make a bill of exchange for the principal include power to give a joint bill in the name of the principal and the agent.¹⁶ So, if power is given to an agent to sign a note, the principal saying that he "did not wish to go out of the family for security," the agent cannot execute a note for the principal with some other person as surety.¹⁷ And an authority given to a wife to indorse a note for her son in the husband's name has been held not to cover the case of a joint note executed by her in his name as a joint maker with another person.¹⁸

Joinder of Agents—Subagents.

§ 355. Again, if the resolution of a board of directors authorizes four of its number to execute an instrument for the corporation, and the paper is executed by only three, the company will not be bound.¹⁹ So, one of several official liquidators, appointed under

¹³ And successive indorsement of all the principals' names is not a proper execution of a power to indorse for them jointly. *Bank of U. S. v. Beirne*, 1 Grat. (Va.) 234, 539. On the other hand, under several powers from A., B., and C., an agent cannot take a note to all, and execute a joint indorsement in the name of all. *Harris v. Johnston*, 54 Minn. 177, 55 N. W. 970.

¹⁴ *Tillier v. Whitehead*, 1 Dall. 269. If one partner, however, indorses the note as his individual act, it will be no confirmation of the agent's authority to act for the firm as makers. *Miller v. House*, 67 Iowa, 737, 25 N. W. 599.

¹⁵ *Attwood v. Munnings*, 7 Barn. & C. 278, 1 Man. & R. 66.

¹⁶ *Stainback v. Read*, 11 Grat. (Va.) 281; *Bryan v. Berry*, 6 Cal. 394.

¹⁷ *First Nat. Bank of Trenton v. Gay*, 63 Mo. 33.

¹⁸ *Cuyler v. Merrifield*, 5 Hun (N. Y.) 559; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228. But see, contra, *Layet v. Gano*, 17 Ohio, 466.

¹⁹ *Ducarry v. Gill*, 4 Car. & P. 121, *Moody & M.* 450.

the statute for winding up a corporation, cannot, by his single acceptance, bind either the company or his co-liquidators.²⁰ And, in general, power conferred on several jointly must be executed by all.²¹ So, if a company, by its directors, authorizes the president and cashier to execute instruments for it, this will not render it liable on a draft executed by the president alone.²²

It is also true that an agent cannot delegate his authority so as to render his principal liable upon a bill or note given by his sub-agent.²³ He may, however, delegate to another the mere manual act of signing the paper in his presence.²⁴ Thus, where a general agent has authority to accept a bill, his bookkeeper may sign the acceptance by his direction so as to bind the principal.²⁵ In like manner, where A. authorizes B. to borrow money for him and give his note for it, and B. borrows the money, and D., at his request and in his presence, signs the note, "A., by D.," this will bind A. as his note.²⁶

Express Authority.

§ 356. Where the power of the agent is a limited one, the principal will not be liable beyond the limits he has assigned, so far as regards original parties to the transaction and others with notice.²⁷ So, where an agent, authorized to draw a check for his principal, has overdrawn his account by collusion with the bookkeeper of the

²⁰ *In re London & M. Bank*, 5 Ch. App. 567.

²¹ *Story*, Ag. § 42; *Union Bank of Maryland v. Beirne*, 1 Grat. (Va.) 226. And see *Rollins v. Phelps*, 5 Minn. 463 (Gil. 373). And a joint power to two persons cannot be executed by the survivor. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180.

²² *Ridgway v. Bank*, 12 Serg. & R. (Pa.) 264. But, if both the officers empowered agree, it seems that one may execute the paper. *Id.*; *Fleckner v. Bank*, 8 Wheat. 362.

²³ 1 *Daniel*, Neg. Inst. 263; 1 *Pars. Notes & B.* 105; *Combe's Case*, 9 Coke, 75; *Palliser v. Ord*, Bunb. 166; *Emerson v. Manufacturing Co.*, 12 Mass. 237; *Brewster v. Hobart*, 15 Pick. (Mass.) 302.

²⁴ *Lord v. Hall*, 8 C. B. 627; *Ex parte Sutton*, 2 Cox, Ch. 84; *Coles v. Trecothick*, 9 Ves. 234.

²⁵ *Commercial Bank of Lake Erie v. Norton*, 1 Hill (N. Y.) 501.

²⁶ *Weaver v. Carnall*, 35 Ark. 198.

²⁷ *Chit. Bills*, 37; *Fenn v. Harrison*, 3 Term R. 757; *East India Co. v. Hensley*, 1 Esp. 111; *Sykes v. Giles*, 5 Mees. & W. 645. Thus, an authority

bank, the principal will not be liable to the bank for such checks drawn in excess of his authority.²⁸ But where the authority was a general one in a letter authorizing the agent to draw on his principal to the amount of £10,000, and the power had been exhausted by drafts to this extent, and a further amount was afterwards obtained by the agent on a similar draft from one who neither knew of the letter of authority nor of the fact that it had been exhausted, recovery on such subsequent bill was allowed against the principal, the money obtained on it having been applied to his use.²⁹ And a clear express authority will bind the principal, even where the agent (a corporation officer) acts in violation of his duty.³⁰ In Louisiana the authority to draw or indorse bills and notes must be "express and special."³¹ And in Kentucky a surety can only be bound by an agent whose authority is in writing.³²

Express Authority Strictly Construed.

§ 357. As a rule, special authority to accept or indorse commercial paper is to be strictly construed.³³ Thus, a power of attorney, enumerating certain objects "and all other acts," will not include power to make a bill of exchange.³⁴ Nor will a power to accept or indorse commercial paper be included in a general power

to execute a note for \$500 will not render the principal liable on a \$1,000 note, even to a bona fide holder. *King v. Sparks*, 77 Ga. 285, 1 S. E. 266.

²⁸ *Union Bank in City of New York v. Mott*, 39 Barb. (N. Y.) 180.

²⁹ *Withington v. Herring*, 5 Bing. 442.

³⁰ *Bryant v. Banque du Peuple* [1893] App. Cas. 170.

³¹ LOUISIANA (Rev. Civ. Code, art. 2997). And see, as to this statute, *People's Bank of New Orleans v. Sealzo*, 127 Mo. 164, 29 S. W. 1032.

³² KENTUCKY (Gen. St. c. 22, § 20). And see *Bramel v. Byron* (Ky.) 43 S. W. 695. But the want of written authority is cured by a ratification in writing. *Riggan v. Crain*, 86 Ky. 249, 5 S. W. 561.

³³ *Byles, Bills*, 33; 1 *Edw. Bills & N.* § 79. Even as to prescribed form of execution. *Dobbins v. Mining Co.*, 75 Ga. 238. Thus, a joint bank account, with authority to the bank to honor the drafts of either of them, will not bind one to an acceptance signed by the other in their joint names. *Odell v. Cormack*, 19 Q. B. Div. 223.

³⁴ *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494. Nor does such power extend to an acceptance, *Attwood v. Munnings*, 7 Barn. & C. 278, 1 Man. & R. 78; or indorsement, *Esdaile v. La Nauze*, 1 Younge & C. Exch. 394.

to transact business, and receive and pay debts,³⁵ or to regulate and take account of earnings, distribute expenses, regulate the running of boats, maintain offices, etc.³⁶

But a power to transact all the principal's business in a certain county has been held to authorize the transfer of a note belonging to the principal.³⁷ So, an authority given by the directors of a corporation to the president, bestowing "full power and control of all its business," will enable him to borrow money for the corporation and execute a note in its name for payment.³⁸ So, where a principal said that he would stand to whatever arrangement his agent made, he was held liable for a note given by the agent in the transaction contemplated.³⁹ So, where he agreed in a letter addressed to the agent "to become responsible for all contracts made by him for machinery," etc., "for the use of his factory."⁴⁰ So, if the principal put money into the hands of his agent with power "to manage, loan, control, and collect," he would have authority to bind his principal by extending the time for payment of a note belonging to him.⁴¹ So, an authority "to sign my name where expedient in the transaction and conduct of such business as to my attorney shall seem meet," will cover a note given by the agent.⁴² But it has been held that a power "to use and sign my name" will

³⁵ Byles, Bills, 33; Chit. Bills, 39; 1 Pars. Notes & B. 106; *Hogg v. Snaith*, 1 Taunt. 347; *Murray v. East India Co.*, 5 Barn. & Ald. 204; *Gardner v. Baillie*, 6 Term R. 591, overruling *Howard v. Baillie*, 2 H. Bl. 618; *Kilgour v. Finlyson*, 1 H. Bl. 155.

³⁶ *Beach v. Vandewater*, 1 Sandf. (N. Y.) 277. So, a power to superintend and manage a business will not include power to make a note for a debt already contracted in it by the principal. *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295.

³⁷ *Newland v. Oakley*, 6 Yerg. (Tenn.) 489.

³⁸ *Castle v. Foundry Co.*, 72 Me. 167. Authority to pay for repairs will authorize the agent's draft on the principal for the amount. *Scotfield v. Warren*, 13 Misc. Rep. 209, 34 N. Y. Supp. 175. But authority to manage a store, and sell and purchase goods for it, will not enable such agent to borrow money, and bind his principal by notes given for such loans. *Perkins v. Boothby*, 71 Me. 91.

³⁹ *Tanner v. Hastings*, 2 Ill. App. 283.

⁴⁰ *Frost v. Wood*, 2 Conn. 23.

⁴¹ *Hurd v. Marple*, 2 Ill. App. 402, 10 Ill. App. 418.

⁴² *Dollfus v. Frosch*, 1 Denio (N. Y.) 367.

not include the execution of a nonnegotiable note for the payment of a debt with a clause for attorney's fees on nonpayment.⁴³ Power to an agent to act in a partition matter for his principal authorizes the execution of a note, if necessary for the transaction of the business.⁴⁴ But, where an agent was put in charge of a tract of land with authority to advance money for the taxes, the principal is not liable on a note given by the agent in the principal's name for such taxes.⁴⁵ So, an agent authorized to make advances on consignments and draw on his principal for the amount cannot draw against consignments made by himself.⁴⁶ An agent may, however, draw in his own name upon his principal in execution of an authority "as my agent to make drafts on me."⁴⁷

Implication from Other Express Powers.

§ 358. It has been held, furthermore, that authority to accept a bill of exchange cannot be implied from an authority to pay it.⁴⁸ Nor will authority to collect rents include the power to indorse a check payable to the principal received in payment for them,⁴⁹ or to give a note for the employment of counsel in making such collection.⁵⁰ Nor will power to collect a bill of exchange include power to sell it.⁵¹ So, an attorney at law receiving an overdue note

⁴³ First Nat. Bank of Trenton v. Gay, 63 Mo. 33.

⁴⁴ Layet v. Gano, 17 Ohio, 466.

⁴⁵ Webber v. College, 23 Pick. (Mass.) 302.

⁴⁶ Schimmelpennich v. Bayard, 1 Pet. 264.

⁴⁶ Merchants' Bank of Canada v. Griswold, 72 N. Y. 472.

⁴⁸ Gould v. Lead Co., 9 Cush. (Mass.) 338.

⁴⁹ Robinson v. Bank, 86 N. Y. 407.

⁵⁰ Layet v. Gano, 17 Ohio, 466.

⁵¹ Goodfellow v. Landis, 36 Mo. 168; Smith v. Johnson, 71 Mo. 382; Thompson v. Elliott, 73 Ill. 221; Padfield v. Green, 85 Ill. 529. So, too, in the case of a power to one joint payee to collect for the other. Ryhiner v. Feickert, 92 Ill. 305. And an agent to hold and collect a note for the payee has no authority to pledge or dispose of it after it becomes due. Templeton v. Poole, 59 Cal. 286. So, power to sell goods and take a note for the principal will not imply power to receive payment of the note after its delivery to the principal. Draper v. Rice, 56 Iowa, 114, 7 N. W. 524, 8 N. W. 797. So, an agent authorized to collect a note is not thereby authorized to give construction to a doubtful word in it so as to bind his principal. Van Vechten v. Smith, 59 Iowa, 173, 13 N. W. 94.

for collection is not thereby authorized to dispose of it.⁵² But authority to transfer is an authority to indorse, where that is necessary.⁵³

An authority given to an agent to sell a note will not include authority to bind the principal by a guaranty of it.⁵⁴ Power to purchase goods and pay for them will not authorize the agent to give a bill or note in payment,⁵⁵ or to accept a bill for the same purpose.⁵⁶ So, authority to sell "for cash" will not authorize an agent to take a note in payment, and the principal may disavow the note and sue for the value of the goods.⁵⁷ So, power to sell goods does not imply power to indorse a note received for them.⁵⁸ So, power to receive money from a third person by drawing upon him does not authorize the agent to draw a bill payable to his own order on such third person.⁵⁹

Construction of Express Powers.

§ 359. An authority "to do all acts in my name concerning certain operations" referred to, and to sign any "company articles," will not render the principal liable on a note given by the agent.⁶⁰ So, where authority is given to an agent to make a note for a particular purpose, he has no authority to do so for any other purpose.⁶¹ Thus, if authorized to buy grain, and draw bills on his principal in payment, he cannot buy tobacco and bind his principal by bills drawn for that.⁶² Or, if authorized to draw a note for dis-

⁵² *Goodfellow v. Landis*, 36 Mo. 168.

⁵³ *Mars v. Mars*, 27 S. C. 132, 3 S. E. 60.

⁵⁴ *Graul v. Strutzel*, 53 Iowa, 712, 6 N. W. 119.

⁵⁵ *Mills v. Carnly*, 1 Bosw. (N. Y.) 159; *Brown v. Parker*, 7 Allen (Mass.) 337.

⁵⁶ *Gould v. Lead Co.*, 9 Cush. (Mass.) 338.

⁵⁷ *State of Wisconsin v. Torinus*, 24 Minn. 332.

⁵⁸ *Bank of Hamburg v. Johnson*, 3 Rich. (S. C.) 42. And power to receive a check is not power to collect it. *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919.

⁵⁹ *Hogarth v. Wherley*, L. R. 10 C. P. 530. So, authority in a corporation officer to sign warehouse receipts is not an authority to issue such receipts in his own favor. *Hanover Nat. Bank of City of New York v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72.

⁶⁰ *Washburn v. Alden*, 5 Cal. 463.

⁶¹ *Nixon v. Palmer*, 8 N. Y. 398.

⁶² *Hopkins v. Blane*, 1 Call (Va.) 361.

count to obtain a loan, he has no power to give a note for groceries purchased by himself so as to bind his principal.⁶³

In like manner, if authorized to make a note payable at a particular bank and to it, he cannot give a note payable in any other way.⁶⁴ Or, if authorized to give a note payable in six months, he cannot give a note payable sooner.⁶⁵ So, if authorized to draw a bill of exchange at four months, he cannot make it payable sooner, so as to bind his principal by antedating it.⁶⁶ But it has been held that authority to renew a note in 60 or 90 days will cover the indorsement of a note payable in 88 days.⁶⁷ And, if the authority designates the amount, a note for a larger sum will not bind the principal.⁶⁸

§ 360. — The acceptor of a bill by his acceptance admits the authority of the drawer as such, where the bill is drawn by an agent; but this does not include an admission of his authority to indorse, though the indorsement was on the bill at the time the acceptance was given.⁶⁹ Where power is given to an agent to obtain discounts for his principal without restriction, power to indorse will be implied,⁷⁰ but not power to pledge a bill as security for the individual debt of the agent.⁷¹

Under the same rule of strict construction it has been held that power to give a bond does not include a note,⁷² or vice versa.⁷³ So, power to give "any note or other instrument of writing" will not

⁶³ *Hortons v. Townes*, 6 Leigh (Va.) 47.

⁶⁴ *Morrison's Ex'r v. Taylor*, 6 T. B. Mon. (Ky.) 82.

⁶⁵ *Patty v. Carswell*, 2 Johns. (N. Y.) 48. But see *Adams v. Flanagan*, 36 Vt. 412, where a 30-day note was considered an immaterial departure from a verbal authority for a 20-day note.

⁶⁶ *Tate v. Evans*, 7 Mo. 419.

⁶⁷ *Bank of State of South Carolina v. Herbert*, 4 McCord (S. C.) 89.

⁶⁸ *King v. Sparks*, 77 Ga. 285, 1 S. E. 266.

⁶⁹ *Robinson v. Yarrow*, 7 Taunt. 455; *Prescott v. Flinn*, 9 Bing. 19.

⁷⁰ *Fenn v. Harrison*, 4 Term R. 177. Although on a previous trial of the same case, where indorsing appeared to have been expressly prohibited by the principal, he was not held liable. *Id.*, 3 Term R. 757.

⁷¹ *Foster v. Pearson*, 1 Crompt., M. & R. 849, 5 Tyrw. 255. Notwithstanding any usage to the contrary. *Id.* As to this, however, see *infra*.

⁷² *School Directors v. Sippy*, 54 Ill. 287. But authority to make a mortgage will include a note secured by it. *Taylor v. Hudgins*, 42 Tex. 244.

⁷³ *Mayor, etc., of Little Rock v. State Bank*, 8 Ark. 227.

authorize a bill single.⁷⁴ Power to purchase land and pay by draft on the principal will not authorize a note by the agent as his attorney.⁷⁵ Power to give a check will not include a bill of exchange,⁷⁶ or a postdated check,⁷⁷ nor will such postdated check be covered by a power "to make, sign, indorse, and accept all checks, notes, drafts, and bills of exchange."⁷⁸ Authority to draw a "company note" will, however, cover a bill of exchange.⁷⁹ But power to accept *for the principal* bills of exchange drawn by his agent or correspondent, it has been held, does not include acceptances on partnership account.⁸⁰ Power to sign as surety will not authorize a note as principal maker.⁸¹

Accommodation and Pledge—Not Included in General Powers.

§ 361. It is also to be observed that the general power to give a bill or note does not include accommodation paper;⁸² although, if such accommodation paper were given by the agent with the principal's consent, and to take up other similar paper upon which he was liable, he would be bound.⁸³

⁷⁴ Alder v. Buckley, 1 Swan (Tenn.) 69.

⁷⁵ Sage v. Sherman, Lator, Supp. (N. Y.) 147.

⁷⁶ Bank of Deer Lodge v. Hope Min. Co., 3 Mont. 146.

⁷⁷ Forster v. Mackreth, L. R. 2 Exch. 163.

⁷⁸ Nash v. Mitchell, 71 N. Y. 199, 3 Abb. N. C. 171.

⁷⁹ Tripp v. Paper Co., 13 Pick. (Mass.) 291.

⁸⁰ Attwood v. Munnings, 7 Barn. & C. 278, 1 Man. & R. 78. See, too, Bank of Bengal v. Macleod, 7 Moore, P. C. 35. So, an authority to draw drafts on a joint bank account will not authorize the acceptance of a bill drawn on both, although done in winding up their joint business. Odell v. Cormack, 19 Q. B. Div. 223.

⁸¹ Farmington Sav. Bank v. Buzzell, 61 N. H. 612.

⁸² Stainer v. Tysen, 3 Hill (N. Y.) 279; Sage v. Sherman, Lator, Supp. (N. Y.) 147; Farmers' Bank v. Empire Stone-Dressing Co., 5 Bosw. (N. Y.) 275; Wallace v. Bank, 1 Ala. 565; German Nat. Bank v. Studley, 1 Mo. App. 260. So, for the debt of a third person, Boord v. Strauss (Fla.) 22 South. 713; or of the agent himself, Dowden v. Cryder, 55 N. J. Law, 329, 26 Atl. 941; or a check as corporation agent for his individual debt, Hnil v. Allen, 87 Hun. 516, 34 N. Y. Supp. 577. But see, as to effect of representations by agent,

⁸³ German Nat. Bank v. Studley, 1 Mo. App. 260.

Authority to "sell, indorse, and assign" a note will not include a transfer of it as collateral for the individual note of the agent which he has had discounted.⁸⁴ Nor, as we have seen, can an agent, authorized to discount his principal's paper, pledge it for his own debt,⁸⁵ or even for his principal;⁸⁶ although an exception seems to have been made to this rule by the usage of London in favor of a broker pledging such paper, with other like paper of his principal, in order to effect the object desired by his principal.⁸⁷

It has also been held that power to make and discount notes does not include the power to give renewals.⁸⁸ Nor can an agent alter a note by changing the order of the indorsements upon it.⁸⁹ And the fact of their being accommodation indorsements implies no power of alteration.⁹⁰ So, it seems that a general power to draw bills of exchange is limited to the case where the principal has funds or credit in the drawee's hands to be drawn upon.⁹¹ This is true, at least, where the principal specifies, in the authority given, that such bills are to be drawn when he has an account to draw against.⁹²

North River Bank v. Aymar, 3 Hill (N. Y.) 262; *Kingsley v. Bank*, 3 Yerg. (Tenn.) 107.

⁸⁴ *Bank of Bengal v. Macleod*, 7 Moore, P. C. 35; *Bank of Bengal v. Fagan*, *Id.* 61.

⁸⁵ *Haynes v. Foster*, 2 Crompt. & M. 237. Or for that of another. *Ft. Dearborn Nat. Bank of Chicago v. Seymour* (Minn.) 73 N. W. 724. And the burden of proving authority is on the pledgee. *Norfolk Nat. Bank v. Newnow*, 50 Neb. 429, 69 N. W. 936; *Security Bank of Minnesota v. Kingsland*, 5 N. D. 263, 65 N. W. 697.

⁸⁶ *Shaw v. Nail Co.*, 144 N. Y. 220, 39 N. E. 73, affirming 78 Hun, 7, 29 N. Y. Supp. 254. Or to give the guaranty of a corporate principal for a third person; the burden of proving such authority being on the holder. *Dobson v. More*, 164 Ill. 110, 45 N. E. 243.

⁸⁷ *Byles, Bills*, 36; *Foster v. Pearson*, 1 Crompt., M. & R. 849, 5 Tyrw. 255.

⁸⁸ *Ward v. Bank*, 7 T. B. Mon. (Ky.) 93.

⁸⁹ *Bank of South Carolina v. McWillie*, 4 McCord (S. C.) 438.

⁹⁰ *Aetna Nat. Bank v. Winchester*, 43 Conn. 391.

⁹¹ *Craighead v. Peterson*, 10 Hun (N. Y.) 596; *Crescent City Bank v. Hernandez*, 25 La. Ann. 43; *Stainback v. Read*, 11 Grat. (Va.) 281.

⁹² *Craighead v. Peterson*, *supra*.

Authority Implied from Declarations and Conduct.

§ 362. The authority of an agent need not be expressly conferred on him, but may be implied from his conduct, coupled with that of his principal.⁹³ So, a corporation may be bound by the act of an agent, his authority being inferred from facts and circumstances, and not shown by any writing.⁹⁴ And it is enacted by statute, in England, that bills and notes accepted, made, or indorsed in the name of a company, under its authority, express or implied, shall be binding upon it.⁹⁵ So, where drafts are drawn by an agent without further written authority than a letter from the principal asking the person addressed to give A. any assistance he might need as his agent, and charge it to him, other acts of the agent of like character, confirmed by the principal, are admissible to strengthen the implication of authority on his part to make the draft in question.⁹⁶

But the acts and declaration of the agent alone, unsupported by act or statements of the principal, cannot be used as evidence of the agency.⁹⁷ It has been held, however, that frequent and usual acts of the agent in subscribing his principal's name, not disavowed by the principal, are sufficient to charge him without any express pow-

⁹³ Chit. Bills, 40; 1 Daniel, Neg. Inst. 273; Bank of Columbia v. Patterson, 7 Cranch, 209; Narragansett Bank v. Atlantic Silk Co., 3 Mete. (Mass.) 282; Davison v. Robertson, 3 Dowl. 229; Neal v. Erving, 1 Esp. 61; Haughton v. Ewbank, 4 Camp. 188; Valentine v. Packer, 5 Pa. St. 333; Union Bank of Maryland v. Ridgely, 1 Har. & G. (Md.) 324, 419; Humphreys v. Wilson, 43 Miss. 328; Wheeler v. Benton, 67 Minn. 293, 69 N. W. 927. It has been held that power to indorse for a corporation will even be presumed from the fact of indorsement. Citizens' Nat. Bank of Tacoma v. Wintler, 14 Wash. 558, 45 Pac. 38. But in Louisiana an express power is necessary for making a promissory note. Nugent v. Hickey, 2 La. Ann. 358; Avery v. Lauve, 1 La. Ann. 457. See § 356, supra.

⁹⁴ American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496; First Nat. Bank v. North Missouri, etc., Co., 86 Mo. 125; Burch v. West, 134 Ill. 260, 25 N. E. 658.

⁹⁵ Lindus v. Melrose, 27 Law J. Exch. 326, 2 Hurl. & N. 293; 25 & 26 Vict. c. 89, § 47, amended by 30 & 31 Vict. c. 131.

⁹⁶ Friedlander v. Cornell, 45 Tex. 585.

⁹⁷ Poore v. Magruder, 24 Grat. (Va.) 197; Streeter v. Poor, 4 Kan. 412; Germania Safety-Vault & Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797; Union School Tp. v. First Nat. Bank, 102 Ind. 464, 2 N. E. 194.

er having been given.⁹⁸ So, if the agent has given a note in the principal's business and for his benefit, authority may be implied from this fact, as well as from acts of the principal or the custom of his business.⁹⁹ In connection with such circumstances, the agent's own declarations are proper evidence to be submitted to a jury upon the question of agency.¹⁰⁰ If the authority has been conferred by parol, it may be proved by the testimony of the agent, as by that of any other witness.¹⁰¹ And even where the express power given to a company's agent extends only to notes, of which the consideration has gone immediately to its use, it has been held that further authority may be proved by admissions of a member of the company.¹⁰²

Authority Implied from Recognition of Similar Acts.

§ 363. Agency will not, however, be implied from earlier conduct of the principal, unless it amount to a plain recognition of the agent's action in the particular case or in other similar cases.¹⁰³ Thus, it has been held that the fact that the agent managed the principal's store, and had transacted banking business for him, and had sold a bill of exchange, and renewed a note in his name, will not amount to evidence of authority to make a note.¹⁰⁴ On the other hand, payment by a principal of previous acceptances given by the agent is presumptive evidence of the agent's authority to give an acceptance.¹⁰⁵

⁹⁸ *Neal v. Erving*, 1 Esp. 61; *Haughton v. Ewbank*, 4 Camp. 88; *Watkins v. Vince*, 2 Starkie, 368. So, too, the receipt of the money by an undisclosed principal, using the name of an irresponsible agent. *Harper v. Bank*, 54 Ohio St. 425, 44 N. E. 97.

⁹⁹ *Hunt v. Chapin*, 6 Lans. (N. Y.) 139.

¹⁰⁰ *National Mechanics' Bank v. National Bank*, 36 Md. 5.

¹⁰¹ *Gould v. Lead Co.*, 9 Cush. (Mass.) 338.

¹⁰² *Odiorne v. Maxcy*, 15 Mass. 39.

¹⁰³ The case must be strictly similar; e. g. an accommodation indorsement with security is no precedent for a second indorsement without security. *Usher v. Skate Co.*, 163 Mass. 1, 39 N. E. 416. Much less, the execution of notes in the principal's name without his knowledge, even though the proceeds had been partly applied to his debts. *First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun. 412, 9 N. Y. Supp. 859.

¹⁰⁴ *Smith v. Gibson*, 6 Blackf. (Ind.) 369.

¹⁰⁵ *Byles, Bills*, 34; *Chit. Bills*, 41; *Barber v. Gingell*, 3 Esp. 60; *Llew-*

The recognition and payment by a father of previous indorsements by his son, without any disclaimer until after the son had absconded, amounts to an implied authority to the son to indorse for him.¹⁰⁶ So, it has been held that where a son has been shown to have signed bills of exchange three or four times for his father, and they have been recognized by him, this is sufficient to render admissible as evidence a guaranty in the father's name by the son, or in his handwriting, so as to leave the question one of fact for the jury.¹⁰⁷ Recognition, however, by the father of a single such instrument, or silence on his part on receiving notice of a note forged in his name by his son, will not imply any authority to give such note.¹⁰⁸ Nor can the son's authority to sell a note belonging to his father be implied either from possession by him with authority to receive the money due on it or from his having in several instances borrowed money for his father.¹⁰⁹ But if the father has previously paid notes forged in his name by his son, knowing them to be such, this would be admissible against him as evidence of an authority.¹¹⁰ So, if he had knowingly paid acceptances of like character.¹¹¹ But the propriety of drawing such inferences as to authority by the principal from payment of a previous forgery has been denied.¹¹²

In order that authority to bind the principal by a bill or note may be implied, by way of estoppel, from previous recognition on his part of similar acts, it is necessary that the other have taken the instrument in question on the strength of such previous recognition.¹¹³ And it has been held that one who knowingly allows his agent to indorse notes and procure discounts in his name, without

ellyn v. Winckworth, 13 Mees. & W. 598; *Morris v. Bethell*, L. R. 5 C. P. 51; *Kelley v. Lindsey*, 7 Gray (Mass.) 287. And evidence of such former habit may go to the jury, to support the allegation of authority from the principal. *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501.

¹⁰⁶ *Abeel v. Seymour*, 6 Hun (N. Y.) 656.

¹⁰⁷ *Watkins v. Vince*, 2 Starkie, 368.

¹⁰⁸ *Greenfield Bank v. Crafts*, 2 Allen (Mass.) 269.

¹⁰⁹ *Ames v. Drew*, 31 N. H. 475.

¹¹⁰ *Hammond v. Varian*, 54 N. Y. 398.

¹¹¹ *Cash v. Taylor*, Lloyd & W. 178; *Llewellyn v. Winckworth*, 13 Mees. & W. 598.

¹¹² *Whiteford v. Munroe*, 17 Md. 135; *Walters v. Munroe*, Id. 150; *Ducougé v. Forgay*, 15 La. Ann. 37.

¹¹³ *St. John v. Redmond*, 9 Port. (Ala.) 428; *Rawson v. Curtiss*, 19 Ill.

taking any steps to make known the agent's want of authority, makes himself liable by such passive conduct.¹¹⁴

Implication Must be Necessary.

§ 364. Where authority to make commercial paper is inferred, this must be by necessary implication. It cannot be implied merely from an authority to purchase goods for the principal.¹¹⁵ So, authority to take from a buyer of goods an acceptance of a draft, with the drawer's name blank, made payable "to my order," and fraudulently filled and misappropriated by the agent, is not to be implied either from a letter of the principal to the agent, saying he should like to draw upon the buyer for the goods, nor from any similar previous transaction.¹¹⁶ On the other hand, where goods have been purchased for the principal, and a draft on the principal given by the agent in payment, authority to give the draft will be implied from his receiving the goods after full information as to the transaction.¹¹⁷

So, authority to receive payment of a note may be implied from its possession by the agent;¹¹⁸ but not, as has been already said, authority to transfer it.¹¹⁹ And possession by an agent of an *undorsed* note gives him, it has been held, no authority to receive payment.¹²⁰ But such authority may be implied from his having received already a partial payment of it with the principal's knowledge and without dissent on his part.¹²¹ So, if an agent receives author-

456; *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344, 6 N. W. 823; *Odell v. Cormack*, 19 Q. B. Div. 223.

¹¹⁴ *Morse v. Diebold*, 2 Mo. App. 163.

¹¹⁵ *Temple v. Pomroy*, 4 Gray (Mass.) 128; *Paige v. Stone*, 10 Mete. (Mass.) 160.

¹¹⁶ *Hogarth v. Wherley*, L. R. 10 C. P. 630.

¹¹⁷ *Nutting v. Sloan*, 57 Ga. 392.

¹¹⁸ *Morris v. Foreman*, 1 Dall. 193; *Merritt v. Cole*, 9 Hun (N. Y.) 98, affirmed 14 Hun (N. Y.) 324; *Murrell v. Jones*, 40 Miss. 565; *Streeter v. Poor*, 4 Kan. 412; *Florat v. Marchand*, 26 La. Ann. 741.

¹¹⁹ *Scott v. Stevenson*, 3 Hun (N. Y.) 352.

¹²⁰ *Doubleday v. Kress*, 50 N. Y. 410.

¹²¹ *Wardrop v. Dunlop*, 1 Hun (N. Y.) 325. Or from long-continued payments of interest. *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423.

ity to employ servants, this has been held to authorize payment of their wages by a note given by him for that purpose.¹²²

Authority—Implied from Relation of Parties.

§ 365. The authority of one person to make commercial paper or indorse it for another is often implied from their relation to one another.¹²³ Thus, a cashier may bind his bank by giving a certificate of deposit, and in such case the cashier's authority may be shown from the custom of the bank.¹²⁴ So, partners may bind their firm by commercial paper executed for it. But this does not extend to bills or notes executed for one another, although it has been held that previous knowledge or acknowledgment by the partner whose name is used is admissible evidence of agency, as in other cases.¹²⁵ If, however, one partner has received authority from another to negotiate a single note belonging to him, authority cannot be implied from this to negotiate two such notes, and the transfer of the latter will not be binding on the principal.¹²⁶ But it has been held that power to draw a bill of exchange is admissible as evidence to a jury from which they may infer power to indorse one.¹²⁷

Authority Implied from Official Employment.

§ 366. Authority to make or indorse commercial paper may often be implied from the nature of the agent's employment.¹²⁸ Such authority belongs to a general agent or factor, and a principal will be liable for all his acts.¹²⁹ Although the authority of such agent

¹²² James v. Lewis, 26 La. Ann. 664.

¹²³ As to agency of husband and wife for one another. see § 322, supra.

¹²⁴ Barnes v. Bank, 19 N. Y. 152, 159. And such certificate does not come within the statute requiring bills and notes issued for circulation as money to be signed by the president and cashier. *Id.*

¹²⁵ Stroh v. Hinchman, 37 Mich. 490.

¹²⁶ Callender v. Golsan, 27 La. Ann. 311.

¹²⁷ Prescott v. Flinn, 9 Bing. 19, 2 Moore & S. 22.

¹²⁸ Trundy v. Farrar, 32 Me. 225; Forsyth v. Day, 46 Me. 176.

¹²⁹ *Chit. Bills*, 37; 1 *Edw. Bills & N.* § 79. So, a general agent appointed to carry on lumbering business for a company may give a company note for services rendered in that business. *Tappan v. Bailey*, 4 Mete. (Mass.) 529.

or factor to pledge his principal's goods did not exist until given by the statute of 6 Geo. IV., he was held to have the power at common law as to bills of exchange.¹³⁰ So, where a firm is engaged in business as a dealer in commercial paper, authority will be implied in its general cashier and financial agent to give checks and indorsements.¹³¹ So, a corporation will be bound by an acceptance by its general agent on account of goods consigned to it for sale on commission.¹³² So, where the principal's business is managed by an agent who is the ostensible principal, the principal will be bound by his acceptance, although expressly forbidden in his instructions.¹³³ So, a corporation will be liable on a note incidental to its business given by its general agent.¹³⁴

But it will not be inferred that an agent for managing a farm has authority to bind his principal by giving a bill of exchange.¹³⁵ Nor can the manager of a store or business do so;¹³⁶ nor the master¹³⁷ or supercargo of a vessel;¹³⁸ nor a merchant's clerk.¹³⁹ Nor can a clerk acting outside of his regular employment, and without authority, bind his principal by a bill of lading.¹⁴⁰ So, a sales agent

¹³⁰ *Newsome v. Thornton*, 6 East, 21; *Martini v. Coles*, 1 Maule & S. 140; *Solly v. Rathbone*, 2 Maule & S. 298; *Guichard v. Morgan*, 4 Moore, 36.

¹³¹ *Edwards v. Thomas*, 66 Mo. 468.

¹³² *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44.

¹³³ *Edmunds v. Bushell*, L. R. 1 Q. B. 97, 35 Law J. 21. But see, contra, as to the power of a general agent to accept a bill of exchange, *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 619.

¹³⁴ *Wallace v. Lamson*, 20 La. Ann. 243.

¹³⁵ *Davidson v. Stanley*, 2 Man. & G. 721; *Nugent v. Hickey*, 2 La. Ann. 358; *Hills v. Upton*, 24 La. Ann. 427; *Meyer v. Baldwin*, 52 Miss. 263; *Robertson v. Levy*, 19 La. Ann. 327.

¹³⁶ *Smith v. Gibson*, 6 Blackf. (Ind.) 369; *Helena Nat. Bank v. Rocky Mountain Tel. Co.* (Mont.) 51 Pac. 829; *Connell v. McLoughlin*, 28 Or. 230, 42 Pac. 218; *Fairly v. Nash*, 70 Miss. 193, 12 South. 149. But where there is no treasurer the general manager can indorse for collection. *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561, 14 N. Y. Supp. 16.

¹³⁷ Either to draw a bill of exchange. *Bowen v. Stoddard*, 10 Mete. (Mass.) 375; or accept it, *May v. Kelly*, 27 Ala. 497. Nor can he, except in case of sudden and unforeseen necessity, draw a bill against the ship's cargo. *Newhall v. Dunlap*, 14 Me. 180.

¹³⁸ *Scott v. McLellan*, 2 Me. 199.

¹³⁹ *Terry v. Fargo*, 10 Johns. (N. Y.) 114.

¹⁴⁰ *Dows v. Perrin*, 16 N. Y. 325.

cannot take a note to his company, and transfer it by his own indorsement as its agent.¹⁴¹ In cases of this sort, the question whether an authority can be inferred will sometimes depend on whether the giving of such paper has been for goods or other things necessary to the transaction of the principal's business.¹⁴² An auctioneer's clerk has not, in general, authority to bind his principal by such paper.¹⁴³ Neither has the clerk of a steamboat,¹⁴⁴ nor the purchasing agent of a carriage factory.¹⁴⁵ So, an attorney at law receiving a note for collection has no authority to transfer it.¹⁴⁶ And this is true of other collecting agents.¹⁴⁷ As to the authority of an agent inferable from the possession of a bill or indorsement in blank, the reader is referred to another part of this work.

Corporate Authority Implied.

§ 367. It has already been said that authority from a corporation may be implied as from an individual.¹⁴⁸ If, however, its charter describes a particular way in which authority to act for it must be conferred, this way must be followed, and no other will be sufficient.¹⁴⁹ But a statutory requirement as to the method of ex-

¹⁴¹ *Englehart v. Plow Co.*, 21 Neb. 41, 31 N. W. 391.

¹⁴² *Odiorne v. Maxey*, 13 Mass. 178.

¹⁴³ *Entz v. Mills*, 1 McMul. (S. C.) 453.

¹⁴⁴ *Anderson v. Irwin*, 7 La. Ann. 494.

¹⁴⁵ *Paige v. Stone*, 10 Metc. (Mass.) 160.

¹⁴⁶ *Russell v. Drummond*, 6 Ind. 216.

¹⁴⁷ *Graham v. Institution*, 46 Mo. 187. So, a selling agent cannot receive checks in payment, and indorse them. *Jackson v. Bank*, 92 Tenn. 154, 20 S. W. 802.

¹⁴⁸ *Lester v. Webb*, 1 Allen (Mass.) 34; *Melledge v. Iron Co.*, 5 Cush. (Mass.) 158, 175; *Fay v. Noble*, 12 Cush. (Mass.) 1, 16; *Williams v. Cheney*, 3 Gray (Mass.) 215; *Conover v. Insurance Co.*, 1 N. Y. 290. But even the directors cannot authorize a note which the company could not make, such as a gratuity to one of the officers. *Doe v. Coal Co.*, 78 Fed. 62.

¹⁴⁹ *McCullough v. Moss*, 5 Denio (N. Y.) 567, 575; *Cattron v. Society*, 46 Iowa, 106. Thus, the rector and wardens cannot by their note bind a church corporation whose power of action is vested by charter in the rector, wardens, and vestry. *Episcopal Charitable Soc. v. Episcopal Church in Dedham*, 1 Pick. (Mass.) 372. So, if the charter of a bank requires its bills to be signed by the president and cashier, the corporation will not be liable for bills signed by the vice president and assistant cashier. *Planters'*

cuting notes and bills issued by a bank for circulation as money is not to be applied to certificates of deposit or other contracts not made for that purpose.¹⁵⁰ And where money is borrowed by an officer of the corporation upon notes belonging to it, and is applied to its use, with the knowledge and consent of the trustees, it amounts to a recognition by the company of the action of its agent, and binds it, although the statute required a vote of the trustees for a valid transfer of its securities.¹⁵¹ But, where the by-laws of a corporation require indorsements for it to be made by the secretary, an indorsement by the president to a director of the corporation chargeable with knowledge of such by-laws will not be binding upon it.¹⁵² The maker of a note held and transferred by a corporation cannot object to the informal manner of the transfer, where the statute (as in a case requiring a previous resolution of the directors) is designed manifestly only for the protection of the corporation and its creditors.¹⁵³

The best, though not the only, evidence of authority from a corporation to its agent is to be found in its own minutes and other records.¹⁵⁴ But evidence that an agent has been acting as cashier, and that his acts as such in duties properly belonging to such officer

& Mechanics' Bank of Dalton v. Erwin, 31 Ga. 371. But the bills intended in such statutory requirement are only bank bills intended for circulation. Paine v. Stewart, 33 Conn. 516; Barnes v. Bank, 19 N. Y. 152, 157.

¹⁵⁰ Safford v. Wyckoff, 4 Hill (N. Y.) 442, 462; Barnes v. Bank, *supra*.

¹⁵¹ Creswell v. Lanahan, 101 U. S. 347. So, where the note was made by the directors. American Exch. Nat. Bank of New York v. First Nat. Bank of Spokane Falls, 27 C. C. A. 274, 82 Fed. 961.

¹⁵² Leavitt v. Peat Co., 6 Blatchf. 139, Fed. Cas. No. 8,170. On the other hand, the corporation may become bound by its own business usage, by a note signed by the president and treasurer, although its by-laws required the signature of the secretary. Milbank v. De Riesthal, 82 Hun, 537, 31 N. Y. Supp. 522.

¹⁵³ Elwell v. Dodge, 33 Barb. (N. Y.) 336.

¹⁵⁴ Owings v. Speed, 5 Wheat. 420; Clark v. Manufacturing Co., 15 Wend. (N. Y.) 256; Thayer v. Insurance Co., 10 Pick. (Mass.) 326; Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 286. But such proof is not necessary. Topping v. Bickford, 4 Allen (Mass.) 120; Bank of U. S. v. Dandridge, 12 Wheat. 64, so holding as to proof of approval of a cashier's official bond. So its by-laws are admissible to define the manager's authority. Railway Equipment & Publication Co. v. Lincoln Nat. Bank, 82 Hun, 8, 31 N. Y. Supp. 44.

have been recognized by resolution of the directors, may be sufficient proof of his official position.¹⁵⁵ And where one acts and is held out as the officer of a corporation it will be presumed that he has been elected and qualified as such.¹⁵⁶

Corporation Officers—President.

§ 368. The acts of a corporation agent will bind the corporation within their official scope.¹⁵⁷ And an indorsement by an officer of a corporation is prima facie the act of the corporation.¹⁵⁸ An officer, however, who has no connection with the business of the corporation, has no authority to give a bill or note for it.¹⁵⁹

The directors are themselves, as a body, the source of authority,¹⁶⁰

¹⁵⁵ *Barrington v. Bank*, 14 Serg. & R. (Pa.) 405, 421. See, too, *Baldwin v. Bank*, 1 Wall. 234.

¹⁵⁶ *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282, 289; *Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co.*, 159 Mass. 505, 34 N. E. 1083. And, where his election has been irregular, the company will still be bound by its recognition of his acts as treasurer. *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

¹⁵⁷ *Merchants' Bank v. State Bank*, 10 Wall. 604, 644; *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539; *Moran v. Commissioners*, 2 Black, 722; *Com. v. Select Councils of City of Pittsburg*, 34 Pa. St. 495, 519; *Com. v. Commissioners of Allegheny Co.*, 37 Pa. St. 277, 287; *Elwell v. Dodge*, 33 Barb. (N. Y.) 336. And it is not necessary that the agent's act be performed at the company's office. *Merchants' Bank v. State Bank*, supra; *Bissell v. Bank*, 69 Pa. St. 415; *Pendleton v. Bank*, 1 T. B. Mon. (Ky.) 121.

¹⁵⁸ *Frye v. Tucker*, 24 Ill. 180; *First Nat. Bank of Freeport v. Compo-Board Mfg. Co.*, 61 Minn. 274, 63 N. W. 731; *American Exch. Nat. Bank v. Oregon Pottery Co.*, 55 Fed. 265 (holding the apparent authority conclusive in favor of a bona fide holder, and, although dated before his appointment, it will be presumed to have been given afterwards); *School Dist. v. First Nat. Bank of Xenia*, 19 Neb. 89, 26 N. W. 912. And the use of the corporate seal raises a presumption of the officer's authority. *McDonald v. Chisholm*, 131 Ill. 273, 23 N. E. 596.

¹⁵⁹ *Ehrgott v. Manufactory*, 16 Kan. 486.

¹⁶⁰ *Kneeland v. Railway Co.*, 167 Mass. 161, 45 N. E. 86. And, where they have designated an agent, the holder of paper executed in due form is not required to verify the election and official standing of the directors. *Mahony v. Mining Co.*, L. R. 7 H. L. 869. But, without formal appointment, even a majority cannot bind the corporation by their signatures. *People's Bank v. St. Anthony's Church*, 39 Hun (N. Y.) 498.

except so far as they are restricted by charter or by-laws. Thus, the directors of a banking company may authorize any agent by power of attorney to transfer a note belonging to the company.¹⁶¹ So, they may authorize the president and cashier to borrow money and give drafts for it in the company's name.¹⁶² And it has been held that the members of a Masonic lodge may authorize their presiding officer to bind it by a note.¹⁶³ So, a note or acceptance given by the president of a bank, who is also its general agent and manager, with the knowledge and approval of the directors, will bind the bank.¹⁶⁴

The corporation will be liable on a note made in its name by its president, where the proceeds went to its use,¹⁶⁵ or where the note was used to purchase goods in its ordinary business,¹⁶⁶ or where similar acts of the president, amounting to a custom, have been recognized by it.¹⁶⁷ So, the vice president, as acting president, may

¹⁶¹ *Northampton Bank v. Pepoon*, 11 Mass. 288. And a blank indorsement by such attorney is sufficient. *Id.*

¹⁶² *Ridgway v. Bank*, 12 Serg. & R. (Pa.) 256. *Ex officio*, the president has no authority to sign the company's name to a check. *Putnam v. U. S.*, 162 U. S. 687, 16 Sup. Ct. 923. But see, as to checks signed by president and secretary, by long usage, and as to a note so signed by express authority of the board on the eve of its removal, *Mining Co. v. Anglo-California Bank*, 104 U. S. 192.

¹⁶³ *Ferris v. Thaw*, 5 Mo. App. 279, 72 Mo. 446.

¹⁶⁴ *Libby v. Bank*, 99 Ill. 622.

¹⁶⁵ *Grant v. George C. Treadwell Co.*, 1 App. Div. 367, 37 N. Y. Supp. 392; *National Spraker Bank of Canajoharie v. George C. Treadwell Co.*, 80 Hun, 363, 30 N. Y. Supp. 77; *City Electric St. Ry. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 34 S. W. 89; *Tuskaloosa Cotton Seed Oil Co. v. Perry*, 85 Ala. 158, 4 South. 635; *Central Trust Co. v. Cook Co. Nat. Bank*, 15 Fed. 885. See, too, *Morris v. Griffith, etc., Wedge Co.*, 69 Fed. 131. So, a note signed by the president and the secretary. *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419. So, where the note was made by the president in carrying out a duly-authorized agreement which he had executed for the company. *Melton v. Chisholm*, 131 Ill. 273, 23 N. E. 596. But the burden of proof of authority is on the holder. *Fifth Nat. Bank of Providence v. Navassa Phosphate Co.*, 57 N. Y. Super. Ct. 168, 6 N. Y. Supp. 1.

¹⁶⁶ *Siebe v. Machine Works*, 86 Cal. 390, 25 Pac. 14.

¹⁶⁷ *National Park Bank v. German-American Mt. Warehousing & Security Co.*, 53 N. Y. Super. Ct. 367; *Martin v. Manufacturing Co.*, 44 Hun (N. Y.) 130.

borrow money for the company in the course of its business;¹⁶⁸ or may make a delivery of its bonds, payable to bearer, binding in favor of bona fide holders at least.¹⁶⁹

But the president or vice president cannot, without special authority, make a corporation note or certificate of deposit to himself;¹⁷⁰ nor certify his own check;¹⁷¹ nor pledge the company's bonds to himself;¹⁷² nor authorize the treasurer to make a note to them both for his personal use.¹⁷³

In general, by virtue of his office, the president of an incorporated company has power to indorse and transfer negotiable paper belonging to such company.¹⁷⁴ He may bind his company by indorsement of such paper.¹⁷⁵ And he may transfer such paper without express authority.¹⁷⁶ So, too, the authority to transfer may be presumed from the face of a note itself, as in the case of a note made

¹⁶⁸ *Chemical Nat. Bank of New York v. Armstrong*, 76 Fed. 339. By virtue of usage and long dealings. *Armstrong v. Bank*, 27 C. C. A. 601, 83 Fed. 556.

¹⁶⁹ *Pittsburgh, C., C. & St. L. Ry. Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596. So, he may sign the coupons, although they were referred to in the collateral mortgage as signed by the president. *Conshohocken Tube Co. v. Iron-Car Equipment Co.*, 161 Pa. St. 391, 28 Atl. 1119.

¹⁷⁰ *Chemical Nat. Bank v. Armstrong*, 13 C. C. A. 47, 65 Fed. 573; *Smith v. Association*, 78 Cal. 289, 20 Pac. 677. Although for a debt justly due him.

¹⁷¹ *Clafflin v. Bank*, 25 N. Y. 293.

¹⁷² Even as trustee for another. *Hook v. Ayers*, 26 C. C. A. 257, 80 Fed. 978.

¹⁷³ *Chemical Nat. Bank v. Wagner*, 93 Ky. 525, 20 S. W. 535.

¹⁷⁴ *Thomas v. Bank*, 40 Neb. 501, 58 N. W. 943, affirmed in 46 Neb. 861, 65 N. W. 895; *United States Nat. Bank v. First Nat. Bank*, 24 C. C. A. 597, 79 Fed. 296; *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,683. So, too, a transfer with guaranty by the vice president, acting without express authority, but with the knowledge and consent of the president and cashier. *People's Bank v. National Bank*, 101 U. S. 181.

¹⁷⁵ *Topping v. Bickford*, 4 Allen (Mass.) 120; *Palmer v. Bank*, 78 Ill. 380; *Irwin v. Bailey*, 8 Biss. 523, Fed. Cas. No. 7,079. See, too, *Elwell v. Dodge*, 33 Barb. (N. Y.) 336. But he cannot bind the company by an accommodation indorsement. *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167.

¹⁷⁶ *Aspinwall v. Meyer*, 2 Sandf. (N. Y.) 180. And the maker of a note cannot question the payee's capacity as a corporation to transfer it, especially at suit of a holder for value. *Id.*

payable to the president as such.¹⁷⁷ And even an indorsement by the ex-president of a corporation of a note payable to the company will be sufficient, where the proceeds of the transfer have gone to the company.¹⁷⁸ And a fortiori, the indorsement by the president of a note payable to his order as such will transfer the company's interest in the note, where the indorsement has been expressly authorized by a vote of the board of directors.¹⁷⁹

§ 369. — But the president of a company has no power to surrender its rights or assets without express authority. He cannot, for instance, bind the company by an agreement to give up a note belonging to it in consideration of bank stock sold by the maker of the note to him.¹⁸⁰ Nor, it seems, can he give a receipt to the maker of a note, which belongs to the company, showing the note to be a mere voucher or memorandum.¹⁸¹ Although the cashier of a bank is the proper officer to transfer or accept negotiable paper for it, the president may, by force of usage, in the absence of the cashier and while his place is supplied by a temporary cashier, bind the bank by an indorsement or by signing a draft or check.¹⁸² When the management of a corporation is, however, expressly lodged by its charter in a board of directors, the president and cashier have no power, without express authority from such directors, to transfer its assets to a creditor as security for its debts.¹⁸³

So, where an insurance company has received notes for advance premiums, its president has no authority to surrender such notes. Nor, it seems, can the president agree with an indorser of paper held by the bank that he shall not be liable on his indorsement;¹⁸⁴ or that collateral pledged as security for notes shall not be sold.¹⁸⁵ So, where a note has been made by a bank to its president and in-

¹⁷⁷ *Nichols v. Frothingham*, 45 Me. 220.

¹⁷⁸ *Patten v. Moses*, 49 Me. 255.

¹⁷⁹ *Spear v. Ladd*, 11 Mass. 94.

¹⁸⁰ *Rhodes v. Webb*, 24 Minn. 292.

¹⁸¹ *Hodge's Ex'r v. Bank*, 22 Grat. (Va.) 51.

¹⁸² *Neiffer v. Bank*, 1 Head (Tenn.) 162.

¹⁸³ *Hoyt v. Thompson*, 5 N. Y. 320. Nor can they use the corporate seal without authority of the directors. *Id.*

¹⁸⁴ *Bank of Metropolis v. Jones*, 8 Pet. 12; *Bank of U. S. v. Dunn*, 6 Pet. 51; *Gallery v. Bank*, 41 Mich. 169, 2 N. W. 193.

¹⁸⁵ *Breyfogle v. Walsh*, 71 Fed. 898.

dorsed to another bank having the same president, he has no authority to bind the first bank by an agreement that the note shall be paid out of its funds.¹⁸⁶

Cashier.

§ 370. The *cashier* of a bank is, in general, the proper officer to execute a bill of exchange for it,¹⁸⁷ or a promissory note,¹⁸⁸ or check.¹⁸⁹ So, the cashier of a bank has power to bind it by his certificate of deposit,¹⁹⁰ or by certifying checks drawn upon it.¹⁹¹ And, even if he has certified such check without drawer's funds to meet it, the bank will be liable to a bona fide holder.¹⁹² The cashier of a bank is also the proper agent to indorse or accept commercial paper for it;¹⁹³ or to receive it for discount.¹⁹⁴ But he has no

¹⁸⁶ *Gallery v. Bank*, 41 Mich. 169, 2 N. W. 193.

¹⁸⁷ *Safford v. Wyckoff*, 4 Hill (N. Y.) 442. As to authority of bank cashiers, see 20 Cent. Law J. 126. The extent may be shown by local custom, and by statements of the bank's officers made to others. *Crain v. Bank*, 114 Ill. 516, 2 N. E. 486. But he cannot bind the bank, without consideration, to pay notes for which it is not liable. *Ft. Dearborn Nat. Bank v. Seymour* (Minn.) 73 N. W. 724.

¹⁸⁸ *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Rockwell v. Bank*, 13 Wis. 653; *City Nat. Bank v. Chemical Bank*, 26 C. C. A. 195, 80 Fed. 559. Or to agree for a renewal. *Bank of Commerce v. Bright*, 23 C. C. A. 586, 77 Fed. 949.

¹⁸⁹ *Phillips v. Bank*, 140 N. Y. 556, 35 N. E. 982, affirming 67 Hun, 378, 22 N. Y. Supp. 254; *Northern Bank v. Johnson*, 5 Cold. (Tenn.) 88. But, where the cashier has drawn a bank check for his individual use, the burden of proving his authority is on the holder. *Anderson v. Kissane*, 35 Fed. 699.

¹⁹⁰ *Barnes v. Bank*, 19 N. Y. 156; *State Bank v. Kain*, *Beecher's Breese* (Ill.) 75. But not to his own order. *Lee v. Smith*, 84 Mo. 304.

¹⁹¹ *Merchants' Bank v. State Bank*, 10 Wall. 649.

¹⁹² *Cooke v. Bank*, 52 N. Y. 96, affirming 1 Lans. 494.

¹⁹³ *U. S. Bank v. Fleckner*, 8 Mart. (La.) 309; *Fleckner v. Bank*, 8 Wheat. 338, 355; *Chillicothe Branch Bank v. Fox*, 3 Blatchf. 433, Fed. Cas. No. 2,683; *Potter v. Bank*, 28 N. Y. 641; *Bank of State of New York v. Muskingum Branch Bank*, 29 N. Y. 619, affirming 36 Barb. 332; *Folger v. Chase*, 18 Pick. (Mass.) 63; *Burnham v. Webster*, 19 Me. 232; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *Wild v. Bank*, 3 Mason, 505, Fed. Cas. No. 17,646; *Corser v. Paul*, 41 N.

¹⁹⁴ *Kansas Nat. Bank v. Quinton*, 57 Kan. 750, 48 Pac. 20.

power to give accommodation indorsements in its name;¹⁹⁵ or to indorse in its name a note made payable to it, but discounted by some other party;¹⁹⁶ or to bind it by a promise to pay his individual note;¹⁹⁷ or to pay a draft to be drawn on one of its customers.¹⁹⁸

The cashier of a bank is the proper officer to forward its notes for collection.¹⁹⁹ A bank may authorize its cashier to transfer notes and other security belonging to it in payment of its debts.²⁰⁰ And, in general, authority to transfer such paper is implied from his official character.²⁰¹ So, he may borrow for it in the regular course of its business.²⁰² So, he may sell a bill of exchange and bind the bank by a warranty that it is "perfectly safe."²⁰³ But he has no power to transfer a nonnegotiable note belonging to the bank;²⁰⁴

H. 24; *Houghton v. Bank*, 26 Wis. 663; *Lafayette Bank v. State Bank*, 4 McLean, 208, Fed. Cas. No. 7,987; *Robb v. Bank*, 41 Barb. 591; *Hartford Bank v. Barry*, 17 Mass. 93; *Kimball v. Cleveland*, 4 Mich. 606; *First Nat. Bank v. Stone*, 106 Mich. 367, 64 N. W. 487; *Everett v. U. S.*, 6 Port. (Ala.) 166; *Harper v. Calhoun*, 7 How. (Miss.) 203; *Cooper v. Curtis*, 30 Me. 488; *Smith v. Lawson*, 18 W. Va. 212; *Lanning v. Lockett*, 10 Fed. 451; *Blair v. Bank*, 2 Flip. 111, Fed. Cas. No. 1,485. In *Bank of State of New York v. Muskingum Branch Bank*, supra, a distinction was made between an indorsement for transfer or collection, and an indorsement "for the purpose of making the bank liable on a contract of indorsement," and the latter was spoken of as not lying within the cashier's authority. This distinction is, however, not a sound one, and the decision has been overruled on another point. *Robb v. Bank*, 41 Barb. (N. Y.) 593. The cashier's power to accept a bill for the bank was questioned in *Pendleton v. Bank*, 1 T. B. Mon. (Ky.) 180.

¹⁹⁵ *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557. But see *Houghton v. Bank*, 26 Wis. 663.

¹⁹⁶ *Elliot v. Abbot*, 12 N. H. 557.

¹⁹⁷ *State Nat. Bank v. Newton Nat. Bank*, 14 C. C. A. 61, 66 Fed. 691.

¹⁹⁸ *Flannagan v. Bank*, 56 Fed. 959.

¹⁹⁹ *Burnham v. Webster*, 19 Me. 232.

²⁰⁰ *Crocket v. Young*, 1 Smedes & M. (Miss.) 241.

²⁰¹ *Everett v. U. S.*, 6 Port. (Ala.) 166; *Farrar v. Gilman*, 19 Me. 440; *Harper v. Calhoun*, 7 How. (Miss.) 203; *Hartford Bank v. Barry*, 17 Mass. 93; *City Bank of New Haven v. Perkins*, 29 N. Y. 554; *Lamb v. Cecil*, 28 W. Va. 659; *Hawkins v. Bank* (Ind. Sup.) 49 N. E. 957.

²⁰² *Coats v. Donnell*, 94 N. Y. 168; *Donnell v. Bank*, 80 Mo. 165.

²⁰³ *Sturges v. Bank*, 11 Ohio St. 156.

²⁰⁴ *Barrick v. Austin*, 21 Barb. (N. Y.) 241.

or to release accommodation paper in which he is personally interested.²⁰⁵ His authority to pledge negotiable securities, held by the bank as collateral for advances, under a written agreement made by him as cashier, will be presumed, where he has frequently transacted such business for his bank.²⁰⁶

A bank may also be bound, by way of estoppel, by representations made by its cashier to the sureties on a note held by it, inducing them to believe it paid, and therefore to give up collaterals held by them.²⁰⁷ But it seems that this is not so where the surety is a director of the bank, and has means of ascertaining the truth of the statement for himself.²⁰⁸ The cashier cannot bind the bank by a promise to refund moneys paid to it on a forged certificate of deposit from another bank.²⁰⁹ If, however, notes have been placed in a bank on special deposit, and exchanged by the cashier for other securities, and indorsed by him for the purpose of such exchange, the bank will be liable to its depositor for such act.²¹⁰ So, notice to a cashier that a draft will not be paid is notice to the bank, although the cashier may have had no power to discount notes for the bank.²¹¹

Other Officers—Teller—Secretary—Treasurer.

§ 371. An *assistant cashier* cannot bind the bank without authority by accepting a postdated check.²¹² But it has been held

²⁰⁵ *Allen v. Bank*, 127 Pa. St. 51, 17 Atl. 886. His authority to cancel notes and release liens may, however, be proved as custom of the bank. *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428.

²⁰⁶ *Merchants' Bank v. State Bank*, 10 Wall. 604; *Coats v. Donnell*, 94 N. Y. 168; *Mercantile Bank v. McCarthy*, 7 Mo. App. 318.

²⁰⁷ *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116; *Merchants' Bank of Lincoln v. Rudolf*, 5 Neb. 527; *Grant v. Cropsey*, 8 Neb. 205.

²⁰⁸ *Merchants' Bank of Lincoln v. Rudolf*, 5 Neb. 527.

²⁰⁹ *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 96.

²¹⁰ *Lloyd v. Bank*, 15 Pa. St. 172.

²¹¹ *Boggs v. Bank*, 7 Watts & S. (Pa.) 331. Where a borrower has received the proceeds, it cannot question a cashier's authority to discount its paper. *Tradesmen's Nat. Bank v. Bank of Commerce*, 6 App. Div. 358, 39 N. Y. Supp. 554.

²¹² *Pope v. Bank*, 57 N. Y. 126. But if he is authorized to certify checks on sufficient funds and certify without such funds, the bank will be liable,

that a check may be certified by the teller so as to bind the bank.²¹³ And the bank will be liable on such certification, although the checks were not drawn against funds in bank and the teller had no authority to certify them.²¹⁴

The business of a *paying teller* not extending to the receipt of money in a bank having also a cashier and a receiving teller, the bank will not be liable in an action by the drawer of a bill payable at the bank, on the ground that funds were left for its payment with the paying teller, although such teller had been known to receive money in a few instances for such purpose, and the bank had not forbidden it.²¹⁵ But where a depositor has overdrawn his account, and upon notice to that effect from the paying teller, with a request to call and make his account good, makes payment for that purpose to the paying teller at the bank, in the absence of the receiving teller, without knowledge that receiving such payment is not within the limits of the paying teller's authority, the bank will be bound by the receipt of the money, as though paid to the proper officer.²¹⁶ The teller of a bank has no authority, however, to bind it by a statement as to the genuineness of an indorsement.²¹⁷

The official acts of the *treasurer* of a corporation within the scope of his official duties bind the company. Thus, it will be liable for stock issued by him, although fraudulently issued.²¹⁸ But the agent of a company, whose business and authority relate only to the payment of its bills, cannot bind it by giving a promissory note for such payment.²¹⁹ And the treasurer of a corporation has no authority to

and his general authority may be proved by usage. *Hill v. Trust Co.*, 108 Pa. St. 1.

²¹³ *Meads v. Bank*, 25 N. Y. 145. And he may bind the bank by a statement that his signature to such certificate was all right, when the signature was a forgery. *Continental Nat. Bank v. National Bank of Commerce*, 50 N. Y. 575. But his representation that a check is "good" extends only to funds and signature of drawer, and will not bind the bank where the check has been altered by raising the amount. *Espy v. Bank*, 18 Wall. 604.

²¹⁴ *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623, affirmed in 16 N. Y. 125.

²¹⁵ *Thatcher v. Bank*, 5 Sandf. (N. Y.) 121.

²¹⁶ *East River Nat. Bank v. Gove*, 57 N. Y. 597.

²¹⁷ *Walker v. Bank*, 5 Mo. App. 214.

²¹⁸ *Tome v. Railroad*, 39 Md. 36.

²¹⁹ *Torrey v. Monument Ass'n*, 5 Allen (Mass.) 327. But his authority

give notes in its name under a by-law requiring him to "have charge of the finances of the company, and sign all checks, and receive and account for all moneys coming to his hands."²²⁰ So, the treasurer of a savings bank has no authority to bind it by indorsing a note in its name.²²¹ Where, however, the acceptance of a draft is within the scope of the treasurer's authority, it will bind the company.²²² And power on his part to indorse may be implied from his acting as general manager.²²³

The *secretary* of a company has not generally power to bind it by contracts;²²⁴ or to give a draft in its name.²²⁵ Nor can the general managing agent of a company, it has been held, bind it by a may be proved by the usage of the corporation, and its receipt of the proceeds. *Foster v. Mining Co.*, 17 Fed. 130. And, in general, authority in the treasurer may be shown by usage, either to make notes, *Trapp v. Bank (Ky.)* 41 S. W. 577; *National Bank of Cynthiana v. John G. Mattingly & Sons (Ky.)* 33 S. W. 415; or to indorse, *Blake v. Manufacturing Co. (N. J. Ch.)* 38 Atl. 241; but not where the by-laws require both president and treasurer to sign such paper, *Millward-Chiff Cracker Co.'s Estate*, 161 Pa. St. 57, 28 Atl. 1072.

²²⁰ *Chemical Nat. Bank of New York v. Wagner*, 93 Ky. 525, 20 S. W. 535. So, the treasurer of a company has no authority, *ex officio*, to borrow money, and give notes in its name. *First Nat. Bank v. Council Bluffs City Waterworks Co.*, 56 Hun, 412, 9 N. Y. Supp. 859. But see, *contra*, *Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co.*, 159 Mass. 505, 34 N. E. 1083.

²²¹ *Bradlee v. Bank*, 127 Mass. 107. Or to borrow money and give notes in its name. *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318.

²²² *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

²²³ *Chase v. Hathorn*, 61 Me. 505. So, where he has made and negotiated notes for the company by long usage. *Perry v. Waterworks Co.*, 67 Hun, 456, 22 N. Y. Supp. 151. So, where he signs notes with the president's knowledge, making frequent mention of them in his reports. *Glidden & Joy Varnish Co. v. Interstate Nat. Bank*, 16 C. C. A. 534, 69 Fed. 912.

²²⁴ *Chit. Bills*, 37; *Neale v. Turton*, 4 Bing. 149. But see, as to delivery of bonds, where the secretary was principal owner and manager, *Buffalo Loan, Trust & Safe-Deposit Co. v. Medina Gas & Electric Light Co.*, 12 App. Div. 199, 42 N. Y. Supp. 781.

²²⁵ *First Nat. Bank v. Hogan*, 47 Mo. 472. Or a note. *Pauly v. Pauly*, 107 Cal. 8, 40 Pac. 29. Nor can he assign a promissory note belonging to the corporation. *Blood v. Marcuse*, 38 Cal. 590. But he may have authority by usage. *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb. 626, 56 N. W. 382.

note.²²⁶ Neither can its business manager.²²⁷ So, the pastor and deacons of a church are not authorized as agents to give a note for the corporation.²²⁸ But even a local agent may be authorized by usage to indorse for the company.²²⁹

Municipal Officers.

§ 372. The power of municipal corporations to execute commercial paper has been already discussed. It remains for us to consider here the authority of its officers to bind it by such paper. Where the power exists in a parish, its officers have no authority to exercise it as incidental to their authority to levy taxes.²³⁰ Neither have township trustees;²³¹ nor school trustees;²³² nor a board of supervisors;²³³ nor the selectmen of the town.²³⁴ So, a township committee, appointed to lay out a highway, cannot bind the town by a note.²³⁵ So, a county judge cannot bind the county by negotiable bonds given for the building of the county court house.²³⁶

²²⁶ *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644.

²²⁷ *Culver v. Leovy*, 19 La. Ann. 202; *Railway Equipment & Pub. Co. v. Lincoln Nat. Bank*, 82 Hun, 8, 31 N. Y. Supp. 44 (as to transfer of note). But see, contra, *Citizens' Nat. Bank of Tacoma v. Wintler*, 14 Wash. 558, 45 Pac. 38.

²²⁸ *Jefts v. York*, 10 Cush. (Mass.) 392, 4 Cush. (Mass.) 371.

²²⁹ *Lake Shore Nat. Bank v. Butler Colliery Co.*, 51 Hun, 63, 3 N. Y. Supp. 776.

²³⁰ *Police Jury v. Britton*, 15 Wall. 566; *Citizens' Bank v. Police Jury of Parish of Concordia*, 28 La. Ann. 263. And authority to issue county orders confers no power on the county officers to issue negotiable paper for the county. *People v. Johnson*, 100 Ill. 537.

²³¹ *Inhabitants of Congressional Tp. No. 11 v. Weir*, 9 Ind. 224; *State v. Hawes*, 112 Ind. 323, 14 N. E. 87.

²³² *Union School Tp. v. First Nat. Bank of Crawfordsville*, 102 Ind. 464, 2 N. E. 194. But see, contra, in Iowa, *Baker v. Chambles*, 4 G. Greene, 428.

²³³ *Board of Sup'rs of Rensselaer Co. v. Weed*, 35 Barb. (N. Y.) 136; *People v. Stupp*, 49 Hun, 544, 2 N. Y. Supp. 537.

²³⁴ *Eaton v. Berlin*, 49 N. H. 219. But see *Andover v. Grafton*, 7 N. H. 294, where it was held that the selectmen had such power, but that one of them could not bind the town by such a note.

²³⁵ *Savage v. Rix*, 9 N. H. 263.

²³⁶ *Hull v. County of Marshall*, 12 Iowa, 142. Nor by a note for that purpose executed by an agent under his appointment. *Exchange Bank v. Lewis Co.*, 28 W. Va. 273.

An auditor for building public works cannot give negotiable certificates of indebtedness to bind the corporation.²³⁷ And where the statute designated the mayor, an ex-mayor cannot be authorized by city ordinance to execute its bonds.²³⁸ But, where a note has been given to a township trustee, he may bind the township by an agreement for forbearance or settlement.²³⁹ It has been held, too, that the commissioners of a county are its proper agents to execute bonds which have been expressly authorized by statute;²⁴⁰ and that a note made to a county may be assigned by order of court by the county clerk.²⁴¹

But a municipality is not estopped from denying its officer's assumed authority to execute bonds in its name either by the form of his signature,²⁴² or by recital of his authority.²⁴³ And even a town treasurer cannot bind it by acceptance of an illegal order.²⁴⁴

The ordinary rules of majority of quorum govern the action of a corporation, but it cannot, in the absence of express authority, be bound by the contract of a mere informal majority of its members.²⁴⁵

Authority Implied from Blanks.

§ 373. As has been already said, where a person executes notes or other negotiable instruments in blank, and delivers the paper in that condition, he makes the holder his agent to fill in such blank. And a blank note given by an agent in his principal's name will bind the principal in like manner.²⁴⁶ The indorsement of a note

²³⁷ Ballard Pavement Co. v. Mandel, 2 MacArthur, 351.

²³⁸ Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720.

²³⁹ Phillips v. East, 16 Ind. 254.

²⁴⁰ Com. v. Commissioners of Allegheny Co., 37 Pa. St. 277, 283; Howard v. Kiowa Co., 73 Fed. 406; Middleton v. Mullica Tp., 112 U. S. 433, 5 Sup. Ct. 198 (township committee).

²⁴¹ Gatten v. Dimmitt, 27 Ill. 400.

²⁴² E. g. as "mayor" after expiration of his term of office. Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720.

²⁴³ Hudson v. Inhabitants of Winslow, 35 N. J. Law, 437. But see, contra, German Ins. Co. v. City of Manning, 78 Fed. 900.

²⁴⁴ Goodwin v. Town of East Hartford (Conn.) 38 Atl. 876.

²⁴⁵ Ohio v. Treasurer of Liberty Tp., 22 Ohio St. 144. In this case, however, the warrant given by it failed for want of a valid consideration.

²⁴⁶ Lambert v. Carroll, Wright (Ohio) 108.

in blank is said to be a letter of credit for an indefinite sum, and the giver of such paper will be liable to a bona fide holder for whatever sum may be written in the blank.²⁴⁷ If the amount is stated in the margin in figures, it will be sufficient authority to the holder to fill up the bill or note for that amount and for no more.²⁴⁸ If such paper is not given for value, the authority, as in other cases of agency, will be revoked by the death of the principal.²⁴⁹ But where a blank acceptance is given for value, the blank may be filled in after the acceptor's death.²⁵⁰

It has been held that a guaranty may be written by an indorsee over a blank indorsement, if such was the indorser's intention, and that such intention may be shown by parol.²⁵¹ And it has been held that parol evidence is admissible to show that a blank indorsement was given by the indorser to the holder merely as a receipt or voucher on payment of the note by him as the maker's agent.²⁵² As to the effect of indorsements in blank and the extent of authority implied by them, as also for further consideration of the admissibility of parol evidence to show the intention and meaning of such indorsements, the reader is referred to another part of this work.

Ratification—General Principles.

§ 374. If an agent assumed to act as such in executing commercial paper, the subsequent ratification of his act by the principal will be equivalent to an original authority for it.²⁵³ This will apply to

²⁴⁷ *Cruchley v. Clarence*, 2 Maule & S. 90; *Schultz v. Astley*, 2 Bing. N. C. 544.

²⁴⁸ *Clute v. Small*, 17 Wend. (N. Y.) 238.

²⁴⁹ *Hatch v. Searles*, 2 Smale & G. 147.

²⁵⁰ So held as to drawer's name left blank. *Carter v. White*, 20 Ch. Div. 225. Under such circumstances, as in the case of an indorsement in blank, the authority to fill the blank is irrevocable. *Cope v. Daniel*, 9 Dana (Ky.) 415.

²⁵¹ *Levi v. Mendell*, 1 Duv. (Ky.) 77; *Ulen v. Kittredge*, 7 Mass. 233.

²⁵² *Davis v. Morgan*, 64 N. C. 570; *Andover v. Grafton*, 7 N. H. 298.

²⁵³ *Byles, Bills*, 53; *Chit. Bills*, 42; 1 *Daniel, Neg. Inst.* 295; 1 *Pars. Notes & B.* 101; *Saunderson v. Griffiths*, 5 Barn. & C. 909, 8 Dowl. & R. 643; *Ward v. Evans, Ld. Raym.* 930, 2 *Salk.* 442; *Vere v. Ashby*, 10 Barn. & C. 288; *Wilson v. Tumman*, 6 Man. & G. 236; *Ancona v. Marks*, 7 Hurl. & N. 686; *Fenn v. Harrison*, 3 Term R. 757; *Howard v. Baillie*, 2 H. Bl. 618; *Bigelow*

the indorsement of a receipt for the payment of interest so as to take the liability of an accommodation indorser out of the statute of limitations.²⁵⁴ But a ratification will not be extended beyond the very act ratified,²⁵⁵ and it must be made with full knowledge on the principal's part of all circumstances affecting his right in the matter.²⁵⁶ With such knowledge, it relates back to the time the paper was executed and requires no new consideration.²⁵⁷ And it has been held that where an agent sold goods with a warranty, under an authority originally sufficient, but after the expiration of his agency, and took and turned over to his successor a note in payment for the goods, such successor having no authority to give a warranty, and having forwarded the note to his principal without informing him by whom the sale had been made, the acceptance of the note by the principal and his attempt to collect it will still amount to a ratification both of the sale and warranty.²⁵⁸

The unauthorized act of the agent of a corporation may also be ratified.²⁵⁹ But an act which is *ultra vires* cannot be ratified.²⁶⁰

v. Denison, 23 Vt. 564; *Forsythe v. Bonta*, 5 Bush (Ky.) 547; *Hatch v. Taylor*, 10 N. H. 538; *Burch v. West*, 134 Ill. 260, 25 N. E. 658; *Lysle v. Beals*, 27 La. Ann. 274. But the person ratified must have acted professedly as agent. *Crowder v. Reed*, 80 Ind. 1. And the principal cannot ratify part and repudiate part of the transaction. *D. M. Osborn & Co. v. Jordan* (Neb.) 72 N. W. 479.

²⁵⁴ *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155.

²⁵⁵ Thus, a corporation may ratify a note taken by the secretary for an admitted debt, and disavow his agreement, upon a renewal of it, that the maker should not be called on to pay. *Moshannon Land & Lumber Co. v. Sloan*, 109 Pa. St. 532.

²⁵⁶ *Nixon v. Palmer*, 8 N. Y. 398; *First Nat. Bank of Trenton, Mo., v. Gay*, 63 Mo. 33; *Edwards v. Water Co.*, 21 Nev. 469, 34 Pac. 381.

²⁵⁷ *First Nat. Bank of Trenton, Mo., v. Gay*, 63 Mo. 33. And it seems that even a forged signature may be ratified without new consideration. *Dow's Ex'r v. Spenny's Ex'r*, 29 Mo. 386; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447.

²⁵⁸ *Eadie v. Ashbaugh*, 44 Iowa, 519.

²⁵⁹ *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. (Mass.) 372; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207. So, too, of a municipal corporation. *Peterson v. Mayor, etc.*, 17 N. Y. 453.

²⁶⁰ *McCracken v. City of San Francisco*, 16 Cal. 591; *Zottman v. City and County of San Francisco*, 20 Cal. 96.

And, if the statute requires the authority to be in writing, the ratification must also be in writing.²⁶¹

But, after the principal's own power to make a contract has expired, he cannot ratify the previous unauthorized contract of his agent.²⁶² Nor does the payment of one bill of exchange imply or involve the ratification of a second.²⁶³ And it is to be observed that the principal's subsequent ratification of an unauthorized contract will not relieve the agent from the personal liability which he may have incurred by executing it.²⁶⁴ It has been said, too, that the doctrine of ratification by a principal cannot be extended to the case of a forgery of his name.²⁶⁵

Ratification—What Acts Amount to.

§ 375. Where the agent of a corporation gave a draft, of which the proceeds were used for the benefit of the company, its silence as to this draft, with previous recognition of similar acts, has been construed to amount to a ratification.²⁶⁶ Where the agent of a firm had authority to make advances for the purchase of notes and bills to be remitted to the firm, and his authority had ceased by a change in the firm with notice to him, a bill subsequently purchased by him, and sent to the firm, will be ratified by their retention and use of it, and a renewal of authority will be implied which will be binding on the new firm.²⁶⁷ So, the cashier of a bank may bind it by notes executed in its name with the knowledge of the directors; and

²⁶¹ *Blood v. Water Co.*, 113 Cal. 221, 45 Pac. 252; the vote of the directors, recorded in the minutes, being held to be a sufficient writing.

²⁶² *Bird v. Brown*, 14 Jur. 132, where the principal had become a bankrupt before the ratification.

²⁶³ *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146.

²⁶⁴ *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494.

²⁶⁵ 1 *Edw. Bills & N.* § 83; *Marks v. King*, 6 Alb. Law J. 193. But see *Dow's Ex'r v. Spenny's Ex'r*, 29 Mo. 386; *Ferry v. Taylor*, 33 Mo. 323; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447. An acknowledgment by a principal of a forged signature, made to save the unauthorized "agent" from prosecution for forgery, will not render the principal liable upon the bill. *Chit. Bills*, 338; *Ex parte Edwards*, 5 Jur. 706; *Farmington Sav. Bank v. Buzzell*, 61 N. H. 612.

²⁶⁶ *Union Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248, affirming 1 Colo. 532.

²⁶⁷ *Callanan v. Van Vleck*, 36 Barb. (N. Y.) 324.

if the notes were originally unauthorized, and the directors appropriate the proceeds and suffer renewals to be made, it will amount to a ratification.²⁶⁸ So, if a collecting agent sells without authority a note sent him for collection, and gives his own note to the principal for it, the principal's acceptance of such note will amount to a ratification of the sale.²⁶⁹ So, if the principal named as maker in a note makes a part payment of the note, it will be *prima facie* evidence of his authority for its execution.²⁷⁰ This is true of a sealed note also executed by an agent under a verbal authority.²⁷¹ So, if the principal, in a letter written by him, speaks of the note as his, and promises to pay it, this will be a ratification.²⁷²

And it has been held that where a son bought goods and directed that they should be charged to his father, and the father, when afterwards informed of it, said it was all right and he would pay for them, this was a ratification of the son's act.²⁷³ This is true, also, of similar actions on the principal's part in relation to a note executed in his name, "*Per Proc. A. B.*"²⁷⁴ So, if the principal receive and retain the proceeds of a note made in his name, and acquiesce in the act when made known to him until the note has been protested, he will be held to have ratified it, and will be liable on it.²⁷⁵ So, if the agent of a corporation buys property and gives a note for it in the company's name, the company will ratify the note by taking possession of the property.²⁷⁶ And if, on the other hand, an agent takes a note without authority, and the principal accepts

²⁶⁸ *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120. So, if he merely accepts the proceeds of paper, which he knew to have been executed in his name, *Hawkins v. Bank* (Ind. Sup.) 49 N. E. 957.

²⁶⁹ *Cushman v. Loker*, 2 Mass. 106; *Turner v. Wilcox*, 54 Ga. 593.

²⁷⁰ *Walter v. Trustees of Schools*, 12 Ill. 63.

²⁷¹ *Bates v. Best*, 13 B. Mon. (Ky.) 215.

²⁷² *Bigelow v. Denison*, 23 Vt. 564.

²⁷³ *Booker v. Tally*, 2 Humph. (Tenn.) 308.

²⁷⁴ *Harper v. Devene*, 10 La. Ann. 724. In this case the principal also corrected the date of the note.

²⁷⁵ *People's Bank v. National Bank*, 101 U. S. 181; *Pauly v. Pauly*, 107 Cal. 8, 40 Pac. 29; *National Bank of Orleans v. Fassett*, 42 Vt. 432. But not a mere promise to pay, with no acknowledgment of the act as his. *Owsley v. Phillips*, 78 Ky. 517.

²⁷⁶ *Moss v. Mining Co.*, 5 Hill (N. Y.) 137. So, too, *Gilbert v. Dent*, 46 Ga. 238; *Warder v. Pattee*, 57 Iowa, 515, 10 N. W. 881.

it with knowledge of the circumstances, he will be bound.²⁷⁷ So, if he afterwards brings suit on it.²⁷⁸ So, if a note is sent by the payee to a bank for collection, and the bank sells it, and the payee receives the proceeds.²⁷⁹

Ratification—By Acquiescence.

§ 376. A ratification may also be implied from the silence of the principal after becoming acquainted with the facts.²⁸⁰ Thus, if the agent receives and indorses a note in his principal's name for goods sold or money due to his principal, and the principal fails to disclaim it and retains the proceeds, although he knew of the matter 17 days before the maturity of the note, when, too, the maker was in failing circumstances, he will be held to have ratified the taking and indorsing of the note.²⁸¹ So, where an agent, without original authority to give a note for his principal, has renewed it with the principal's knowledge and without dissent on his part, it will amount to an original authority for the note.²⁸² So, if the principal knows of the agent's receiving money without authority on a note left in his possession, and remains silent afterwards for nearly three years, leaving the money in the meanwhile in the agent's hands, his authority will be implied for other subsequent payments made to the agent on the note.²⁸³ So, if the principal has indorsed a check in blank, and given it to his agent, who has raised the amount and filled the instrument up as a bill of exchange, it has been held that the principal's failure to object to the alteration when the bill was pre-

²⁷⁷ *Farrar v. Peterson*, 52 Iowa, 420, 3 N. W. 457. So, proof of a claim in bankruptcy against the maker of a note by one as indorser, whose name has been indorsed by an agent without his authority, will be a ratification of the agent's indorsement. *Harrod v. McDaniels*, 126 Mass. 413.

²⁷⁸ *Farmers' & Merchants' Bank of Elk Creek v. Farmers' & Merchants' Bank*, 49 Neb. 379, 68 N. W. 488.

²⁷⁹ *Coykendall v. Constable*, 99 N. Y. 313, 1 N. E. 884

²⁸⁰ *Gold-Mining Co. v. National Bank*, 96 U. S. 640.

²⁸¹ *National Bank of Orleans v. Fassett*, 42 Vt. 432. So, two years' silence after knowledge by the bank officers that a check had been given in its name by the cashier without authority amounts to evidence of ratification by the bank. *De Land v. Bank*, 20 Cent. Law J. 196.

²⁸² *Whiting v. Stage Co.*, 20 Iowa, 554.

²⁸³ *Wardrop v. Dunlop*, 1 Hun (N. Y.) 325.

sented to him for payment amounted to a ratification.²⁸⁴ But where bank notes are stolen after being signed by the cashier, and the president's signature upon them was forged, the action of the directors, in refusing payment of the notes and returning them without any statement that they were counterfeit, does not amount to ratification on their part.²⁸⁵

Termination of Agency.

§ 377. The authority of an agent, once conferred, continues until it has been revoked and notice of that fact duly given.²⁸⁶ If the authority of a known agent has been revoked without giving notice of the fact, a bill of exchange drawn under it afterwards will bind the principal.²⁸⁷ This rule applies to the authority of a servant, which ends only when the determination of the relation to which it was incident has been made generally known.²⁸⁸ But a special agency expressly given for a limited time will end with the limitation.²⁸⁹ So, where the charter of a bank expires at a fixed time, and the cashier appointed before that time holds over after an extension of the charter, his authority, so far as regards the liability of his original bondsmen, has been held to end with the expiration of the original charter.²⁹⁰

As has been said, an indorsement of a note for collection will amount to a power of attorney to collect it; but such power will be revoked by a subsequent transfer of the note by the principal.²⁹¹ So, too, in general, death operates as a termination of all agencies.²⁹²

²⁸⁴ Ward v. Williams, 26 Ill. 447.

²⁸⁵ Salem Bank v. Gloucester Bank, 17 Mass. 29. So, an indorsement by the agent in his principal's name is ratified by a subsequent waiver of protest and notice. Allin v. Williams, 97 Cal. 403, 32 Pac. 441.

²⁸⁶ Byles, Bills, 59; Chit. Bills, 42; 1 Daniel, Neg. Inst. 271; Newsome v. Coles, 2 Camp. 617.

²⁸⁷ Caldwell v. Neil, 21 La. Ann. 342.

²⁸⁸ ——— v. Harrison, 12 Mod. 346; Nickson v. Brohan, 10 Mod. 110; Monk v. Clayton, Moll. 282.

²⁸⁹ Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69.

²⁹⁰ Union Bank v. Ridgely, 1 Har. & G. (Md.) 324, 431. But not with the year for which he was originally elected. Id.

²⁹¹ Atkins v. Cobb, 56 Ga. 86.

²⁹² Or insanity. Renfro v. City of Waco (Tex. Civ. App.) 33 S. W. 766. And, where the wife of a dying principal fraudulently obtained checks for her

But where an agent has been directed by his principal to obtain securities on a note, and to hand them over with the note to a creditor of the principal, this amounts, in equity, to a transfer of the note, and may be perfected, it has been held, by an actual delivery by the agent after the principal's death.²⁹³ The authority of an agent, as has been seen, will also be suspended, and in some cases terminated, by the outbreak of a war making the principal and agent alien enemies. For the consideration of this subject the reader is referred to an earlier part of this work.²⁹⁴

own use from his confidential clerk, the clerk's authority to draw checks was held to be insufficient proof of authority to deliver them without the principal's knowledge or consent. In *re James*, 146 N. Y. 78, 40 N. E. 876. For ratification by administrator, in such a case, after death of principal, see *Seaver v. Weston*, 163 Mass. 202, 39 N. E. 1013. And see § 352, note, *supra*.

²⁹³ *Nicolet v. Pillot*, 24 Wend. (N. Y.) 240. So, where a note was delivered to an agent, to be delivered by him to the payee after his principal's death, such delivery after the maker's death has been held to be sufficient. *Giddings v. Giddings' Adm'r*, 51 Vt. 227.

²⁹⁴ See chapter 8, § 248 et seq.

II. LIABILITY OF AGENT.

- § 378. Individual Liability of Agent.
 379. — Not Confined to Instrument.
 380. — How Avoided.
 381. Public Officers not Liable.
 382. Agent's Liability to Principal—Drawer to Drawee.
 383. — Drawer to Payee.
 384. — Indorser to Indorsee.
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Individual Liability of Agent.

§ 378. Where an agent signs commercial paper in his principal's name and by his authority, the principal will be liable, with or without subsequent ratification.²⁹⁵ Sometimes the agent may bind his principal by his indorsement so far as to effect a good transfer, although the act may not be binding as an indorsement upon the principal.²⁹⁶ If an agent, known to be such and authorized to make a contract, makes a contract for a corporation which is ultra vires, he will not thereby become personally liable.²⁹⁷ But, if he makes a contract without authority, he will become personally liable in many cases *ex contractu*.²⁹⁸ So, if he exceeds the authority given him.²⁹⁹ And in such case he may be held liable for the whole amount due on the contract.³⁰⁰ And, where an agent has accepted a bill of

²⁹⁵ *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494.

²⁹⁶ *Brown v. Donnell*, 49 Me. 421.

²⁹⁷ *Hall v. Lauderdale*, 46 N. Y. 75.

²⁹⁸ *Bytes, Bills*, 64; *Chit. Bills*, 47; 1 *Edw. Bills & N.* § 85; 1 *Pars. Notes & B.* 105; *Lewis v. Nicholson*, 18 Q. B. 509; *Randell v. Trimen*, 18 C. B. 786; *Collen v. Wright*, 7 El. & Bl. 301, 8 El. & Bl. 647; *Kelner v. Baxter*, 36 Law J. C. P. 94; *Scott v. Lord Ebury*, Id. 161; *Miller v. Reynolds*, 92 Hun. 800, 36 N. Y. Supp. 660; *Conant v. Alvord*, 166 Mass. 311, 44 N. E. 250; *Frankland v. Johnson*, 147 Ill. 520, 35 N. E. 480. And this is so in Louisiana, when the agent has exceeded his powers, and not disclosed his principal. *Barry v. Pike*, 21 La. Ann. 221; *Clay v. Oakley*, 5 Mart. (La.; N. S.) 137. But he may have relief in equity, where his want of authority is due to the absence of other signatures omitted by mistake. *Burgoyne v. Cottrell*, 24 Law J. Q. B. 28.

²⁹⁹ *Roberts v. Button*, 14 Vt. 195.

³⁰⁰ *Feeter v. Heath*, 11 Wend. (N. Y.) 479; *Hampton v. Speckenagle*, 9 Serg.

exchange without authority, he will be liable not only to the original payee or holder, but to subsequent indorsees.³⁰¹ So, too, a broker who sells invalid bonds or bills without disclosing his principal will become liable personally as the assignor.³⁰² In order, however, to hold an agent personally liable for executing a paper without authority, his want of authority must be made to appear affirmatively.³⁰³

Liability not Confined to the Instrument.

§ 379. Where an agent has executed a sealed note for his principal under a verbal authority, it has been held that neither he nor the principal will be bound *by the note*, but the agent may be held liable in a separate action on the case.³⁰⁴ So, directors of a corporation, not forming the majority required by charter in order to bind the company, may become liable individually to a bank which has advanced money on checks of the company's agent on the strength of representations made by such directors as to the agent's authority.³⁰⁵ So, where two directors borrowed money for the company without authority, on a memorandum of deposit, they were held to be liable in an action for breach of warranty of authority.³⁰⁶

Personal Liability—How Avoided.

§ 380. But if an agent is known to be such, e. g. if the master of a vessel draws a bill as such for supplies for the vessel on account

& R. (Pa.) 212; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *White v. Skinner*, 13 Johns. (N. Y.) 307.

³⁰¹ *Polhill v. Walter*, 3 Barn. & Adol. 114; *West London Commercial Bank v. Kitson*, 13 Q. B. Div. 360, affirming 12 Q. B. Div. 157.

³⁰² *Pugh v. Moore*, 44 La. Ann. 209, 10 South. 710; *Herwig v. Richardson*, 44 La. Ann. 703, 11 South. 135. But this is not so where the principal received the proceeds, and the character of the broker as an agent was known to the buyer. *Monticello Bank v. Bostwick*, 71 Fed. 641.

³⁰³ *Wilson v. Barthrop*, 2 Mees. & W. 863.

³⁰⁴ *Delius v. Cawthorn*, 13 N. C. 90.

³⁰⁵ *Cherry v. Bank*, L. R. 3 P. C. 24. And see *Ducarry v. Gill*, 4 Car. & P. 121.

³⁰⁶ *Richardson v. Williamson*, L. R. 6 Q. B. 276. See, too, *Weeks v. Propert*, L. R. 8 C. P. 427.

of the agents and consignees, he will not be individually liable.³⁰⁷ On the other hand, if an agent contracts personally, he will be personally liable, although the agency be known and the principal disclosed.³⁰⁸ And it has been held that merely describing themselves as agents in such a contract will not relieve them from individual liability.³⁰⁹

To avoid personal liability, an agent should either sign his principal's name or expressly state his own ministerial character.³¹⁰ But it has been held, under special circumstances, that he may become liable individually upon a note or bill executed without authority in his principal's name.³¹¹ And this has been held upon the theory that the agent, using another's name as maker of a note without his authority, really intended to bind himself, and had used an assumed name for that purpose.³¹² So, it has been held that if an agent without authority signs a note as "A. B., Attorney for C. D.," he will be personally liable.³¹³ The rule is, however, not to be extended beyond cases where the agent uses apt words to charge himself. In other cases he will not be liable on a contract executed in his principal's name.³¹⁴

Where an agent has procured a policy insuring "A. for B., to be insured in ship G.," and gives his individual note for it without any intention of agency, and charges it to his principal, and the com-

³⁰⁷ *Lincoln v. Smith*, 11 La. 11.

³⁰⁸ *Andrews v. Allen*, 4 Har. (Del.) 452.

³⁰⁹ *Rollins v. Phelps*, 5 Minn. 463 (Gil. 373). Especially where only a part of the whole number of agents designated joined in signing the paper.

³¹⁰ *Leadbitter v. Farrow*, 5 Maule & S. 345; *Sowerby v. Butcher*, 2 Crompt. & M. 368, 4 Tyrw. 320.

³¹¹ So held on proof of agent's want of good faith. *Wilson v. Barthrop*, 2 Mees. & W. 863. So, where a bill was drawn upon the agent of a joint-stock company, and accepted by him, "per procuration," without authority, the agent, being also a member of the company, was held liable as such. *Nicholls v. Diamond*, 9 Exch. 154. So, too, in Louisiana, where the agent, without authority, gave a note in the name of a firm after its dissolution. *Dodd v. Bishop*, 30 La. Ann. 1178.

³¹² *Grafton Bank v. Flanders*, 4 N. H. 239.

³¹³ *Byars v. Doores*, 20 Mo. 284.

³¹⁴ *Chit. Bills*, 48; *Hall v. Crandall*, 29 Cal. 567; *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Woodes v. Dennett*, 9 N. H. 55; *Blanchard v. Kaull*, 44 Cal. 440. See, too, *White v. Madison*, 26 N. Y. 117; *Bean v. Mining Co.*, 66 Cal. 45, 6 Pac. 86.

pany subsequently proves its claim for premiums against the bankrupt estate of the agent, and receives a dividend from it, it cannot afterwards betake itself to the principal for payment of the balance due.³¹⁵ So, where an agent, authorized to borrow money and draw bills of exchange on his principal, gives instead a bond under seal purporting to bind himself and his principal, the principal cannot be held in an action of assumpsit by the obligee of the bond.³¹⁶

If an agent signs his principal's name, adopting and using it at the time as his own, he will become individually liable.³¹⁷ But if he gives a note in the principal's name, signing it as agent, he will not be.³¹⁸ If, without authority, he signs the name of another as acceptor to a bill of exchange without any fraudulent intent, this will be a fraud in law, for which he will be individually liable in an action, even to subsequent indorsees of the bill.³¹⁹ So, where the trustees of a company give a note without authority, describing themselves as such both in the body of the instrument and in their signatures, they will still be liable individually.³²⁰ The proper mode of executing commercial paper by an agent and the liability of parties, as affected by the mode of execution, are more fully considered in an earlier part of this work, treating of the form of the instrument.³²¹

Where an agent has given a note or bill without authority, in his principal's name, his liability must be confined to such damages as are proved.³²² And he will not be liable for a failure of authority due to the death of his principal without his knowledge.³²³

³¹⁵ Bedford Commercial Ins. Co. v. Covell, 8 Metc. (Mass.) 442.

³¹⁶ Banorgoe v. Hovey, 5 Mass. 11.

³¹⁷ Baker v. Dening, 8 Adol. & E. 94; Kelner v. Baxter, L. R. 2 C. P. 174; Jewett v. Whalen, 11 Wis. 124; Rogers v. Coit, 6 Hill (N. Y.) 322; Brown v. Bank, Id. 443; Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443.

³¹⁸ Jefts v. York, 4 Cush. (Mass.) 371, 10 Cush. (Mass.) 392; Moor v. Wilson, 26 N. H. 332.

³¹⁹ Polhill v. Walter, 3 Barn. & Adol. 114.

³²⁰ McClure v. Bennett, 1 Blackf. (Ind.) 189.

³²¹ See § 131 et seq., supra.

³²² Eastwood v. Bain, 3 Hurl. & N. 738.

³²³ Smout v. Ilbery, 10 Mees. & W. 1. Nor in such case are the representatives of the deceased principal liable. Blades v. Free, 9 Barn. & C. 167.

Public Officers not Liable.

§ 381. A government officer, as has been already said, will not be individually liable on a draft or bill of exchange given by him as such officer.³²⁴ Nor can he maintain an action in his own name on such a paper made to him in his official capacity.³²⁵ And it has been held that a note, made to the town treasurer by name "or his successors in office," could not be sued upon by the town.³²⁶ The exemption of public officers from personal liability on their contracts has been held to extend to school trustees,³²⁷ sheriffs,³²⁸ tax and revenue collectors,³²⁹ building committees,³³⁰ superintendents of public institutions,³³¹ municipal officers,³³² army and navy officers,³³³ cabinet officers,³³⁴ and foreign consuls.³³⁵

³²⁴ See § 132, *supra*. But it would be otherwise if there was an intention on the officer's part to make himself individually liable, *Perry v. Hyde*, 10 Conn. 330; or if he was guilty of fraud, or by his act prevented a recovery from the government, *Freeman v. Otis*, 9 Mass. 272. And mere want of authority for the contract has been held sufficient to charge him personally in New Hampshire. *Savage v. Rix*, 9 N. H. 263.

³²⁵ *Irish v. Webster*, 5 Me. 171; *State v. Boies*, 11 Me. 474.

³²⁶ *Arlington v. Hines*, 1 D. Chip. (Vt.) 431.

³²⁷ *Tutt v. Hobbs*, 17 Mo. 486; *Syme v. Butler*, 1 Call (Va.) 105.

³²⁸ *Enloe v. Hall*, 1 Humph. (Tenn.) 303.

³²⁹ *Nichols v. Moody*, 22 Barb. (N. Y.) 611.

³³⁰ *Fox v. Drake*, 8 Cow. (N. Y.) 191; *Dameron v. Irwin*, 30 N. C. 421; *Tucker v. Justices*, 35 N. C. 434. But see *Simonds v. Heard*, 23 Pick. (Mass.) 120.

³³¹ *Osborne v. Kerr*, 12 Wend. (N. Y.) 179; *Dawes v. Jackson*, 9 Mass. 490.

³³² *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Olney v. Wickes*, 18 Johns. (N. Y.) 122. But see, for individual liability of such officers, growing out of form of signature, *Underhill v. Gibson*, 2 N. H. 352; *Hall v. Cockrell*, 28 Ala. 507.

³³³ *Walker v. Swartwout*, 12 Johns. (N. Y.) 444; *Syme v. Butler*, 1 Call (Va.) 105.

³³⁴ *Hodgson v. Dexter*, 1 Cranch, 345.

³³⁵ *Jones v. Le Tombe*, 3 Dall. 384.

Drawer—Agent of Drawee.

§ 382. Where the agent draws a bill of exchange on his principal by his authority, the principal is not, in general, liable as drawer.³³⁶ Nor is it necessary, in such case, that the agency of the drawer should be expressed on the face of the bill, if it is drawn in fact for a debt of the principal.³³⁷ Where the drawer of a bill is the agent of the drawee, it is held in England that he is liable both to the payee and subsequent parties, although known by them to be acting as agent merely.³³⁸ In the United States a different rule seems to have been laid down, and it has been held that the agent who draws a bill on his principal for goods sold him, disclosing the principal, is not liable to a payee who has knowledge of the agency.³³⁹ But, if the agent draws the bill on his principal in his individual name, he will be liable as drawer to the payee and subsequent parties.³⁴⁰ even though the bill is drawn expressly chargeable to the principal's account, and though the payee knows of the agency.³⁴¹

Drawer or Maker—Agent of Payee.

§ 383. Where the drawer of a bill is the payee's agent, as in the case of a bill drawn on the purchaser of goods for payment, the agent is individually liable to the payee by the English rule.³⁴² But in the United States again a different rule has been laid down.³⁴³ And where the maker of a note, as agent for the payee, uses a fictitious name for the purpose of raising money for the payee, he

³³⁶ *Ducarry v. Gill*, 4 Car. & P. 121.

³³⁷ *Wolfe v. Jewett*, 10 La. 383.

³³⁸ *Leadbitter v. Farrow*, 5 Maule & S. 345.

³³⁹ 1 Daniel, Neg. Inst. 290; 1 Pars. Notes & B. 94; *Roberts v. Austin*, 5 Whart. (Pa.) 313, reversing 2 Miles (Pa.) 254.

³⁴⁰ *Newhall v. Dunlap*, 14 Me. 180.

³⁴¹ *Mayhew v. Prince*, 11 Mass. 54.

³⁴² *Chit. Bills*, 46; 1 Daniel, Neg. Inst. 292; 1 Pars. Notes & B. 103; *Le Fevre v. Lloyd*, 5 Taunt. 749, 1 Marsh. 318; *Sowerby v. Butcher*, 2 Crompt. & M. 368; 4 Tyrw. 320.

³⁴³ *Jones v. Lathrop*, 44 Ga. 398; *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 390.

has been held in a recent case not to be individually liable even to a bona fide holder for value.³⁴⁴

Indorser—Agent of Indorsee.

§ 384. Where the agent acts as indorser of a bill or note in transferring it to his principal, he makes himself liable in England as indorser, unless he expressly restricts the liability.³⁴⁵ But he would not be liable on such indorsement to his principal, if it were made merely for the purpose of a remittance and by the principal's own order.³⁴⁶ If the agent purchases a draft for his principal by his direction, and remits it by indorsement, the draft being that of a drawer in good credit at the time, he will not be liable to his principal as an indorser.³⁴⁷ But if he is directed to make remittance by bill on a "good house," and the house drawn upon proves otherwise, he will be liable to the principal.³⁴⁸

In general, to render an agent liable as a guarantor to his principal of paper so indorsed by him, consideration for such liability is necessary, as well as an express undertaking on the agent's part.³⁴⁹ Agents under a *del credere* commission are, however, liable on their indorsement to their principal, it being a part of the business intrusted to them.³⁵⁰ And such agents are liable for loss

³⁴⁴ *Bartlett v. Tucker*, 104 Mass. 336. In this case the note was purchased on the payee's credit, the actual maker being neither known nor credited by the purchaser.

³⁴⁵ *Chit. Bills*, 46; 1 *Daniel, Neg. Inst.* 293; 1 *Pars. Notes & B.* 104; *Goupy v. Harden*, 7 Taunt. 159, 2 Marsh. 454.

³⁴⁶ *Chit. Bills*, 49; 1 *Daniel, Neg. Inst.* 293; *Warwicke v. Noakes, Peake*, 68; *Kimmell v. Bittner*, 62 Pa. St. 203. See, too, *Lewis v. Brehme*, 33 Md. 431. And an action by the principal's indorsee against the agent on such an indorsement was restrained by injunction in a case where the bill had been made payable to the agent accidentally, the plaintiff being cognizant of that fact. *Kidson v. Dilworth*, 5 Price, 564. And an agent remitting a bill by mail will not be liable for its loss, where it was stolen, and paid to a stranger. *Warwicke v. Noakes, Peake*, 68. And this would have been the case, it seems, even without express directions, it being in the ordinary course of business. *Id.*, per Lord Kenyon.

³⁴⁷ *Byers v. Harris*, 9 Heisk. (Tenn.) 652.

³⁴⁸ *Leverick v. Meigs*, 1 Cow. (N. Y.) 645.

³⁴⁹ *Sharp v. Emmet*, 5 Whart. (Pa.) 288.

³⁵⁰ *Chit. Bills*, 46; 1 *Daniel, Neg. Inst.* 293; 1 *Pars. Notes & B.* 105; *MacKenzie v. Scott*, 6 Brown, Parl. Cas. 280; *Lewis v. Brehme*, 33 Md. 431.

on a bill of exchange remitted by them to a member of their firm who had made advances, in repayment of such advances, and dishonored while in his hands.³⁵¹ If an agent indorses to his principal for accommodation merely, he will not be liable to the principal, following the usual rule as to accommodation paper.³⁵²

Agent's Liability for Negligence or Fraud.

§ 385. The liability of an agent to his principal for negligence or fraud in the performance of his duty will be considered more fully elsewhere, and is treated of more extensively in special works upon the subject of agency. If an agent, employed to obtain a discount for his principal, misapplies the proceeds, he will be liable to the principal for damages.³⁵³ Instead of a special action on the case against the agent for breach of his duty as such, the principal may sue him in such case for money had and received.³⁵⁴ This is the proper form of action to be employed, and he cannot bring trover for the bill which has been misapplied.³⁵⁵ In like manner, if a municipal officer has obtained money on a note issued by him without authority in the name of the town, a recovery of the money received may be had against him by the town, and the illegality of the note will be no defense.³⁵⁶

It is a well-established principle of law that an agent cannot make a profit in his principal's business at the principal's expense, and that all profits made by him from dealing with his principal's property and in his business belong to the principal.³⁵⁷ Thus, parties whose interests are adverse to one another cannot well stand in the relation of principal and agent in the same business. For instance, the holder of a note cannot be the maker's agent for the purpose of taking it out of the statute of limitations by indorsing

³⁵¹ *Lucas v. Groning*, 1 Starkie, 391.

³⁵² *Chit. Bills*, 46; 1 *Daniel, Neg. Inst.* 293; 1 *Pars. Notes & B.* 104; *Ex parte Robinson*, *Buck*, 113.

³⁵³ *Wolfe v. Brouwer*, 5 *Rob. (N. Y.)* 601.

³⁵⁴ *Thorpe v. Thorpe*, 3 *Barn. & Adol.* 580.

³⁵⁵ *Palmer v. Jarman*, 2 *Mees. & W.* 282.

³⁵⁶ *Holderness v. Baker*, 44 *N. H.* 414.

³⁵⁷ *Diplock v. Blackburn*, 3 *Camp.* 43; *Thompson v. Havelock*, 1 *Camp.* 527.

on it a new promise of payment.³⁵⁸ So, a corporation cannot give a valid note to its acting trustees;³⁵⁹ although it has been held that a municipal corporation may lawfully take and sue upon a note made by a defaulting city treasurer for the money taken by him.³⁶⁰

³⁵⁸ *Wright v. Bessman*, 55 Ga. 187. The payee of a note may, however, act as agent for the maker in signing it in his presence, and at his request. *Haven v. Hobbs*, 1 Vt. 238.

³⁵⁹ *Wilbur v. Lynde*, 49 Cal. 290. And see, as to the question of a treasurer borrowing city funds in his hands as such, and giving his note to the city, *Greening v. Patten*, 51 Wis. 146, 8 N. W. 107.

³⁶⁰ *City of Buffalo v. Bettinger*, 76 N. Y. 393.

III. DEFENSES.

- § 386. Defense—Want of Authority.
- 387. — When Admissible.
- 388. — Notice of Limit of Authority.
- 389. — Municipal Warrants.
- 390. — When Inadmissible—Bona Fide Holder.
- 391. — Commercial Paper Payable to Bearer.
- 392. — Principal Estopped by Conduct.
- 393. Evidence—Burden of Proof.

Want of Authority—As a Defense.

§ 386. Where the owner's title to a bill or note is bad, as, for instance, in case of forged or stolen paper, such defect will also affect the title of any agent to whom it is transferred.³⁶¹

Where the agent himself has no authority to sign a bill or note for his principal, the signature will amount to a forgery, on which the principal will not be liable even to a bona fide holder for value.³⁶² And, where the principal has limited the authority given his agent, he will not be liable if the authority is exceeded.³⁶³ Thus, if an agent be authorized to indorse certain notes for his principal in their joint name, they not being partners, a holder, who knew nothing of this authority, cannot recover against the principal on another note executed in that manner, but in excess of the express authority given, although the holder be a bona fide purchaser for value.³⁶⁴ This is still more clearly the case where the instrument carries notice of the limit of authority on its face, e. g. where the selectman of the town was authorized to give notes for bounty payable to recruits when mustered into the United States service, and the notes bore the words "value received in government military service," but the payee, though enlisted, was never mustered into

³⁶¹ Byles, Bills, 259; Chit. Bills, 292; *Solomons v. Bank*, 13 East, 135, note; 1 Rose, 99; *De la Chaumette v. Bank*, 9 Barn. & C. 208.

³⁶² 1 Edw. Bills & N. § 83; 1 Pars. Notes & B. 119; *Lander v. Castro*, 43 Cal. 497.

³⁶³ *Feun v. Harrison*, 3 Term R. 757; *East India Co. v. Hensley*, 1 Esp. 111.

³⁶⁴ *Hotchkiss v. English*, 4 Hun (N. Y.) 369.

the service.³⁶⁵ But where power was given by the directors of a company to their chairman to accept bills drawn on it by A., on his depositing securities to a certain amount, a bona fide holder of the acceptances was held not to be affected by the fact that this condition as to deposit of securities was only partially complied with, the restriction being in a measure a secret one, and the directors being estopped by their action from setting it up.³⁶⁶

Where an agent purports to sign a note for several principals, some of whom have given him no authority to do so, the others who have authorized him will still be bound.³⁶⁷ If an agent has indorsed a bill payable to order without any authority, he alone will be liable to an action.³⁶⁸ Such defense is, however, a personal

³⁶⁵ Ladd v. Town of Franklin, 37 Conn. 53.

³⁶⁶ In re Land-Credit Co. of Ireland, 4 Ch. App. 460. Giffard, L. J., says in this case (page 474): "Under resolutions such as these, if there is an acceptance *modo et forma*, and by the persons pointed out by the resolutions, it is not to be deemed incumbent, even on persons who have notice of the resolutions, to inquire whether the particular consideration mentioned in them was received. The fact of the person who is the agent accepting, and parting with the acceptance, is, in point of fact, an assurance by that person that he has done all that is required to be done by him on behalf of the company who employed him,—an assurance on which the person who deals with the company not only may safely rely, but must of necessity rely; otherwise the business of companies of this description could never be carried on. * * * I think it is quite enough to put the case simply upon this: that the acceptance of the bills was a transaction plainly within the powers of the company, that it was a transaction plainly within the powers of the board of directors, that the fact that these bills were accepted and handed over was perfectly well known to the board of directors, and that whether it was assented to by them with or without knowledge as to the securities which were taken is, in my opinion, quite immaterial. There was, at all events, a representation to the public by the agents of the company, who were instructed to carry out this transaction, that everything was rightly done; and I am of opinion that it does not lie in the mouth of the company to assert that what was so represented to be rightly done was not carried out according to the precise terms specified in that which, if, in point of fact, it was a limitation of authority at all, was not a limitation of authority intended to be communicated to the public, or to have any effect as between the company and the public."

³⁶⁷ Taylor v. Jones, 1 Ind. 17.

³⁶⁸ Fearn v. Filica, 7 Man. & G. 513.

privilege, and it has been held that a surety signing a promissory note cannot set up in his own defense that the principal's name was signed without authority.³⁶⁹

Where notes are given to an agent in settlement of losses which he falsely represented himself to have incurred in the maker's business, it will be no defense to the maker that the notes were given without knowledge that his instructions had been disobeyed by the agent. But fraudulent representations on the agent's part as to the transactions, inducing the principal to give the notes, will be a good defense, the notes being to that extent without consideration.³⁷⁰

Defenses—When Admissible.

§ 387. Where bills and notes are negotiated by an agent without authority after they are due, they are subject to the defense of want of authority, and the principal may have an action for the refunding of the money obtained on them.³⁷¹ But where a bill is payable to the drawer's order, and indorsed by him to his agent after its maturity for the purpose of taking up his own outstanding acceptances, and is misapplied by the agent, this will constitute no defense against a bona fide holder.³⁷²

On the other hand, where a bill is indorsed to an agent for the purpose of procuring a discount before its maturity, and is misapplied by the agent, this will constitute a good defense at suit of a holder before maturity for usurious consideration.³⁷³

If the holder of a bill takes it with knowledge that it was given without authority of the principal, he will take it subject to such defense.³⁷⁴ And if a bill has been received by an agent for a particular purpose, and discounted by him in disregard of that purpose, neither he nor a third person purchasing it with knowledge of

³⁶⁹ *Weare v. Sawyer*, 44 N. H. 198. So, too, only the bank can question the authority of its cashier indorsing in its name. *Haugan v. Sunwall*, 60 Minn. 367, 62 N. W. 398.

³⁷⁰ *Beall v. January*, 62 Mo. 434.

³⁷¹ *Lee v. Zagury*, 8 Taunt. 114.

³⁷² *Wright v. Hay*, 2 Starkie, 398.

³⁷³ *Keutgen v. Parks*, 2 Sandf. (N. Y.) 60.

³⁷⁴ *Byles, Bills*, 58; *Attwood v. Munnings*, 7 Barn. & C. 278, 1 Man. & R. 78.

the circumstances can hold the proceeds or use them as a set-off against the real owner.³⁷⁵ But the mere fact that the person selling the note to the plaintiff was a broker is not sufficient to charge him with notice, or subject him to such a defense on the part of an owner, who has been defrauded by the agent's sale of the note for his own benefit.³⁷⁶

Where a principal has given his agent authority to accept bills in his name, he cannot escape liability by setting up his own want of interest in the particular transaction or the want of consideration to him, unless he shows that the holder had knowledge of the agent's abuse of his authority.³⁷⁷

Notice of Limit of Agent's Authority.

§ 388. If the agency of the party is made to appear, the principal will not be bound beyond the authority given.³⁷⁸ And, where the holder has notice that the party acting as agent is such, he is bound to inquire into his authority.³⁷⁹ Where the authority is expressly conferred in writing, and is exceeded by the agent, the principal will not be liable.³⁸⁰ And authority appearing by the use of such words as "per procuration" is such notice of agency as will put the holder on inquiry.³⁸¹ But it seems that the addition to the indorser's name of the word "curator" will not amount to such notice.³⁸² Where an agent is authorized to accept a bill for his principal, the holder may demand the production of the au-

³⁷⁵ *Ex parte Frere*, Mont. & M. 263; *Key v. Flint*, S Taunt. 21; *Ex parte Flint*, 1 Swanst. 30.

³⁷⁶ *Atlas Nat. Bank v. Savery*, 127 Mass. 75.

³⁷⁷ *Broadway Sav. Bank v. Vorster*, 30 La. Ann. 587.

³⁷⁸ *Chit. Bills*, 37; 1 *Daniel*, Neg. Inst. 265.

³⁷⁹ *Chit. Bills*, 37; *Attwood v. Munnings*, 7 Barn. & C. 278; *East India Co. v. Tritton*, 3 Barn. & C. 280; *Dowden v. Cryder*, 55 N. J. Law, 329, 26 Atl. 941.

³⁸⁰ *Beach v. Vandewater*, 1 Sandf. (N. Y.) 265. In this case authority was given to accept drafts to be drawn against goods purchased, the agent "having evidence in his possession of such purchases."

³⁸¹ *Byles*, Bills, 56; *Alexander v. MacKenzie*, 6 C. B. 766; *Attwood v. Munnings*, supra; *Stagg v. Elliott*, 12 C. B. (N. S.) 373.

³⁸² *Paulette v. Brown*, 40 Mo. 52.

thority.³⁸³ Where an indorsement contains such words as "for my use," or "within must be credited to A. B.," this shows a limited agency in the indorsee, and will prevent a transfer by him free from defense.³⁸⁴ And in such case a bill transferred by the agent as security for advances made to him may be recovered in trover by the principal.³⁸⁵

Municipal Warrants—Defense Admissible.

§ 389. As we have already seen, municipal warrants drawn by one town officer on another are not, properly speaking, negotiable. Such instruments are, therefore, liable even at suit of a bona fide holder to the defense of being issued without authority.³⁸⁶ And this is true although they are made payable to bearer;³⁸⁷ and especially where they are made payable out of some particular fund, specifying a road tax or other public fund.³⁸⁸

Defenses—When Inadmissible—Bona Fide Holder.

§ 390. Where a note or bill payable to bearer has been delivered to an agent, and by the agent without authority from his principal, and has come into the hands of a bona fide holder for value before maturity, it will be good against all parties notwithstanding the agent's want of authority.³⁸⁹ So, if notes have been put in the hands of an agent to obtain discounts for his principal, and have been transferred by his indorsement and the proceeds misapplied by him, the principal cannot recover them from a bona fide holder for value.³⁹⁰ So, where notes are indorsed in blank to an agent

³⁸³ Byles, Bills, 59; 1 Pars. Notes & B. 120; Attwood v. Munnings, 7 Barn. & C. 278, 1 Man. & R. 78.

³⁸⁴ Treuttel v. Barandon, 8 Taunt. 100; Sigourney v. Lloyd, 8 Barn. & C. 622, 3 Man. & R. 58.

³⁸⁵ Treuttel v. Barandon, 8 Taunt. 100.

³⁸⁶ Sturtevant v. Inhabitants of Liberty, 46 Me. 457; People v. Supervisors of El Dorado, 11 Cal. 171.

³⁸⁷ Smith v. Inhabitants of Cheshire, 13 Gray (Mass.) 318.

³⁸⁸ Dyer v. Covington Tp., 19 Pa. St. 200.

³⁸⁹ Byles, Bills, 58; Miller v. Race, 1 Burrows, 452; Lawson v. Weston, 4 Esp. 56; Raphael v. Bank, 17 C. B. 161; Bird v. Daggett, 97 Mass. 494.

³⁹⁰ Ogden v. Marchand, 29 La. Ann. 61.

for a particular purpose, which has been disregarded by him, the principal will be bound to a bona fide holder by reason of the general authority implied in the blank, and cannot, against such holder, avail himself of the fact that the agent has exceeded his authority.³⁹¹ And it makes no difference in such case that the agent has been guilty of a fraud upon his principal.³⁹² Such fraud will not make the indorsement a forgery.³⁹³

In like manner, where paper has been delivered with blanks not filled up, an agency to fill them is created by, and implied from, the delivery of the paper; and, if the blanks are filled in excess of the authority given, the maker will still be liable to a bona fide holder of the paper for value.³⁹⁴ So, if a note is indorsed in blank, and delivered as collateral to one who disposes of it in violation of the agreement under which he holds it, and it comes into the hands of a bona fide holder, who surrenders it for a new note from the maker, the indorser cannot afterwards set up against the maker who has thus paid it the want of authority on the part of his own indorsee to transfer it.³⁹⁵

So, where the holder of a note places it for sale in the hands of a broker, he will be bound by his representations to a buyer that it is good business paper, and he cannot afterwards set up that the note had no previous existence as a note, and was purchased from the broker at a usurious rate of interest.³⁹⁶

Commercial Paper Payable to Bearer.

§ 391. From these cases the rule may be laid down that possession carries with it presumptively the ownership and power to dispose of negotiable paper payable to bearer or indorsed in blank,

³⁹¹ *Collins v. Martin*, 1 Bos. & P. 648, 2 Esp. 520; *Grant v. Vaughan*, 3 Burrows, 1516.

³⁹² *Bolton v. Puller*, 1 Bos. & P. 539; *Ramsbotham v. Cator*, 1 Starkie, 228.

³⁹³ *Putnam v. Sullivan*, 4 Mass. 45.

³⁹⁴ *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 373; *Herbert v. Huie*, 1 Ala. 18; *Roberts v. Adams*, 8 Port. (Ala.) 297; *Putnam v. Sullivan*, 4 Mass. 45; *Fullerton v. Sturges*, 4 Ohio St. 529; *Johnson v. Blasdale*, 1 Smedes & M. (Miss.) 17; *Hemphill v. Bank*, 6 Smedes & M. (Miss.) 44; *Goad v. Hart's Adm'rs*, 8 Smedes & M. (Miss.) 787.

³⁹⁵ *Yates v. Valentine*, 71 Ill. 643.

³⁹⁶ *Ahern v. Goodspeed*, 9 Hun (N. Y.) 263.

and the bona fide holder of such an instrument is not subject to any defense arising out of the agent's fraud or want of authority.³⁹⁷ Thus, where the agent draws a bill on his principal, which is accepted by the principal for the purpose of obtaining a discount, he will be bound by the agent's subsequent pledge of the bill.³⁹⁸ So, if a broker, intrusted with a note for the purpose of sale for his principal's benefit, pledges it for a pre-existing debt of his own, the principal cannot recover it from such pledgee.³⁹⁹ So, if the agent under such circumstances transfers it for the purpose of obtaining indemnity for himself in another matter.⁴⁰⁰ And this has been held to be true even if municipal bonds made by a school district, which are negotiable in form, and have been transferred by the agent in payment of his own debt.⁴⁰¹ It is also true, in general, of bills and notes indorsed in blank to an agent for collection⁴⁰² or for safe keeping.⁴⁰³

Principal Estopped by Conduct.

§ 392. Where one suffers his agent to act ostensibly as principal, in a business name which is used for the principal's business and belongs neither to principal nor agent individually, an acceptance by the agent in such name will bind the principal, although expressly forbidden by him.⁴⁰⁴ So, if one has suffered another to draw bills of exchange in his name, he will be liable to a bona fide holder of such bills for value, although he may have received no consideration for, and had no knowledge of, the particular bill in question.⁴⁰⁵ So, where the agent has indorsed a note in excess of his authority and in fraud of his principal, and other notes similarly executed by him have been recognized and paid by the principal, a general authority may be implied which will bar the principal from defense in such

³⁹⁷ *Murrell v. Jones*, 40 Miss. 565.

³⁹⁸ *Clement v. Leverett*, 12 N. H. 317.

³⁹⁹ *Glovanovich v. Bank*, 26 La. Ann. 15.

⁴⁰⁰ *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9.

⁴⁰¹ *School Dist. No. 16 v. State Bank of Nebraska*, 8 Neb. 168.

⁴⁰² *Stutzman v. Payne*, 23 Iowa, 17.

⁴⁰³ *Ringling v. Kohn*, 4 Mo. App. 59.

⁴⁰⁴ *Edmunds v. Bushell*, L. R. 1 Q. B. 97.

⁴⁰⁵ *Smith v. Stanger*, Peake, Add. Cas. 116.

case against the holder for value without notice.⁴⁰⁶ This is true, too, of the fraud of a bank director, misappropriating the proceeds of paper sent to him in his official capacity to be discounted;⁴⁰⁷ or of an accommodation indorsement without authority by the general cashier and financial agent of a note-broking firm;⁴⁰⁸ and, in general, of bills and notes misapplied by any agent having a general authority.⁴⁰⁹

The principal is bound in like manner, as we have seen; by representations of the agent as to the character of such paper discounted for the principal.⁴¹⁰ And the fact that the principal's instructions to his agent have been violated by him will be no defense against a bona fide holder for value, if the agent's act is within the general scope of his business.⁴¹¹ It is to be remembered, however, that a general agency to manage a business as a clerk, or even, in many cases, as a general manager, will not cover notes or bills so as to render the principal liable, especially where the consideration has not been received by the agent in the course of the principal's business.⁴¹²

An indorsement generally warrants the authority of prior parties to sign the paper. But where an indorsee has voluntarily taken up and paid a bill drawn by an agent after personal examination of the agent's authority, and has been afterwards obliged to pay it again by reason of the agent's want of authority, he cannot hold his immediate indorser as warranting the authority of such agent.⁴¹³

⁴⁰⁶ *Exchange Bank v. Monteath*, 26 N. Y. 505, reversing 17 Barb. (N. Y.) 171, 24 Barb. (N. Y.) 371.

⁴⁰⁷ *Bank of U. S. v. Davis*, 2 Hill (N. Y.) 452.

⁴⁰⁸ *Edwards v. Thomas*, 66 Mo. 468.

⁴⁰⁹ *Hooc v. Oxley*, 1 Wash. (Va.) 19; *Hanover Nat. Bank of City of New York v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72. But in all such cases the pretended agent must have had apparent authority derived from the principal. *King v. Sparks*, 77 Ga. 285, 1 S. E. 266.

⁴¹⁰ *North River Bank v. Aymer*, 3 Hill (N. Y.) 262.

⁴¹¹ *Crawford v. Hildebrant*, 6 Lans. (N. Y.) 502.

⁴¹² *Bank of Hamburg v. Johnson*, 3 Rich. Law (S. C.) 42.

⁴¹³ *East India Co. v. Tritton*, 3 Barn. & C. 280.

Evidence—Burden of Proof.

§ 393. Where commercial paper has been executed by an agent, it is always incumbent upon the holder to prove the agent's authority in order to render the principal liable. And the burden of making such proof is upon the holder.⁴¹⁴ Where the agent is an officer of an incorporated company, as has been already said, his authority as agent is sometimes to be presumed from his office. Thus, the cashier of a bank will be presumed to have authority to transfer its negotiable securities by indorsement.⁴¹⁵ But it has been held that, where the charter of the company provides that its affairs shall be conducted by a board of directors, it will not be presumed that the president and secretary have authority by virtue of their office to make notes for the company.⁴¹⁶ So, if a note be made by the selectmen of a town, the holder must show their authority to bind the town in such manner.⁴¹⁷ Or, if a note be given by the trustees of a school district, their authority must be shown.⁴¹⁸ So, if the agent, who sells a note for his principal, gives an express warranty of its genuineness, his authority so to do must be shown by the holder of

⁴¹⁴ *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344. 6 N. W. 823; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Wallace v. Wallace*, 8 Ill. App. 69; *Flax & Hemp Mfg. Co. v. Ballentine*, 16 N. J. Law, 454; *Knight v. Lang*, 2 Abb. Prac. (N. Y.) 227; *Spicer v. Smith*, 23 Mich. 96. This rule is changed as to bank drafts in England by St. 16 & 17 Vict. c. 59, § 19, which provides that "any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof." And this act applies to the indorsement of the name of the payee, "A. B., per C. D., Agent." *Charles v. Blackwell*, 1 C. P. Div. 548, 2 C. P. Div. 151.

⁴¹⁵ *Wild v. Bank*, 3 Mass. 505.

⁴¹⁶ *McCullough v. Moss*, 5 Denio (N. Y.) 567, 575.

⁴¹⁷ *Great Falls Bank v. Farmington*, 41 N. H. 32; *Andover v. Grafton*, 7 N. H. 294; *Rich v. Errol*, 51 N. H. 350.

⁴¹⁸ *School Dist. No. 7 v. Thompson*, 5 Minn. 280 (Gil. 221).

the paper.⁴¹⁹ And, if the holder of a note executed by an agent relies on its ratification by the principal, he must show its execution by the agent, and the subsequent adoption by the principal of the unauthorized signature as his own.⁴²⁰ But in some states the holder of a note purporting to be executed by an agent need not prove the execution nor the authority of the agent, unless they are expressly denied in the pleading.⁴²¹

At common law the averment that the defendant accepted or drew a bill of exchange "in his own proper handwriting" was formerly held to be supported by proof of signature by an authorized agent, and could be rejected as surplusage, if untrue.⁴²² This has now been changed by the recent English rules of pleading, where there is no proof of a subsequent promise by the principal.⁴²³

Where it is incumbent on the holder of a bill or note to prove the agent's authority as agent of the maker or indorser, this may be done by parol evidence.⁴²⁴ And, even though the bill itself shows the agent to have acted under a special written authority, other evidence is admissible to establish this authority.⁴²⁵ Where an agent has executed a draft for his principal, the agent's statements as to a former draft, executed by him under similar circumstances and paid by his principal, have been held admissible as evidence of his agency.⁴²⁶ And admissions on the principal's part of his authority to execute another similar acceptance have been held admissible in confirmation of other evidence showing a general authority

⁴¹⁹ *Wilder v. Cowles*, 100 Mass. 487.

⁴²⁰ *Cravens v. Gillilan*, 63 Mo. 28.

⁴²¹ *Brashear v. Martin*, 25 Tex. 202; *Moore v. Holmes* (Minn.) 70 N. W. 872.

⁴²² *Byles, Bills*, 631; *Chit. Bills*, 642; *Booth v. Grove*, *Moody & M.* 182, 3 Car. & P. 335. And although, since the recent English rules of pleading (1 Wm. IV.), such averment, if untrue, will subject the plaintiff to costs, it may still be supported by evidence of a subsequent promise by defendant to pay. *Helmshley v. Loader*, 2 Campb. 450.

⁴²³ *Levy v. Wilson*, 5 Esp. 180.

⁴²⁴ *Miller v. Moore*, 1 Cranch, C. C. 471, Fed. Cas. No. 9,584; *Morse v. Green*, 13 N. H. 32; *Cain v. Mack*, 33 Tex. 135; *McWhirt v. McKee*, 6 Kan. 412.

⁴²⁵ *Page v. Lathrop*, 20 Mo. 589.

⁴²⁶ *McDonough v. Heyman*, 38 Mich. 334.

for the acceptance in question.⁴²⁷ On the other hand, where the payee's indorsement has been made by an agent, the payee's admission, in writing, of his agent's authority is not competent evidence of that fact in an action by the indorsee against the maker.⁴²⁸

⁴²⁷ Llewellyn v. Winckworth, 13 Mees. & W. 598.

⁴²⁸ Clark v. Peabody, 22 Me. 500.

CHAPTER XII.

CAPACITY—PARTNERS, EXECUTORS, ETC.

- I. PARTNERS.
 - II. PERSONAL REPRESENTATIVES.
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I. PARTNERS.

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General Powers.

§ 394. Commercial paper is frequently made and transferred by partners, and its execution on behalf of the firm is seldom by all the members of the firm. It is a general rule that partners in mercantile business have power to give, transfer, and accept bills, notes, and checks in the firm name and business.¹ And each member of the firm has authority to sign the firm name to such paper in its business. This applies, also, to indorsements.² And the execution of a bill or note by one partner in the name of the firm will support an averment of its execution by the firm.³ So, where a firm has become liable as agent for the amount of certain notes taken for its principal without authority, one partner may bind the firm by a

¹ Byles, Bills, 44; Chit. Bills, 52; 1 Daniel, Neg. Inst. 326; 1 Edw. Bills & N. § 97; 1 Pars. Notes & B. 123; Story, Prom. Notes, § 72; Story, Partn. § 102; Harrison v. Jackson, 7 Term R. 207; Pinkney v. Hall, 1 Salk. 126, 1 Ld. Raym. 175; Lane v. Williams, 2 Vern. 277; Wells v. Masterman, 2 Esp. 731; Swan v. Steele, 7 East, 210; Ridley v. Taylor, 13 East, 175; Shirreff v. Wilks, 1 East, 48; Sutton v. Gregory, Peake, Add. Cas. 150; Ex parte Bonbonus, 8 Ves. 542; Ex parte Gardom, 15 Ves. 286; Wiseman v. Easton, 8 Law T. (N. S.) 637; National Union Bank v. Landon, 66 Barb. (N. Y.) 189; Williams v. Connor, 14 S. C. 621; Sherwood v. Snow, 46 Iowa, 481; Stimson v. Whitney, 130 Mass. 591; Drennen v. House, 41 Pa. St. 30; Dickson v. Dryden, 97 Iowa, 122, 66 N. W. 148; Barber v. Van Horn, 54 Kan. 33, 36 Pac. 1070. And even to include in the note a warrant to enter judgment. Hier v. Kaufman, 134 Ill. 215, 25 N. E. 517. And, where this is held not to be so, the note may still be ratified by the partners. Miller v. Glass Works, 172 Pa. St. 70, 33 Atl. 350.

² Walker v. Kee, 14 S. C. 142; Barrett v. Russell, 45 Vt. 43; National Exch. Bank v. White, 30 Fed. 412; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872. Especially where the proceeds have gone to the firm. Mohawk Nat. Bank v. Van Slyck, 29 Hun, 188.

³ Porter v. Cumings, 7 Wend. (N. Y.) 172. But not, without proof of authority or partnership, a note signed by one in the individual names of all. Pease v. Morgan, 7 Johns. (N. Y.) 468.

settlement made with the principal by signing the firm name to the notes as a co-maker.⁴

And a partner may bind his firm by a note in the firm name given to a creditor in settlement of an existing liability of the firm, although the power to bind the firm by such paper, in general, is withheld by the articles of partnership.⁵ And in Illinois, where the common-law distinction between sealed and unsealed instruments is done away, it has been held that a partner might bind his firm by a note under seal, signed in its name, and given for money borrowed for its use.⁶ So, one partner may bind the firm by a warranty given in the sale by him of a firm note,⁷ or by an exchange of notes in the course of the firm's business.⁸

The power of partnerships to execute commercial paper in the firm name by the hand of one partner is recognized generally by the mercantile law of the world, and it is sometimes expressly provided for by statute.⁹

Partners by Implication.

§ 395. The relation of partners to one another is, in general, created and regulated by express contract, although it may arise even among themselves by implication. One who represents himself to be a partner, and is not so, becomes liable thereby as such to parties relying on his representation and taking obligations of the firm on the strength of it.¹⁰ So, if a person knowingly suffers another to use his name with his own as that of a firm, he will

⁴ *Brayley v. Hedges*, 52 Iowa, 623, 3 N. W. 652.

⁵ *Langan v. Hewett*, 13 Smedes & M. (Miss.) 122.

⁶ *Walsh v. Lennon*, 98 Ill. 27.

⁷ *Sweet v. Bradley*, 24 Barb. 549.

⁸ *Morris v. Maddox*, 97 Ga. 575, 25 S. E. 487.

⁹ ARGENTINE REPUBLIC. Code Com. art. 809. But in HUNGARY (Exch. Law 1861, art. 12) the firm name must be officially registered for that purpose with a copy of the articles of partnership. In MICHIGAN (1 How. Ann. St. § 2369) limited partnerships cannot become liable beyond \$500 without the signature of two managers, and such a note executed by one partner is void. *Citizens' Sav. Bank v. Vaughan* (Mich.) 73 N. W. 143.

¹⁰ *Chit. Bills*, 51; 1 *Edw. Bills & N.* § 96; *Harvey v. Kay*, 9 Barn. & C. 356; *Fox v. Clifton*, 6 Bing. 791, 4 *Moore & P.* 676; *Doubleday v. Muskett*, 7 Bing. 117, 4 *Moore & P.* 750; *Ex parte Langdale*, 18 Ves. 300.

become liable as a partner on a note or bill given in such firm name, although between themselves no such relation may exist.¹¹ In such case he will be liable to any one to whom he has been held out as such partner with his knowledge and sufferance, and who has relied on such information.¹² But representations of the sort will not render him liable as a partner to any one to whom they were not communicated.¹³

Dormant and Special Partners.

§ 396. The liability of all the partners in a firm upon a bill or note given in its name extends also to dormant partners, whose names do not appear in the firm.¹⁴ Thus, a note given by an active partner in the firm's name, in the hands of a bona fide holder believing it to be, as represented, for the use of the firm, will bind dormant as well as active partners.¹⁵ Where, however, a creditor deals with the firm without knowing of any dormant partner, and learns subsequently of his existence, he may elect to proceed against all the partners or against the active partners only; and, in the latter case, he cannot be compelled to join the dormant partner.¹⁶ In like manner, the ostensible partner may bring suit on a partner-

¹¹ *Smith v. Hill*, 45 Vt. 90.

¹² *Byles, Bills*, 50; 1 *Daniel, Neg. Inst.* 323; *Dickinson v. Valpy*, 10 Barn. & C. 141, 5 Man. & R. 126; *Gurney v. Evans*, 3 Hurl. & N. 122. But where a note is signed without authority by an agent conducting the business on a share of profits, and this is known to the payee, the burden as to existence of a partnership is upon such payee. *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663.

¹³ *Chit. Bills*, 52; *Vice v. Lady Anson*, 7 Barn. & C. 409; *Vere v. Ashby*, 10 Barn. & C. 288; *Carter v. Whalley*, 1 Barn. & Adol. 13.

¹⁴ *Byles, Bills*, 50; *Chit. Bills*, 55; 1 *Edw. Bills & N.* 108; *Vere v. Ashby*, supra; *Lloyd v. Ashby*, 2 Barn. & Adol. 23; *Swan v. Steele*, 7 East, 210; *Wintle v. Crowther*, 1 Tyrw. 215; *Id.*, 1 *Cromp. & J.* 310; *Gurney v. Evans*, 27 Law J. Exch. 166. Even though given for a debt of the old firm, of which he was not a member. *Lloyd v. Ashby*, supra. See, too, *Boudreaux v. Martinez*, 25 La. Ann. 167; *Bradshaw v. Apperson*, 36 Tex. 133.

¹⁵ *Etheridge v. Binney*, 9 Pick. (Mass.) 272.

¹⁶ *Chit. Bills*, 57; *Ex parte Norfolk*, 19 Ves. 455; *Ex parte Hodgkinson*, *Id.* 291; *Ex parte Hamper*, 17 Ves. 403; *Bentfield's Case*, 5 Ves. 424.

ship contract without joining the dormant partner.¹⁷ And, even if the agreement which provides for the dormant partnership is dated back, it will not be retroactive, so as to render the dormant partner liable on paper actually given before the agreement, although after its date, for the benefit of the original active partners.¹⁸ But where a firm which has a dormant partner is dissolved, and its commercial paper is afterwards renewed without any intention of discharging the firm, the former dormant partner, with the others, will still remain liable on the original paper.¹⁹

Many of the states provide by statute for limited or special partnership. In most of these cases the special partner's liability is limited by statute to the capital actually invested by him in the concern; and he is not liable, and cannot be sued, upon contracts made by the firm in its partnership name. For a consideration of special partnerships the reader must be referred to books relating particularly to the law on that subject. As regards persons contracting with the firm, a special partner is virtually not a member of the firm.

New Partners—Anticipation.

§ 397. Where new partners come into a firm, although the name of the former firm continues, the new partners do not become liable on that account for the debts of the old firm.²⁰ A new partner will not be liable to a holder with notice upon an acceptance given by the old partners in the firm name for a debt of the former firm.²¹ But the new partner, though not liable for the debt of the old firm, will be liable to a holder for value and without notice on an acceptance given in the firm name for a debt of

¹⁷ *Leveck v. Shaftoe*, 2 Esp. 468; *Lloyd v. Archbowle*, 2 Taunt. 324; *Mawman v. Gillett*, 2 Taunt. 325, note; *Kell v. Nainby*, 10 Barn. & C. 20.

¹⁸ *Byles, Bills*, 50; *Vere v. Ashby*, 10 Barn. & C. 288. See, too, *Wilson v. Tumman*, 6 Man. & G. 236; *Battley v. Lewis*, 1 Man. & G. 155, 1 Scott, N. R. 143.

¹⁹ *Parker v. Canfield*, 37 Conn. 250. For a fuller discussion of this question the reader is referred to the chapter on "Payment by Note," *infra*.

²⁰ *Richardson v. Bank*, 11 Ill. App. 582, where the bank sought to apply deposits made by the new firm for a new account to settle the overdrawn account of the old firm.

²¹ *Byles, Bills*, 49; *Shirreff v. Wilks*, 1 East, 48.

the old firm.²² And it has been held that where the new firm assumes the debt of the old firm, and promises to pay the holder, giving its note for it, it thereby makes the debt its own, and the note is not a promise to pay the debt of another.²³

Sometimes the firm name is used in *anticipation* of a partnership to be formed. In such case, where a bill has been drawn on a firm before it was formed, the members of the firm will be bound by a subsequent acceptance in the firm name by one partner.²⁴ So, the partners may be bound by a bill or note given in the firm name without authority and in anticipation, but subsequently ratified.²⁵ But the firm will not be liable on a bill of exchange drawn in the firm name by one partner, for advances made to him before the commencement of the partnership;²⁶ nor on a bill given by one partner in the firm name, before its formation, to raise money for himself;²⁷ although the money be afterwards used in the partnership business.²⁸

Power Limited to Partnership Business.

§ 398. The power of a partner to bind his firm by commercial paper executed in its name is confined to transactions in the business of the partnership.²⁹ But, where a bill or note is given in

²² See *Saville v. Robertson*, 4 Term R. 720.

²³ *Osborn v. Osborn*, 36 Mich. 48. In such case a general partner in a limited partnership may give a note of the new firm in renewal of that of the old firm. *Fourth St. Nat. Bank v. Whitaker*, 170 Pa. St. 297, 33 Atl. 100.

²⁴ *Westcott v. Price, Wright*, 220.

²⁵ *Chit. Bills*, 59; *Fox v. Clifton*, 6 Bing. 776; *Ex parte Bonbonus*, 8 Ves. 542; *Thicknesse v. Bromilow*, 2 Crompt. & J. 425.

²⁶ *Chit. Bills*, 59; *Green v. Deakin*, 2 Stark. 347.

²⁷ *Chit. Bills*, 58; *Greenslade v. Dower*, 7 Barn. & C. 635, 1 Man. & R. 640; *Saville v. Robertson*, 4 Term R. 720.

²⁸ *Baxter v. Plunkett*, 4 Houst. 450.

²⁹ *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; *Hotchkiss v. English*, 4 Hun (N. Y.) 369, 6 Thomp. & C. 658; *Graves v. Kellenberger*, 51 Ind. 66; *Bays v. Conner*, 105 Ind. 415, 5 N. E. 18; *Brent v. Davis*, 9 Md. 217; *Stegall v. Coney*, 49 Miss. 761; *Norton v. Thatcher*, 8 Neb. 186; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Tompkins v. Woodyard*, 5 W. Va. 216; *Newman v. Richardson*, 9 Fed. 865. Where a firm of agents has incurred liability as such for a breach of contract, a note given in settlement by one

the partnership name, it is presumed, in the absence of contrary evidence, to have been given in the partnership business.³⁰ And it has been held that this presumption is not destroyed by the fact that the bill drawn in the firm name was made payable to one partner and discounted by him, and the proceeds of the discount paid to him.³¹

Partnership Consent—Implied or Presumed.

§ 399. The liability of partners upon paper given by one partner in the firm name is derived from their consent, expressed or implied. In general, such consent is implied from the business of the firm and the custom of merchants. If the paper is not given in the partnership business, and this fact appears, the consent of the other partners must be proved affirmatively.³² But it is not necessary to such consent that the partners should have actual knowledge of the particular transaction. Consent may be implied from the nature of the partnership.³³ Or it may be implied, like the authority from principal to agent, from the fact that in other transactions and with other parties the partner has acquiesced in

partner is in the business of the firm, and binds all. *Brayley v. Hedges*, 52 Iowa, 623, 3 N. W. 652. And, if a partner originally gave his individual note for a firm debt, he may afterwards renew it or indorse the renewal in the firm name. *Wilson v. Richards*, 28 Minn. 337, 9 N. W. 872.

³⁰ *Doty v. Bates*, 11 Johns. (N. Y.) 544; *Carrier v. Camieron*, 31 Mich. 373; *National Union Bank v. Landon*, 66 Barb. (N. Y.) 193; *Abpt v. Miller*, 50 N. C. 32; *Church v. Sparrow*, 5 Wend. (N. Y.) 223; *Whitaker v. Brown*, 16 Wend. (N. Y.) 507; *Thurston v. Lloyd*, 4 Md. 283; *Manning v. Hays*, 6 Md. 5; *Mifflin v. Smith*, 17 Serg. & R. (Pa.) 165; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; *Ensminger v. Marvin*, 5 Blackf. (Ind.) 210; *Adams v. Ruggles*, 17 Kan. 237; *Holmes v. Porter*, 39 Me. 157; *Hayward v. French*, 12 Gray (Mass.) 453; *Moorehead v. Gilmore*, 77 Pa. St. 118; *Sherwood v. Snow*, 46 Iowa, 481; *Davis v. Cook*, 14 Nev. 265; *Lindh v. Crowley*, 29 Kan. 756; *Marsh v. Bank*, 2 Bradw. (Ill.) 217; *Van Dyke v. Seelye*, 49 Minn. 557, 52 N. W. 215.

³¹ *Haldeman v. Bank*, 28 Pa. St. 440.

³² *Mercein v. Andrus*, 10 Wend. (N. Y.) 401; *Waller v. Keyes*, 6 Vt. 257.

³³ *Smith v. Lusher*, 5 Cow. (N. Y.) 688. Of course, the partner executing the paper cannot defend on the ground of a want of authority to do so. *Louisiana Mut. Ins. Co. v. Walters*, 25 La. Ann. 560.

the use of the firm name in this manner.³⁴ So, the consent of one partner to such contract may be implied from subsequent conduct inconsistent with a disclaimer on his part.³⁵

Subsequent ratification by him may be implied, as in the similar relation of principal and agent.³⁶ Receiving the proceeds of the bill or delay in disaffirming it will amount to a ratification.³⁷ Where a note is made by one firm and indorsed by another to a person who is a common partner in both firms, their assent will be presumed in favor of a bona fide holder for value.³⁸ And although the holder of a note, made in the name of one partner for his individual benefit, and indorsed by him in the firm name without authority of the firm, has taken it with knowledge of this circumstance, the other partners will be bound without any independent consideration by their subsequent promise to pay the note.³⁹

The consent of one partner to a note made in the firm name by a second partner will be binding only on himself and not on a third member of the firm.⁴⁰ Although it has been held that an acceptance in the name of a firm by one of its members will bind the firm, where all appear to have knowledge of it, even if such knowledge has only been clearly proved as to one of two other partners.⁴¹

§ 400. — The presumption of assent extends, in general, only to negotiable paper, and, where a nonnegotiable note is indorsed by one partner in the name of his firm, the burden of proof is on the indorsee to show the assent or ratification of the other partners.⁴²

³⁴ *Ditts v. Lonsdale*, 49 Ind. 521.

³⁵ *Dudley v. Littlefield*, 21 Me. 418.

³⁶ 1 Pars. Notes & B. 142. Ratification is not, however, the same as original authority. *Byles, Bills*, 49; *Duncan v. Lowndes*, 3 Camp. 478; *Vere v. Ashby*, 10 Barn. & C. 288.

³⁷ Receiving the proceeds. *Buettner v. Steinbrecher*, 91 Iowa, 588, 60 N. W. 177; *Richardson v. French*, 4 Metc. (Mass.) 577; using an accommodation indorsement procured by one of the partners. *Springs v. McCoy* (N. C.) 29 S. E. 903. So, *Foster v. Andrews*, 2 Pen. & W. 160, where the firm failed to disaffirm a note after learning that it had been given for the partner's individual debt. And see, as to misappropriation of paper held by the firm in trust, *Deitz v. Regnier*, 27 Kan. 94.

³⁸ *Ihmsen v. Negley*, 25 Pa. St. 297.

³⁹ *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577.

⁴⁰ *King v. Faber*, 22 Pa. St. 21.

⁴¹ *Flemming v. Prescott*, 3 Rich. (S. C.) 307.

⁴² *Sweetser v. French*, 2 Cush. (Mass.) 309.

Inasmuch as the partnership liability is based on the consent of all, expressed or implied, it follows that the members of a firm will not be liable on paper executed without their consent at suit of a party who knows of this want of consent.⁴³ And the fact that the other partner offered to sign as indorser, while he refused to sign as a joint maker, will not render him liable to the payee on a joint note executed in the firm name.⁴⁴ It has been held that a partner may be bound by the act of the majority of the firm, notwithstanding his expressed dissent, and although this fact was known to the holder. These cases seem, however, to have rested on a liability of the firm, independent of the paper in question and serving as consideration for it.⁴⁵ The dissent of a partner to a contract of the firm is a question of fact for the jury.⁴⁶ And the jury may consider his conversation offered in evidence to show his consent to such use of the firm name.⁴⁷ But the mere declaration of one partner making a note, that an accommodation indorsement was obtained by him for the use of the firm and that the proceeds went to the benefit of the firm, will not be sufficient to bind the firm.⁴⁸

Business Foreign to Partnership.

§ 401. If a bill of exchange is made by one partner in the partnership name, but not in its business, it is still ostensibly the paper

⁴³ Byles, Bills, 47; 1 Daniel, Neg. Inst. 329; 1 Edw. Bills & N. § 102; 1 Pars. Notes & B. 129; Heilbut v. Nevill, L. R. 5 C. P. 478; Lord Gallway v. Mathew, 10 East, 264; Willis v. Dyson, 1 Stark. 164. But see Moffitt v. Roche, 92 Ind. 96, to the effect that there must be knowledge of objection on the part of such partner, and not of the mere lack of consent.

⁴⁴ Leavitt v. Peck, 3 Conn. 124.

⁴⁵ 1 Edw. Bills & N. § 98. And see Wilkins v. Pearce, 5 Denio (N. Y.) 541, where it was so held as to an agreement by one partner to indemnify one who signed accommodation paper for the firm. So, it has been held that a firm will be liable on notes given in its name by a majority of the partners for supplies purchased by them in the firm business, notwithstanding the dissent of one partner. Johnston v. Dutton's Adm'r, 27 Ala. 245.

⁴⁶ Vice v. Fleming, 1 Younge & J. 227. And his denial by plea puts the burden of proof of authority on the holder. Lucas v. Baldwin, 97 Ind. 471.

⁴⁷ Windham County Bank v. Kendall, 7 R. I. 77.

⁴⁸ Uhler v. Browning, 28 N. J. Law, 79.

of the firm, and as such will bind the firm at suit of a bona fide holder for value before maturity.⁴⁹ And although such a holder has taken a renewal of such note in the firm name, after learning that the original note was given in a business which did not concern the firm and without the other partner's knowledge, he can still recover against the firm by virtue of his original character as a bona fide holder of the original note.⁵⁰ But, though a firm is bound by a note in the partnership name, the members of it will only be bound jointly on a joint and several note executed in the name of the partners.⁵¹ And the power of a partner to execute or indorse commercial paper for his firm gives him no power to bind an individual partner by acting in his name.⁵²

Release or Defense Affecting All.

§ 402. Where a defense exists against one partner, it will affect the rights of all the firm.⁵³ Thus, if an acceptor is relieved from his liability as to one of a firm drawing a bill of exchange by the individual promise of that partner to provide for it, this will form a good defense as to all the partners.⁵⁴ So, if a bill of

⁴⁹ *Ridley v. Taylor*, 13 East, 175; *Sherwood v. Snow*, 46 Iowa, 481; *First National Bank of Chittenango v. Morgan*, 6 Hun (N. Y.) 346, affirmed 73 N. Y. 593; *Gregg v. Fisher*, 3 Ill. App. 261; *Sedgwick v. Lewis*, 70 Pa. St. 217; *Faler v. Jordan*, 44 Miss. 283; *Smith v. Lusher*, 5 Cow. (N. Y.) 688, 709; *Rolston v. Click*, 1 Stew. (Ala.) 526; *Silverstein v. Atkinson*, 45 Miss. 81; *Peck v. Tingley* (Neb. Sup.) 73 N. W. 450.

⁵⁰ *Hopkins v. Boyd*, 11 Md. 107.

⁵¹ *Byles, Bills*, 45; *Chit. Bills*, 73; 1 *Daniel, Neg. Inst.* 331; 1 *Pars. Notes & B.* 136; *Perring v. Hone*, 4 Bing. 28, 12 *Moore*, 125, 2 *Car. & P.* 401; *McLae v. Sutherland*, 3 El. & Bl. 36.

⁵² *McCauley v. Gordon*, 64 Ga. 221.

⁵³ *Byles, Bills*, 46; 1 *Daniel, Neg. Inst.* 325; *Astley v. Johnson*, 5 *Hurl. & N.* 137; *Brandon v. Scott*, 7 El. & Bl. 234. In like manner, the discharge of one is the discharge of all. *Westcott v. Price, Wright*, 220. But one may make an individual promise to release an accommodation indorser and pay the note out of the maker's funds in his hands without binding his firm, which owned the note, *Webber v. Alderman*, 102 Mich. 638, 61 N. W. 57.

⁵⁴ *Richmond v. Heapy*, 1 *Stark*. 202; the proceeds of the acceptance in this case having been used in payment of previous accommodation acceptances. So, too, a like promise of the individual drawer of a bill to provide for it relieves the acceptor in a suit brought by the drawer's firm,

exchange is drawn or accepted for the accommodation of one partner, and is afterwards transferred to his firm, the firm cannot recover against the accommodation drawer or acceptor.⁵⁵

Contracts between Partners.

§ 403. On the other hand, the relation of the individual partners to one another in matters not relating to firm business is like that of strangers, and they may contract with and sue one another as such. Thus, one partner may give his note to another, even in consideration of advances made by the payee of the note in settlement of the maker's debts to the firm.⁵⁶ So, one partner may sue another on his individual note, although the partnership business may not have been settled between them.⁵⁷

One partner cannot, however, sue another for any debt or claim on which he would be ultimately liable to contribute as a partner.⁵⁸ Thus, one partner after the dissolution of the firm, being retained to defend the others in a matter involving their joint liability, and incurring a bill of costs in such defense, to which he would be liable to contribute as partner, cannot maintain an action at common law against the others to recover the bill of costs.⁵⁹ So, if one partner obtains possession of a bill of exchange drawn, ac-

to whom the bill had been indorsed. *Sparrow v. Chisman*, 9 Barn. & C. 241, 4 Man. & R. 206. But one partner cannot set off his individual debt, by way of a receipt, against a note held by his firm, so as to bind its creditors. *Mayer v. Garber*, 53 Iowa, 689, 6 N. W. 63.

⁵⁵ *Jones v. Yates*, 9 Barn. & C. 539; *Sandilands v. Marsh*, 2 Barn. & Ald. 673; *Rapp v. Latham*, *Id.* 795.

⁵⁶ *Chamberlain v. Walker*, 10 Allen (Mass.) 429. So, as one of the partnership payees, he may indorse the note to the other partner, *Fulton v. Loughlin*, 118 Ind. 286, 20 N. E. 796; or he may, as payee, indorse a note over to his firm, *Allen v. Mason*, 17 Ill. App. 518. But he cannot give to another partner a note made in the firm name, even for advances to the firm. *Bradley v. Linn*, 19 Ill. App. 322.

⁵⁷ *Jemison v. Walsh*, 30 Ind. 167. This might, of course, affect the amount of the recovery.

⁵⁸ *Holmes v. Higgins*, 1 Barn. & C. 74; *Teague v. Hubbard*, 8 Barn. & C. 345, 2 Man. & R. 369.

⁵⁹ *Milburn v. Codd*, 7 Barn. & C. 419

cepted, or indorsed by another for the firm, he cannot sue the other partner or the firm upon it.⁶⁰

As one cannot be both plaintiff and defendant in the same suit, a firm cannot as such sue one of its own members to recover money obtained by him on a draft given in the firm name for his individual debt.⁶¹ So, where the indorsees and holders of a note are a firm having one partner in common with the indorsing firm, they cannot sue the other indorser upon the indorsement, omitting the common partner, and at common law the omission may be pleaded in abatement.⁶² So, one cannot sue his co-maker on a note, of which he has become the sole holder.⁶³ And it has even been held that where a member and agent of a joint-stock company drew and indorsed a bill of exchange on its account in his own name to another agent of the company, who transferred it to a creditor (also a member) of the company, this last holder could not sue the drawer of the bill.⁶⁴ Where, however, a joint and several note was given by two makers, of whom one was also one of the payees, it was held that both payees might bring suit on the note against the other maker.⁶⁵

Actions against Partnership—By Indorsee.

§ 404. Although a partnership cannot, for the reason alleged, sue one of its members or be sued by him, yet a firm making a note to one partner or taking a note from him will be liable to a subsequent indorsee who is not a member of the firm.⁶⁶ And the

⁶⁰ *Neale v. Turton*, 4 Bing. 149, 12 Moore, 365; *Westcott v. Price*, Wright, 220.

⁶¹ *Blodgett v. Sleeper*, 67 Me. 499.

⁶² *Mainwaring v. Newman*, 2 Bos. & P. 120.

⁶³ *Moffat v. Van Milligen*, 2 Bos. & P. 124, note.

⁶⁴ *Teague v. Hubbard*, 8 Barn. & C. 345, 2 Man. & R. 369.

⁶⁵ *Beecham v. Smith*, El., Bl. & El. 442.

⁶⁶ *Morley v. Culverwell*, 7 Mees. & W. 174; *Steele v. Harmer*, 14 Law J. Exch. 230, 14 Mees. & W. 831, 19 Law J. Exch. 34, 4 Exch. 1; *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Hapgood v. Watson*, 65 Me. 510; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; *Ormsbee v. Kidder*, 48 Vt. 361; *Young v. Chew*, 9 Mo. App. 387. It cannot, however, be shown by parol, as to such a note, that the intention was to transpose the relation of maker and indorser, in order to excuse a failure to make proper presentment and pro-

indorsee can recover on such an instrument, although he knew of the partnership and the relation of maker and indorser to one another.⁶⁷ So, when a firm note is transferred by the payee to a member of the firm for value, his purchase of the paper will not amount to a payment of it, and, if it is indorsed over by him to another, the last holder may recover against the firm.⁶⁸ And the fact that the statute of Massachusetts makes legal defenses against the payee of a demand note available against the indorsee also will not destroy the indorsee's right to recover on a note made by a firm to one of its members, and by him indorsed to the holder because his indorser could not sue.⁶⁹ If, however, a firm note to one member of the firm is indorsed after maturity, the indorsee will take it subject to the defense of an unsettled account between the firm and the individual partner who is the payee.⁷⁰

Holders of scrip in a joint-stock company are not such partners as to be incapable of bringing suit against the directors of the company on a note made by them.⁷¹ And if a note is made by one member of a corporation individually to another for the use of the company, the maker cannot plead their common interest in the concern in a defense of a suit by the payee.⁷² Two firms having a partner in common may stand in the relation to one another of maker and indorser on the same paper, and the fact that a bill of exchange has been drawn in the name of one firm, and indorsed in the name of the other, in the same handwriting, by their common partner, is no cause of suspicion or evidence of bad faith to put the purchaser upon inquiry as to the character of the

test. *Coon v. Pruden*, 25 Minn. 105. And where such a note has been destroyed by an accident, and afterwards assigned by the payee to another, to enable him to bring suit against the firm, such assignee has been held, in Michigan, incapable of suing at law, and left, like the original payee, to his remedy in equity. *Davis v. Merrill*, 51 Mich. 480, 16 N. W. 864.

⁶⁷ *Smith v. Lusher*, 5 Cow. (N. Y.) 688.

⁶⁸ *Kipp v. McChesney*, 66 Ill. 460.

⁶⁹ *Thayer v. Buffum*, 11 Mete. (Mass.) 398.

⁷⁰ *Thompson v. Lowe*, 111 Ind. 272, 12 N. E. 476. Especially where the firm had dissolved before transfer of the note. *Davis v. Briggs*, 39 Me. 304. So, too, where the transfer, though before maturity, was only for purpose of suit. *Cutting v. Daigneau*, 151 Mass. 297, 23 N. E. 839.

⁷¹ *Fox v. Frith*, 10 Mees. & W. 131.

⁷² *Mahan v. Sherman*, 7 Blackf. (Ind.) 378.

paper.⁷³ And the indorsee's knowledge of the fact that the two firms have a partner in common will not be such notice as will affect the liability of the firm indorsing the paper.⁷⁴ So, if a bill of exchange is drawn by one firm upon another having a common partner in it, and is accepted by that partner without the knowledge of the other partners, in the firm drawn on, the acceptance will still be binding *prima facie* upon the firm.⁷⁵

What Partnerships Cannot Execute Commercial Paper.

§ 405. The rule which renders partnerships liable on bills and notes executed by one member of the firm only applies to firms engaged in commercial business. Special partnerships for other purposes than trade are not, in general, bound by commercial paper executed in their name by one partner without express authority of the others.⁷⁶ This is true of attorneys at law,⁷⁷ physicians,⁷⁸ stock brokers,⁷⁹ tavern keepers,⁸⁰ and coffee brokers.⁸¹ So, too,

⁷³ *Miller v. Bank*, 48 Pa. St. 514; *Ihmsen v. Negley*, 25 Pa. St. 297

⁷⁴ *Stimson v. Whitney*, 130 Mass. 591.

⁷⁵ *Tutt v. Addams*, 24 Mo. 186.

⁷⁶ *Byles*, Bills, 46; *Chit. Bills*, 58, 59; 1 *Edw. Bills & N.* § 98; 1 *Pars. Notes & B.* 138; 1 *Daniel, Neg. Inst.* 328; *Greenslade v. Dower*, 7 *Barn. & C.* 635. 1 *Man. & R.* 640; *Dickinson v. Valpy*, 10 *Barn. & C.* 128, 5 *Man. & R.* 126; *Bramah v. Roberts*, 3 *Bing. N. C.* 963, 5 *Scott*, 172; *Ricketts v. Bennett*, 4 *C. B.* 699; *Yates v. Dalton*, 28 *Law J. Exch.* 69; *Brown v. Kidger*, 3 *Hurl. & N.* 853; *Ulery v. Ginrich*, 57 *Ill.* 531; *Zuel v. Bowen*, 78 *Ill.* 234; *Smith v. Sloan*, 37 *Wis.* 285; *McCrary v. Slaughter*, 58 *Ala.* 230; *Kimbrow v. Bullitt*, 22 *How.* 256; *Hunt v. Chapin*, 6 *Lans. (N. Y.)* 139.

⁷⁷ *Byles*, Bills, 46; 1 *Daniel, Neg. Inst.* 328; 1 *Edw. Bills & N.* § 101; 1 *Pars. Notes & B.* 138; *Hedley v. Bainbridge*, 3 *Q. B.* 316; *Forster v. Mackreth*, *L. R.* 2 *Exch.* 163; *Garland v. Jacomb*, *L. R.* 8 *Exch.* 219; *Levy v. Pyne*, *Car. & M.* 453; *Breckinridge v. Shrieve*, 4 *Dana (Ky.)* 375; *Smith v. Sloan*, 37 *Wis.* 285; *Friend v. Duryee*, 17 *Fla.* 111.

⁷⁸ *Crosthwait v. Ross*, 1 *Humph. (Tenn.)* 23; *Lewis v. Reilly*, 1 *Q. B.* 349. But it is said in this case that such a note would bind the firm if given for the purchase of things necessary to its business.

⁷⁹ *Byles*, Bills, 46; *Yates v. Dalton*, 28 *Law J. Exch.* 69.

⁸⁰ *Cocke v. Bank*, 3 *Ala.* 175. In this case the note was not given in the firm business, and the defense was allowed against a bona fide holder for value.

⁸¹ *Third Nat. Bank v. Snyder*, 10 *Mo. App.* 211. And see *Linguley v. Morris*, 65 *Ga.* 666.

a special partnership for putting up a steam saw mill;⁸² or for paving and curbing streets;⁸³ or digging tunnels;⁸⁴ or making wells and pumps.⁸⁵ So, too, real estate and insurance brokers;⁸⁶ partners in dairy business;⁸⁷ theater;⁸⁸ laundry;⁸⁹ tavern keeping;⁹⁰ publishing;⁹¹ mining;⁹² sugar refining;⁹³ rope walk;⁹⁴ gas works.⁹⁵ So, partners engaged in the business of carriage building have no implied authority to open a bank account in one another's names so as to charge one another by checks upon it.⁹⁶ Nor can persons engaged in jointly carrying on a farm or plantation bind one another by note or bill;⁹⁷ especially where all inference of such authority is expressly excluded by the articles of partnership, which provide for the furnishing by one partner of the very article for which he gave the partnership note in question.⁹⁸

On the other hand, the running of a vessel has been held to constitute a commercial partnership, with power to make such paper.⁹⁹

⁸² *Lanier v. McCabe*, 2 Fla. 32. So, a partnership for running a sawmill, where the business was divided distinctly between two partners, one attending to the mill, and the other to the general business. *Dowling v. Bank*, 145 U. S. 512, 12 Sup. Ct. 928.

⁸³ *Harris v. City of Baltimore*, 73 Md. 22, 17 Atl. 1046, and 20 Atl. 111, 985.

⁸⁴ *Gray v. Ward*, 18 Ill. 32.

⁸⁵ *Vetsch v. Neiss*, 66 Minn. 459, 69 N. W. 315.

⁸⁶ *Lee v. Bank*, 45 Kan. 8, 25 Pac. 196; *Deardorf's Adm'r v. Thacher*, 78 Mo. 128.

⁸⁷ *Shellenbeck v. Studebaker*, 13 Ind. App. 437, 41 N. E. 845.

⁸⁸ *Pease v. Cole*, 53 Conn. 53, 22 Atl. 681.

⁸⁹ *Neale v. Turton*, 4 Bing. 149.

⁹⁰ *Cocke v. Bank*, 3 Ala. 175.

⁹¹ *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629.

⁹² *Judge v. Braswell*, 13 Bush (Ky.) 69.

⁹³ *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251.

⁹⁴ *Wagnon v. Clay*, 1 A. K. Marsh. (Ky.) 257.

⁹⁵ *Bramah v. Roberts*, 3 Bing. N. C. 963.

⁹⁶ *Alliance Bank v. Kearsley*, L. R. 6 C. P. 433.

⁹⁷ *Hunt v. Chapin*, 6 Lans. (N. Y.) 139; *Prince v. Crawford*, 50 Miss. 344; *Davis v. Richardson*, 45 Miss. 499; *Greenslade v. Dower*, 7 Barn. & C. 635; *Walker's Adm'r v. Walker's Estate*, 66 Vt. 285, 29 Atl. 146. But authority may be shown, as in other cases, by their business usage. *Hymes v. Weld*, 91 Ga. 742, 17 S. E. 1001.

⁹⁸ *McCrary v. Slaughter*, 58 Ala. 230.

⁹⁹ *First Nat. Bank v. Freeman*, 47 Mich. 408, 11 N. W. 219.

And, in general, a firm may become liable by the circumstances of the particular case or by its own business usage. Thus, collecting agents, doing business as a firm, have been held liable on a partnership note given by one of the partners for money collected by the firm.¹⁰⁰ So, a mining partnership may become liable for a bill of exchange given by the managing partner for money borrowed on the credit of the firm and in its business, where such paper is expressly mentioned in the articles of partnership as a ground upon which the partners may dissolve the firm if made for other than the immediate use of the firm.¹⁰¹ And, where a firm has actually and knowingly used property obtained for it by means of bills of exchange or notes executed without authority by its superintendent, it will be estopped from setting up such want of authority.¹⁰²

Joint Payees not Partners—Joint Tenants.

§ 406. Where a bill or note is made payable to several persons jointly, the payees are not partners therein, and neither of them can bind the other by an indorsement for both.¹⁰³ So, where two employ a common factor, who draws a bill on them, neither can bind the other by his acceptance of it.¹⁰⁴ So, where two persons buy a farm under an agreement to pay for it in notes indorsed by them

¹⁰⁰ Van Brunt v. Mather, 48 Iowa, 503.

¹⁰¹ Brown v. Kidger, 3 Hurl. & N. 853.

¹⁰² Jones v. Clark, 42 Cal. 180.

¹⁰³ Wood v. Wood, 16 N. J. Law, 428. But see Carvick v. Vickery, 2 Doug. 653, note, where a bill of exchange drawn by two persons, payable to themselves or order, was indorsed by one only, and a recovery was had under such indorsement against the acceptor. In this case, however, as observed by Hornblower, C. J., in Wood v. Wood, *supra*, the acceptance was given after the bill was so indorsed and transferred to the plaintiff. This is true, also, of the indorsement of a note made payable to two persons as executors. Smith v. Whiting, 9 Mass. 334; Sanders v. Blain, 6 J. J. Marsh. (Ky.) 446; Johnson v. Mangum, 65 N. C. 146. And if a note is payable to A. and B., who are not partners, and indorsed in both names by A. with B.'s consent, B.'s interest will be transferred by the indorsement. Cooper v. Bailey, 52 Me. 230.

¹⁰⁴ Chit. Bills, 73.

both, they do not become partners, and neither one has power to indorse such notes for the other.¹⁰⁵

In like manner, joint owners of property are not partners who can bind one another by a bill or note.¹⁰⁶ This is true even where the persons are joint owners of a ship, and one gives an acceptance for necessities furnished for it.¹⁰⁷ So, joint tenants, and tenants in common of property, real or personal, have no power to bind one another as partners by their commercial paper.¹⁰⁸ Neither can persons bind one another as such because of their common interest in a joint undertaking, but such paper must be signed by all the parties interested.¹⁰⁹ It has been held, however, that where two persons are jointly interested in disposing of a quantity of salt, and the whole business and sale of it is put into the hands of one, they are limited partners in trade, and one may bind both by a note given in their joint name as a firm for expenses necessarily incurred in the business.¹¹⁰

Where creditors are put in possession of the property of their debtor, and carry on the business jointly for their repayment, they are not partners on that account, nor liable as such, on an acceptance given by one in the original firm name of the debtor.¹¹¹ But it has been held that the members of an unincorporated club, purchasing bonds for their own use through an authorized agent, are liable as partners for a note given in payment by the agent, so far as they have authorized or ratified the transaction.¹¹² Where a partnership is of limited or of special character, knowledge of such limitation may be inferred from circumstances, e. g. from publication in the newspapers, and this will amount to constructive notice to persons dealing with the firm.¹¹³

¹⁰⁵ *Ballou v. Spencer*, 4 Cow. (N. Y.) 163. Nor to accept a bill for the purchase price. *Schaeffer v. Fowler*, 111 Pa. St. 451, 2 Atl. 558.

¹⁰⁶ *Chit. Bills*, 58; 1 *Daniel*, Neg. Inst. 327; 1 *Edw. Bills & N.* § 94; *Ex parte Peele*, 6 Ves. 604; *Williams v. Thomas*, 6 Esp. 18.

¹⁰⁷ *Williams v. Thomas*, 6 Esp. 18; *Reed v. White*, 5 Esp. 122.

¹⁰⁸ *Offly v. Warde*, 1 Lev. 234; *Tooker's Case*, 2 Coke, 62; *Lingen v. Payn*, Bridg. 129.

¹⁰⁹ *Ex parte Hunter*, 2 Rose, 363.

¹¹⁰ *Cumpston v. McNair*, 1 Wend. (N. Y.) 457.

¹¹¹ *Byles*, Bills, 46; *Cox v. Hickman*, 8 H. L. Cas. 268, 9 C. B. (N. S.) 47.

¹¹² *Ferris v. Thaw*, 5 Mo. App. 279.

¹¹³ *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251.

Partnership Paper for Individual Debts.

§ 407. The authority which members of a firm have to bind one another by the execution of commercial paper extends only to the firm business, although there is often an implied authority in favor of bona fide holders of such paper who are ignorant of the original consideration for it. The general principle, however, is that no member of a firm can bind the other by giving or indorsing such paper in its name for an individual debt or purpose of his own.¹¹⁴ And an indorser of a note may avail himself of the defense that the partner made it for an individual debt of his own.¹¹⁵ If a note is given to a firm for money due one partner, with a concurrent contemporaneous agreement in writing between him and the maker for payment by house rent to said partner, such agreement must be construed with the note, and forms one contract with it, binding as well upon the firm as upon the individual partner making it.¹¹⁶ But one partner cannot bind his firm by agreeing that a note payable to it shall be credited on an individual account against him.¹¹⁷ If, however, one partner indorses on a note, which belongs to the firm, a part payment in satisfaction of his individual debt, the firm cannot, in an action at law, disregard or rescind such indorsement and recover the whole amount of the

¹¹⁴ *Babcock v. Stone*, 3 McLean, 172, Fed. Cas. No. 701; *Union Nat. Bank v. Underhill*, 21 Hun (N. Y.) 178; *Gale v. Miller*, 54 N. Y. 536, affirming 1 Lans. (N. Y.) 451; 44 Barb. (N. Y.) 420; *Atkin v. Berry*, 1 Lea (Tenn.) 91; *Mechanics' & Traders' Ins. Co. v. Richardson*, 33 La. Ann. 1308; *Mutual Nat. Bank v. Richardson*, Id. 1312; *McRae v. Campbell* (Ga.) 28 S. E. 920; *Lime Rock Fire & Marine Ins. Co. v. Treat*, 58 Me. 415; *Real Estate Inv. Co. v. Russel*, 148 Pa. St. 496, 24 Atl. 59. See, too, *Ex parte Goulding*, 2 Glyn & J. 118; *Ex parte Thrope*, 3 Mont. & A. 716. And, if the individual partner signing such a note die, his representatives, and not the surviving partners, will be liable. *Lill v. Egan*, 89 Ill. 609. If the consideration is in part a loan made to the firm, the note will be binding on it to that extent. *Rice v. Doane*, 164 Mass. 136, 41 N. E. 126.

¹¹⁵ *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Livingston v. Hastie*, 2 Caines (N. Y.) 246; *Rolston v. Click*, 1 Stew. (Ala.) 526; *Hagar v. Mounts*, 3 Blackf. (Ind.) 57.

¹¹⁶ *Bradley v. Marshall*, 54 Ill. 173.

¹¹⁷ *Harper v. Wrigley*, 48 Ga. 495.

debt.¹¹⁸ A note by one partner in the name of the partnership, for money collected by him individually, will not bind the firm at suit of the payee.¹¹⁹ But if the money, so collected by him as agent of the payee of the note, had been borrowed by him and applied to the business of the firm, his note in the firm name would bind it; the presumption of a firm debt arising in such case from the form of the note, and the burden not falling, in the first instance, upon the holder to show either the application of the money or the assent of the firm.¹²⁰

Defense—When Admissible.

§ 408. If a partnership note be given for the individual debt of one partner, the firm may avail itself of that defense against a purchaser of the note after maturity.¹²¹ And, in general, such defense can be set up against the payee,¹²² or against any holder who takes the instrument with knowledge of the fact.¹²³ But, unless the holder knew or had reason to believe that the partner giving such paper was abusing his authority for his own benefit, the firm will be bound by it.¹²⁴ If the partner sign his individual name to a note before that of the firm, this is proper evidence for

¹¹⁸ *Craig v. Hulschizer*, 34 N. J. Law, 363. But a receipt by one of the firm to which the note belongs, for his individual debt to the maker, has been held not to be binding upon partnership creditors. *Mayer v. Garber*, 53 Iowa, 689, 6 N. W. 63.

¹¹⁹ *Hickman v. Reineking*, 6 Blackf. 387.

¹²⁰ *Whitaker v. Brown*, 16 Wend. (N. Y.) 505.

¹²¹ *Whitaker v. Brown*, 11 Wend. (N. Y.) 75.

¹²² *Roberts v. Pepple*, 55 Mich. 367, 21 N. W. 319; *Rice v. Doane*, 164 Mass. 136, 41 N. E. 126; *Benson v. Warehouse Co.*, 99 Ga. 303, 25 S. E. 645.

¹²³ *Wintle v. Crowther*, 1 Crompt. & J. 316; *Joyce v. Williams*, 14 Wend. (N. Y.) 141; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251; *Lansing v. Gaine*, 2 Johns. (N. Y.) 300; *Lanier v. McCabe*, 2 Fla. 32; *Noble v. McClintock*, 2 Watts & S. (Pa.) 152; *Gansevoort v. Williams*, 14 Wend. (N. Y.) 133; *Huntington v. Lyman*, 1 D. Chip. (Vt.) 438; *Baird v. Cochran*, 4 Serg. & R. (Pa.) 397; *Weed v. Richardson*, 19 N. C. 535; *Williams v. Gilchrist*, 11 N. H. 535; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; *Sherwood v. Snow*, 46 Iowa, 481; *Brown v. Pettit*, 178 Pa. St. 17, 35 Atl. 865.

¹²⁴ *Cotton v. Evans*, 21 N. C. 284; *Wagner v. Freschl*, 56 N. H. 495; *Deitz v. Regnier*, 27 Kan. 94; *Windham County Bank v. Kendall*, 7 R. I. 77.

the jury to consider in determining whether the holder had reason to know the actual circumstances of the case.¹²⁵

Consent of Partners—Presumption.

§ 409. If a firm note is given for the individual debt of a partner with the consent of the firm, it will, of course, be binding on all the partners consenting.¹²⁶ And it seems that a subsequent promise of the other partner to pay the note, made to one who had taken it with full knowledge of the facts, would be sufficient to bind the firm without any new consideration.¹²⁷ The consent of the firm to the giving or indorsing of such paper may be implied.¹²⁸ And such consent may be implied from the payment of money by one partner into the hands of the partner drawing the bill as firm assets, and for the purpose of meeting the bill.¹²⁹

But where a bill of exchange is given in the name of a firm for the individual debt of one partner, it will be presumed to have been given without the consent of the other partners, and, if without their consent, then in fraud of them.¹³⁰ Where the character of the paper as accommodation paper of this sort appears, and is

¹²⁵ *Sherwood v. Snow*, 46 Iowa, 481.

¹²⁶ *Lavery v. Burr*, 1 Wend. (N. Y.) 529; *Lanier v. McCabe*, 2 Fla. 32; *Durrell v. Staples*, 169 Mass. 49, 47 N. E. 441; *Noble v. McClintock*, 2 Watts & S. (Pa.) 152; *Tilford v. Ramsey*, 37 Mo. 563; *Midland Nat. Bank v. Schoen*, 123 Mo. 650, 27 S. W. 547. So, where they have assumed the individual debt, and made it a firm debt. *Rice v. Wolff*, 65 Wis. 1, 26 N. W. 181.

¹²⁷ *Commercial Bank v. Warren*, 15 N. Y. 577. It may be implied from the receipt or use of the proceeds, *Meador v. Malcolm*, 78 Mo. 550; or from the usage of the firm, *Haynes v. Crow*, 79 Mo. 293; *Midland Nat. Bank v. Schoen*, 123 Mo. 650, 27 S. W. 547.

¹²⁸ *Gansevoort v. Williams*, 14 Wend. (N. Y.) 133.

¹²⁹ *Davis v. Smith*, 27 Minn. 390, 7 N. W. 731.

¹³⁰ *Byles, Bills*, 47; 1 *Pars. Notes & B.* 126; 1 *Daniel, Neg. Inst.* 336; *Shirreff v. Wilks*, 1 East, 48; *Green v. Deakin*, 2 Starkie, 347; *Arden v. Sharpe*, 2 Esp. 524; *Richmond v. Heapy*, 1 Starkie, 202; *Barber v. Backhouse*, Peake, 61; *Wallace v. Kelsall*, 7 Mees. & W. 264; *Jones v. Yates*, 9 Barn. & C. 532; *Gordon v. Ellis*, 7 Man. & G. 607; *Jacaud v. French*, 12 East, 317; *Leverson v. Lane*, 13 C. B. (N. S.) 278; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; *Kemeys v. Richards*, 11 Barb. (N. Y.) 312; *Mecutchen v. Kennady*, 27 N. J. Law, 230; *Davis v. Smith*, 27 Minn. 390, 7 N. W. 731; *Lavery v. Burr*, 1 Wend. (N. Y.) 531; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Daven-*

known to the purchaser, or where he has reason to know it from the nature of the transaction, the burden of proof will be upon him to show authority on the part of the firm or its subsequent assent.¹³¹ And the assent of the others in such case must be shown clearly.¹³² A mere subsequent promise on their part to pay the bill or note, without knowing the circumstances under which it was issued, will not amount to assent.¹³³ Nor will a waiver on their part of protest for nonpayment, or a failure to disclaim promptly the liability of the firm, amount to such assent or to a ratification of the paper.¹³⁴ Where a note is made by a member of a firm for his individual purchases, and indorsed by him with a guaranty in the name of the firm, it will not bind the firm in the hands of a holder who was ignorant of the circumstances by reason of his own negligence in the matter.¹³⁵ If a firm has given its assent to the execution of partnership paper in payment of an individual debt of one partner, this consent is revocable until actually used and the the paper delivered.¹³⁶

§ 410. — Where a partnership bill or note is given for the individual debt of one partner, the burden of proof is upon the defendant

port v. Runlett, 3 N. H. 386; Rolston v. Click, 1 Stew. (Ala.) 526; Second Nat. Bank v. Hume, 4 Mackey (D. C.) 90.

¹³¹ Bank of Commerce v. Selden, 3 Minn. 155 (Gil. 99); Elliott v. Dudley, 19 Barb. (N. Y.) 326; Bank of Vergennes v. Cameron, 7 Barb. (N. Y.) 143; Rogers v. Batchelor, 12 Pet. 221; Smyth v. Strader, 4 How. 404. But the fact that a note payable to the firm of A. & B. was indorsed by the partner A. to another firm, A., B. & Co., and in its name forthwith to the holder, will not throw on the holder the burden of showing the assent of B., although the holder saw the indorsements made; the former firm being at the time indebted to the latter, and B. saying to the plaintiff that the note was a good collateral. Walker v. Kee, 16 S. C. 76.

¹³² Joyce v. Williams, 14 Wend. (N. Y.) 141. So, if given for the debt of another firm, having a partner in common with the first. Tyree v. Lyon, 67 Ala. 1. Mere knowledge and failure by the other partner to express his dissent are not sufficient. McKinney v. Brights, 16 Pa. St. 399; Elliott v. Dudley, 19 Barb. (N. Y.) 326; Reubin v. Cohen, 48 Cal. 545.

¹³³ Wilson v. Forder (N. Y.) 20 Ohio St. 89.

¹³⁴ Marsh v. Bank, 2 Ill. App. 217.

¹³⁵ New York Firemen Ins. Co. v. Bennett, 5 Conn. 574.

¹³⁶ National Bank of Jacksonville v. Mapes, 85 Ill. 67.

to show this fact.¹³⁷ It is a question of fact for the jury.¹³⁸ So, it is a question of fact whether a bill of exchange, drawn upon a firm and accepted in its name by one partner, for goods sold him outside of the line of business of the firm, has been accepted with the consent of the firm.¹³⁹ Where a note is given in this manner by one partner for money borrowed by him, the firm will not be rendered liable by the mere fact that he has purchased and furnished to it a large amount of goods which have been credited to him on its books.¹⁴⁰

Defense—When Inadmissible.

§ 411. In the hands of a bona fide holder for value before maturity, it is no defense that the bill or note in question was given for the individual debt or advantage of one partner.¹⁴¹ In all such cases the ostensible power of every partner raises a sufficient implication to bind the firm, and without such implication it would be impossible to carry on the ordinary business of a mercantile firm. This applies properly only to commercial paper taken in the

¹³⁷ *Whitaker v. Brown*, 16 Wend. (N. Y.) 505; *Deitz v. Regnier*, 27 Kan. 94; *Hamilton v. Summers*, 12 B. Mon. (Ky.) 11; *Barrett v. Swann*, 17 Me. 180; *Ensminger v. Marvin*, 5 Blackf. (Ind.) 210; *Hickman v. Kunkle*, 27 Mo. 401; *Magill v. Merrie*, 5 B. Mon. (Ky.) 168.

¹³⁸ *Duran v. Ayer*, 67 Me. 145.

¹³⁹ *Chit. Bills*, 61; *Wood v. Holbeck*, May 28, 1826. cor. Abbott, C. J., at Guildhall.

¹⁴⁰ *Clay v. Cottrell*, 18 Pa. St. 408.

¹⁴¹ *Byles, Bills*, 46; *Chit. Bills*, 54; *Swan v. Steele*, 7 East, 210; *Ridley v. Taylor*, 13 East, 175; *Jacaud v. French*, 12 East, 322; *Arden v. Sharpe*, 2 Esp. 524; *Wells v. Masterman*, 2 Esp. 731; *Lane v. Williams*, 2 Vern. 277; *Baker v. Charlton*, Peake, 80; *Babcock v. Stone*, 3 McLean, 172, Fed. Cas. No. 701; *Miller v. Manice*, 6 Hill (N. Y.) 114; *Waldo Bank v. Lumbert*, 16 Me. 416; *Duncan v. Clark*, 2 Rich. Law (S. C.) 587; *Knapp v. McBride*, 7 Ala. 19; *Onondaga County Bank v. De Puy*, 17 Wend. (N. Y.) 47; *Faler v. Jordan*, 44 Miss. 283; *Parker v. Burgess*, 5 R. I. 277; *Kellogg v. Fancher*, 23 Wis. 21; *Blodgett v. Weed*, 119 Mass. 215; *Murphy v. Camden*, 18 Mo. 122; *Potts v. Taylor*, 140 Pa. St. 601, 21 Atl. 443; *Drexler v. Smith*, 30 Fed. 754. But this would be a good defense in favor of a dormant partner not known to the purchaser at the time of taking the paper. *Miller v. Manice*, supra; *Yorkshire Banking Co. v. Beatson*, 4 C. P. Div. 204.

regular course of business.¹⁴² In the hands of such a holder it is immaterial that the paper was given without the knowledge of the other partners, and that the proceeds of it were actually received and used by the partner giving it.¹⁴³

Except the protection afforded to such a holder, a partner cannot render his firm liable for a note given by him in its name for his individual debt by including in the amount of the note a debt of the firm.¹⁴⁴ In such case the firm would be liable *pro tanto* only.¹⁴⁵ This is so, also, where a note is given for a firm debt, part of which accrued before a new partner was taken into the firm and part afterwards. In such case even a bona fide holder can recover against the new partner with the others only for the latter part of the debt.¹⁴⁶

§ 412. — Although a bill of exchange is known by the holder to have been given in part for the debt of one partner, even a secret partner will be liable on the bill, so far as regards the rest of the debt secured by it, notwithstanding that the holder had no knowledge of the existence of a dormant partner.¹⁴⁷ Where, however, a firm note is made for the individual debt of a partner in a partnership which was not commercial in its character, it will not bind the firm, even in the hands of a bona fide holder for value, as there is no general authority implied in such a case to give such paper.¹⁴⁸ On the other hand, a note given for the debt of one partner in a commercial firm will bind the firm at suit of a holder without notice and for value, notwithstanding notice of such fact to the original payee.¹⁴⁹

¹⁴² *Bascom v. Young*, 7 Mo. 1; *Hawes v. Dunton*, 1 Bailey (S. C.) 146.

¹⁴³ *Emerson v. Harmon*, 14 Me. 271.

¹⁴⁴ *King v. Faber*, 22 Pa. St. 21.

¹⁴⁵ *Gamble v. Grimes*, 2 Ind. 392.

¹⁴⁶ *Guild v. Belcher*, 119 Mass. 257.

¹⁴⁷ *Wintle v. Crowther*, 1 Crompt. & J. 316. But see, as to the value of this case, 1 Pars. Bills & N. 129. To the same effect, however, see *Ellston v. Deacon*, L. R. 2 C. P. 20; *Wilson v. Forder*, 20 Ohio St. 89.

¹⁴⁸ *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; *Cocke v. Branch Bank*, 3 Ala. 175; *Gray v. Ward*, 18 Ill. 32.

¹⁴⁹ *Parker v. Burgess*, 5 R. I. 277; *Wright v. Brosseau*, 73 Ill. 381; *Atlantic State Bank v. Savery*, 82 N. Y. 291.

Burden of Proving Notice.

§ 413. In all cases where a firm seeks to avail itself of such defense, the burden is on it to prove notice of the fact.¹⁵⁰ In like manner, a new partner can relieve himself from liability on a note given for debts of the old firm only by proving that the holder knew, or had reason to know, that the firm name was being improperly used in the transaction.¹⁵¹ Where a partnership bill payable to the order of the drawer is drawn by one partner on the firm, and accepted by himself, and indorsed and negotiated in the firm name, this has been held to be sufficient notice of the fact that it was given for the individual benefit of such partner.¹⁵² So, where a note is made by one partner individually, and indorsed by him in the firm name over the indorsement of the payee, this is sufficient notice of the accommodation character of the firm indorsement.¹⁵³ So is a memorandum made on a partnership note to the effect that it was given as security for the note of one partner.¹⁵⁴ But such notice is not presumed from the fact of the note being made in the name of one partner payable to his firm, and indorsed by another partner in the firm name with the date and rate of interest left blank, or from the fact that these were filled in by the partner using the note when he delivered it to the plaintiff.¹⁵⁵

§ 414. — Between the original parties to a bill or note, the fact that it was given and received in payment of the individual debt

¹⁵⁰ *Miller v. Manice*, 6 Hill (N. Y.) 114; *Whitaker v. Brown*, 16 Wend. (N. Y.) 505; *Platt v. Koehler*, 91 Iowa, 592, 60 N. W. 178.

¹⁵¹ *Abpt v. Miller*, 50 N. C. 32.

¹⁵² *Cooper v. McClurkan*, 22 Pa. St. 80. And, as to the effect of individual signature above that of firm, see *Redlon v. Churchill*, 73 Me. 146; *Barber v. Van Horn*, 54 Kan. 33, 36 Pac. 1070.

¹⁵³ *National Bank of Commonwealth v. Law*, 127 Mass. 72; *Gray, C. J.*, saying: "The defendant's name being upon the back of the note, above that of the payee's, it was apparent, upon the note itself, read in the light of the statute, which every one was bound to know, that the liability of the partnership was but conditional and secondary, and, therefore, that *prima facie*, at least, their signature was affixed for the accommodation and benefit of" the maker.

¹⁵⁴ *National Security Bank v. McDonald*, 127 Mass. 82. And in such case the other partners will not be liable, without evidence of their consent. *Id.*

¹⁵⁵ *Wait v. Thayer*, 118 Mass. 473.

of one partner is sufficient notice of his want of authority to bind the firm.¹⁵⁶ So, if the holder of the note of an individual partner takes a firm note in renewal of it, he has notice of such partner's want of authority, and cannot recover against the firm.¹⁵⁷ In opposition to the foregoing view, it has been held that the mere circumstance of taking a partnership bill or note for the individual debt of one partner is not sufficient notice of his want of authority, as he may have a credit in his favor against the firm, and the burden of proving a fraud on the partnership and actual notice to the holder have been held to fall upon the firm, even in such a case.¹⁵⁸ It is said, however, that the taking of the firm paper for such a consideration is at least presumptive evidence of fraud or of gross negligence amounting to fraud.¹⁵⁹ But, if the circumstances of the case are such as to make it reasonable to believe

¹⁵⁶ *Heath v. Sansom*, 2 Barn. & Adol. 291; *Barber v. Backhouse*, Peake, 61; *Ex parte Agace*, 2 Cox, 312; *Ex parte Goulding*, 2 Glyn & J. 118; *Mecutchen v. Kennady*, 3 Dutch. (N. J.) 230; *Gansevoort v. Williams*, 14 Wend. (N. Y.) 133; *Hagar v. Mounts*, 3 Blackf. (Ind.) 57; *Williams v. Gilchrist*, 11 N. H. 535; *Wagnon v. Clay*, 1 A. K. Marsh. (Ky.) 257; *Wells v. Siess*, 24 La. Ann. 178; *Livingston v. Hastie*, 2 Caines (N. Y.) 246. As to this presumption, and also as to the presumption, if any, from the handwriting of one partner, see *Hope v. Cust*, cited in 1 East, 53.

¹⁵⁷ *Union Nat. Bank v. Underhill*, 21 Hun (N. Y.) 178.

¹⁵⁸ *Ex parte Bonbonus*, 8 Ves. 542; *Houlditch v. Nias*, 8 Price, 680; *Henderson v. Wild*, 2 Camp. 561. So, where a partner draws a firm check for furniture purchased by himself, *Warren v. Martin*, 24 Neb. 273, 38 N. W. 849; or in payment of an individual debt, *Dike v. Drexel*, 11 App. Div. 77, 42 N. Y. Supp. 979. See, too, *Ridley v. Taylor*, 13 East, 175, where the partnership bill appeared to have been drawn 18 days before, and for a larger amount than the particular debt in question. In this case Lord Ellenborough, C. J., said: "If this were distinctly the case of a pledging by one partner of a partnership security for his own, separate debt, without the authority of the other partners, or if there existed in this case evident covin between one partner and the holder of the partnership securities upon which the action is brought, in order to charge the other partner, without his knowledge or consent, either expressed or implied, for the private advantage of the parties to such covinous agreement, we should have no hesitation to pronounce a bill drawn and indorsed under such circumstances void in the hands of the covinous holders; * * * but, upon the facts stated, such does not distinctly appear to us to be the case."

¹⁵⁹ *Davenport v. Runlett*, 3 N. H. 386; *Eastman v. Cooper*, 15 Pick. (Mass.) 276.

that the consent of the firm was given to such paper, the firm must prove the fraud in its own defense.¹⁶⁰

§ 415. — It has been held, even, that taking such an instrument from one partner without consulting the others implies sufficient notice of his want of authority, where the whole paper is in his handwriting.¹⁶¹ So, if a note has been indorsed in the partnership name in a transaction which is clearly outside of the firm business, the firm will not be liable upon it.¹⁶²

Where the firm has proved in defense to such paper that it was given for the individual debt of one or more partners, the burden of proof is then on the holder to show himself a bona fide holder for value before maturity.¹⁶³ Where a note is given by one partner in the firm name, for his own debt or benefit, to one who knows the circumstances, but transfers it to a bona fide holder before maturity in order to cut off such defense, such indorser thereby becomes liable for the fraud perpetrated by him upon the partner not consenting to the paper; and such liability is not to the firm, but to the partner injured, and is not a right of action belonging to the firm which passes by a general assignment of the firm debts.¹⁶⁴

Accommodation Paper by Partners.

§ 416. The power of partners to bind one another by commercial paper will not extend to indorsements or other contracts for the accommodation of a third person. And the fact that the paper in question has been given for accommodation is a good defense against any holder who has taken it with knowledge of that fact.¹⁶⁵

¹⁶⁰ *Frankland v. McGusty*, 1 Knapp, 274.

¹⁶¹ *Chit. Bills*, 60; *Hope v. Cust*, cited in 1 East, 53.

¹⁶² *Newman v. Richardson*, 9 Fed. 865.

¹⁶³ *Wright v. Brosseau*, 73 Ill. 381; *Charles v. Remick*, 156 Ill. 327, 40 N. E. 970.

¹⁶⁴ *Calkins v. Smith*, 48 N. Y. 614.

¹⁶⁵ *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332; *Wilson v. Williams*, 14 Wend. (N. Y.) 146; *Bank of Rochester v. Bowen*, 7 Wend. (N. Y.) 158; *Boyd v. Plumb*, Id. 309; *Stall v. Bank*, 18 Wend. (N. Y.) 466; *Sweetser v. French*, 2 Cush. (Mass.) 309; *Bloom v. Helm*, 53 Miss. 21; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; *Laverty v. Burr*, 1 Wend. (N. Y.) 529; *Andrews v. Bank*, 7 Smedes & M. (Miss.) 192; *Chenoweth v. Chamberlin*, 6 B. Mon. (Ky.) 60; *Rollins v. Stevens*, 31 Me. 454; *Lang v. Waring*, 17 Ala. 145;

So, a partner has no power to give a bill or note in the firm name as guarantor for a purpose in no way connected with the partnership business.¹⁶⁶ So, a note given by one in the firm name as surety, and not in the course of the firm's business, is not binding upon it.¹⁶⁷ It has been held that one partner using the firm name in such a way, without consent of the others, is liable as though he had signed his individual name.¹⁶⁸ But, where an acceptance has been given by the acting partner in a firm in consideration of similar acceptances for the firm by the drawer of the bill, such acceptance will be binding upon the firm.¹⁶⁹

Where the word "surety" is added to the signature, this is presumptive evidence of its accommodation character.¹⁷⁰ And where one partner has indorsed a note as surety for the maker in the partnership name, the burden of proof is on the holder to rebut the presumption that the indorsement is given in fraud of the partnership.¹⁷¹ So, where the individual note of one partner is guaranteed by the firm, this is of itself notice that the paper has not been signed in the firm business, and the purchaser takes it at his peril.¹⁷² So, if a partner gives a blank acceptance in the firm name, it is

Heffron v. Hanaford, 40 Mich. 305; Whaley v. Moody, 2 Humph. (Tenn.) 495; Bank of Tennessee v. Saffarrans, 3 Humph. (Tenn.) 597; Chazournes v. Edwards, 3 Pick. (Mass.) 5; Long v. Carter, 25 N. C. 238; Vredenburg v. Lagan, 28 La. Ann. 941; Sentell v. Rives, 48 La. Ann. 1214, 20 South. 732; First Nat. Bank of Friendship v. Weston, 25 App. Div. 414, 49 N. Y. Supp. 542. And see an article on this subject in 15 Cent. Law J. 222. And this is true even where goods have been sold on the strength of the accommodation indorsement, Wilson v. Williams, *supra*; or where benefit has resulted indirectly to the firm, Van Dyke v. Seelye, 49 Minn. 557, 52 N. W. 215.

¹⁶⁶ Marsh v. Bank, 2 Ill. App. 217; Davis v. Blackwell, 5 Ill. App. 32; Spurck v. Leonard, 9 Ill. App. 174. So, it cannot guaranty the note of a third person by way of accommodation, Schaaber v. Bushong, 105 Pa. St. 514. One partner, can, however, execute a firm guaranty in its own business. McNeal v. Gossard (Okla.) 50 Pac. 159.

¹⁶⁷ Long v. Carter, 25 N. C. 238; New York Firemen Ins. Co. v. Bennett, 5 Conn. 574.

¹⁶⁸ Silvers v. Foster, 9 Kan. 56.

¹⁶⁹ Gano v. Samuel, 14 Ohio, 592.

¹⁷⁰ Boyd v. Plumb, 7 Wend. (N. Y.) 309.

¹⁷¹ Darling v. March, 22 Me. 184.

¹⁷² Marsh v. Bank, 2 Ill. App. 217.

notice of his want of authority.¹⁷³ But, where a blank draft is signed by a firm, the drawer's authority is implied, as we have seen, to fill it up and negotiate it, and the fact that it is filled up by the holder at the time of the transfer, and in the transferee's presence, is no evidence of its being accommodation paper.¹⁷⁴

Consent to Accommodation Binds Firm.

§ 417. Accommodation paper given by one partner in the firm name with the consent of the others, either express or implied, binds the firm.¹⁷⁵ Thus, notes of the firm, given by one partner in settlement of a previous liability of the firm as surety for another, which it had recognized by an agreement to give the notes in settlement, will be binding upon the firm.¹⁷⁶ It is not necessary that such paper should be executed under a special authority, but any assent or promise to pay given afterwards by the other partners is sufficient to bind them.¹⁷⁷ A subsequent conversation, in which the other partners did not deny their liability upon such paper, but said that it would have to take its course and be disposed of like other indebtedness of the firm, is material to show their liability and waiver of notice of protest.¹⁷⁸ And it has been held that the consent of a firm to such accommodation paper will include a renewal of it after dissolution of the firm.¹⁷⁹ A partner who discovers that his co-partner is in the habit of improperly drawing, accepting, or indorsing in the firm name for the accommodation of

¹⁷³ *Hogarth v. Latham*, 39 Law T. (N. S.) 75.

¹⁷⁴ *Chemung Canal Bank v. Bradner*, 44 N. Y. 680.

¹⁷⁵ *First Nat. Bank of Ft. Dodge v. Breese*, 39 Iowa, 640; *Laverty v. Burr*, 1 Wend. (N. Y.) 531. See, too, *Sweetser v. French*, 2 Cush. (Mass.) 309. But such consent must clearly appear. *Wilson v. Williams*, 14 Wend. (N. Y.) 146.

¹⁷⁶ *Bloom v. Stern*, 23 La. Ann. 747; *Star Wagon Co. v. Swezey*, 52 Iowa, 391, 3 N. W. 421; *Id.*, 59 Iowa, 609, 13 N. W. 749.

¹⁷⁷ *Butler v. Stocking*, 8 N. Y. 408. But the firm cannot ratify such act after it has become insolvent. *Kidder v. Page*, 48 N. H. 380.

¹⁷⁸ *First Nat. Bank of Dubuque v. Carpenter*, 34 Iowa, 433. But mere silence is not ratification. *Van Dyke v. Seelye*, 49 Minn. 557, 52 N. W. 215.

¹⁷⁹ *Dundass v. Gallagher*, 4 Pa. St. 205.

others should file a bill in equity to prevent further acts of the sort by injunction.¹⁸⁰

Burden of Proving Consent.

§ 418. Where it appears that the firm paper has been given by one partner as accommodation paper, the burden of proof rests on the holder to show original authority or subsequent ratification by the firm.¹⁸¹ The consent of the firm to the giving of such accommodation must be clearly proven.¹⁸² And the mere fact that the other partner had in one instance seen a notice of the maturing of a bill indorsed by the firm name as sureties, and had not denied the authority of the other partner to use the firm name in that manner, coupled with the fact that such notices were often left at the store of the firm, will not be sufficient to hold the firm on a note signed by it as sureties, without other proof or knowledge of that fact.¹⁸³ Nor is it sufficient that the holder has made inquiries before taking the paper at the bank where the firm did its business.¹⁸⁴ And even proof of a habit of giving accommodation in-

¹⁸⁰ *Master v. Kirton*, 3 Ves. 74; *Ryan v. Mackmath*, 3 Brown, Ch. 15; *Newsome v. Coles*, 2 Camp. 619; *Lawson v. Morgan*, 1 Price, 303.

¹⁸¹ *Sweetser v. French*, 2 Cush. (Mass.) 309; *Tompkins v. Woodyad*, 5 W. Va. 216. So, a fortiori, where its accommodation character was known to the holder. *Van Dyke v. Seelye*, 49 Minn. 557, 52 N. W. 215. So, if such note was given as guarantor or surety for another, and the fact was known to the purchaser, the burden is on him to prove authority from the other partners. *Spurck v. Leonard*, 9 Ill. App. 174. And such authority may be presumed from the course of business of the firm. *Sweetser v. French*, supra.

¹⁸² *Butler v. Stocking*, 8 N. Y. 408; *Foot v. Sabin*, 19 Johns. (N. Y.) 154. And it is not conclusive evidence of such authority that blanks for date and rate of interest were left in the note, and filled in when it was indorsed and negotiated by such partner. *Wait v. Thayer*, 118 Mass. 473; *Hendrie v. Berkowitz*, 37 Cal. 113.

¹⁸³ *Andrews v. Bank*, 7 Smedes & M. (Miss.) 192. The fact that the note was made by and payable to the individual partner, and indorsed by him in his own name and in that of his firm, is not sufficient notice to destroy the bona fide character of the purchaser. *Redlon v. Churchill*, 73 Me. 146. And the fact that the note was purchased from a broker will not raise the presumption that he was the agent of the maker. *Id.*

¹⁸⁴ *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629.

dorsements will not be evidence of the firm's assent to an accommodation note given by one partner.¹⁸⁵

Accommodation—When Binding—Bona Fide Holders.

§ 419. Where, however, accommodation paper is given by one partner, and the benefit is received by the firm, it has been held to be binding on the firm.¹⁸⁶ And if a bill is drawn by one partner on his firm, and accepted by them apparently in the regular course of business and discounted for value, it will be binding upon the firm.¹⁸⁷

And, in general, it is no defense against a bona fide holder for value before maturity that the paper was given for accommodation by one partner without the consent of the others.¹⁸⁸ But, if the transfer of such paper is under circumstances calculated to arouse suspicion, the holder will not be regarded as a bona fide purchaser, and will be subject to the defense that the paper was given for accommodation without the consent of the firm.¹⁸⁹ And where a partnership note was drawn by one partner for his own accommodation and transferred to an unincorporated bank, and the partner who made the note was also a partner in the bank, and had received money for the express purpose of taking up the note, and had misapplied it, the bank was held to be bound by his knowledge of the facts.¹⁹⁰

§ 420. — Where partnership paper is proved to have been given for accommodation, the burden of showing his good faith is then shifted to the holder.¹⁹¹ And where a bill has been discounted for the drawer, payable to his firm and indorsed in its name, it will be presumed to have been given for accommodation.¹⁹² And this

¹⁸⁵ *Early v. Reed*, 6 Hill (N. Y.) 12.

¹⁸⁶ *Langan v. Hewett*, 13 Smedes & M. (Miss.) 122.

¹⁸⁷ *Beach v. Bank*, 2 Ind. 488.

¹⁸⁸ *Catskill Bank v. Stall*, 15 Wend. (N. Y.) 364, affirmed as *Stall v. Bank*, 18 Wend. (N. Y.) 466; *Wells v. Evans*, 20 Wend. (N. Y.) 251; *Austin v. Vandermark*, 4 Hill (N. Y.) 259; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Beach v. Bank*, 2 Ind. 488; *Waldo Bank v. Lumbert*, 16 Me. 416.

¹⁸⁹ *Roth v. Colvin*, 32 Vt. 125.

¹⁹⁰ *Stockdale v. Keyes*, 79 Pa. St. 251.

¹⁹¹ *Bank of St. Albans v. Gilliland*, 23 Wend. (N. Y.) 311.

¹⁹² *Bank of Vergennes v. Cameron*, 7 Barb. (N. Y.) 143.

is true especially where the transaction was not within the scope of the partnership business or apparently authorized by any previous habit of indorsing such paper.¹⁹³ But the fact that a note payable to one firm was indorsed to another firm by a partner common to both, and indorsed by such partner for the latter firm also, and discounted by him, will not amount to notice of its accommodation character.¹⁹⁴

Violation of Partnership Agreement.

§ 421. The articles of partnership frequently limit the power of individual partners to bind the firm by bills, notes, or indorsements, and in such case their power is to be determined by such articles, except where purchasers without notice before maturity may be concerned.¹⁹⁵ Against a bona fide purchaser for value before maturity, it is no defense to show that such paper was executed in violation of the articles of partnership.¹⁹⁶ But such restrictions are a good defense at suit of a holder with notice, and so is any notice that the firm will not be responsible for the paper.¹⁹⁷ So, if partners open a bank account and agree that checks are to be signed by both, and so notify the bank, it will be liable to creditors of the firm for payment of checks signed by one only, unless the firm received or used the proceeds.¹⁹⁸ Where a partnership acceptance given in violation of such agreement is in the hands of a holder who has notice of the

¹⁹³ *Tanner v. Hall*, 1 Pa. St. 417.

¹⁹⁴ *Atlas Nat. Bank v. Savery*, 127 Mass. 75.

¹⁹⁵ *Kimbrow v. Bullitt*, 22 How. 256.

¹⁹⁶ *Byles, Bills*, 48; *Chit. Bills*, 52, 55; 1 *Daniel, Neg. Inst.* 340; 1 *Edw. Bills & N.* § 97; 1 *Pars. Notes & B.* 133; *Hogg v. Skeen*, 34 *Law J. C. P.* 153; *Sandilands v. Marsh*, 2 *Barn. & Ald.* 678; *Barrett v. Russell*, 45 *Vt.* 43; *National Union Bank v. Landon*, 66 *Barb. (N. Y.)* 189, affirmed by court of appeals, 40 *How. Prac. (N. Y.)* 721; *Winship v. Bank*, 5 *Pet.* 529; *Michigan Bank v. Eldred*, 9 *Wall.* 544; *First Nat. Bank of Chittenango v. Morgan*, 6 *Hun (N. Y.)* 346; *Pursley v. Ramsey*, 31 *Ga.* 403; *Gregg v. Fisher*, 3 *Ill. App.* 261; *Cottam v. Smith*, 27 *La. Ann.* 128.

¹⁹⁷ *Byles, Bills*, 49; *Chit. Bills*, 62; *Gallway v. Mathew*, 10 *East*, 264, 1 *Camp.* 403; *Minnitt v. Whitney*, 16 *Vin. Abr. "Partners," A*, 244; *Willis v. Dyson*, 1 *Starkie*, 164; *Vice v. Fleming*, 1 *Younge & J.* 227; *Monroe v. Conner*, 15 *Me.* 179; *Dickson v. Primrose*, 2 *Miles (Pa.)* 366. So, too, although the partnership was for a specified period. *Rooth v. Quin*, 7 *Price*, 193.

¹⁹⁸ *Granby Mining & Smelting Co. v. Laverty*, 159 *Pa. St.* 287, 28 *Atl.* 207.

agreement, its further negotiation will be restrained by injunction.¹⁹⁹

If the violation of the articles of partnership is once proved, it then devolves on the holder to prove that he is a holder in good faith and for value.²⁰⁰ But where an acceptance has been given in fraud of the partnership, and issue is taken by the firm *on the acceptance*, the burden of proof is on the firm to show that the holder had notice of the fact; and, until that is shown, he is not required to prove himself a holder for value.²⁰¹ That a firm acceptance has been given without authority, and that the holder had notice of the want of authority, may be shown in evidence under the general issue.²⁰²

Fraud—As a Defense.

§ 422. We have hitherto spoken only of such particular fraud as is involved in the giving of partnership paper for an individual debt or for the accommodation of a third party or in violation of a partnership agreement. But, in general, all fraud between a partner and the holder of such paper will avoid it both against the firm and against other parties.²⁰³ And, where both parties to a transfer are partakers in the fraud, the transferee will hold such paper as a mere trustee for the firm and its creditors.²⁰⁴ So, where one partner receives and misappropriates negotiable securities intrusted to it by a customer in the regular business of the firm, the firm will be liable for such misappropriation to the person defrauded.²⁰⁵

¹⁹⁹ Hood v. Aston, 1 Russ. 412.

²⁰⁰ Byles, Bills, 49; Chit. Bills, 55; 1 Daniel, Neg. Inst. 341; 1 Edw. Bills & N. § 97; Grant v. Hawkes, K. B. Guildhall, 1817; Hogg v. Skeen, 34 Law J. C. P. 153; Puler v. Roe, Peake, 197.

²⁰¹ Byles, Bills, 49; Musgrave v. Drake, 5 Q. B. 185. But see dissent of Wills, J., in Hogg v. Skeen, 34 Law J. C. P. 153.

²⁰² Byles, Bills, 49; Jones v. Corbett, 2 Q. B. 828; Grout v. Enthoven, 1 Exch. 382.

²⁰³ Byles, Bills, 48; Ex parte Bonbonus, 8 Ves. 540; Wells v. Masterman, 2 Esp. 731; Green v. Deakin, 2 Starkie, 347. See, too, Cotton v. Van Bokkelin, 21 N. C. 284. So, fraud by one partner in procuring a note may be set up against the firm in an action on the note. Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108.

²⁰⁴ Stegall v. Coney, 49 Miss. 761.

²⁰⁵ Townsend v. Hagar, 19 C. C. A. 256, 72 Fed. 949.

But fraud against the firm will not render the paper invalid in the hands of a bona fide holder for value.²⁰⁶ So, if a note is given to one partner in payment for partnership property sold, and is disposed of by him in fraud of his partners, this defense will not be available at suit of a bona fide holder for value.²⁰⁷ And subsequent misapplication of money obtained by discounting the firm paper in the regular course of its business will not relieve the firm from its liability to holders of such paper.²⁰⁸ So, too, a surviving partner will be liable on a partnership bill executed in blank by his deceased partner, and fraudulently negotiated after his death to a bona fide holder by a clerk of the firm, who filled the blank with a date prior to the death of the partner.²⁰⁹ And in case of fraud by a deceased partner, although his executor could not be sued at law, he may be held liable in equity to a bona fide holder for the amount of the note or bill fraudulently given.²¹⁰ But the agent for selling a patent, who is authorized by the owner to take notes payable to both in their joint names, cannot as a partner bind his principal, the owner of the patent, by a fraudulent accommodation indorsement, even in the hands of a bona fide holder for value before maturity.²¹¹

Pleading Fraud—Burden of Proof.

§ 423. Fraud upon the partnership in giving a bill or acceptance may be proved under the general issue.²¹² But under such plea the

²⁰⁶ Byles, Bills, 48; Chit. Bills, 60; 1 Pars. Notes & B. 125; *Ridley v. Taylor*, 13 East, 175; *Sutton v. Gregory*, Peake, Ad. Cas. 150; *Duncan v. Clark*, 2 Rich. (S. C.) 587; *Hopkins v. Boyd*, 11 Md. 107; *Parker v. Burgess*, 5 R. I. 277; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *Cotton v. Van Bokkelin*, 21 N. C. 284; *Boardman v. Gore*, 15 Mass. 339; *Manufacturers', etc., Bank v. Gore*, Id. 75; *First Nat. Bank of Chittenango v. Morgan*, 73 N. Y. 593; *Barber v. Van Horn*, 54 Kan. 33, 36 Pac. 1070; *Redlon v. Churchill*, 73 Me. 146. So, where notes belonging to the firm are fraudulently transferred by one partner, and come to the hands of a bona fide holder for value. *Hibernian Bank v. Everman*, 52 Miss. 500.

²⁰⁷ *Nichols v. Sober*, 38 Mich. 678.

²⁰⁸ *Winship v. Bank*, 5 Pet. 529.

²⁰⁹ *Usher v. Dauncey*, 4 Camp. 97.

²¹⁰ *Lane v. Williams*, 2 Vern. 277; *Devaynes v. Noble*, 1 Mer. 568; *Anderson v. Maltby*, 4 Brown, Ch. 423, 2 Ves. Jr. 244.

²¹¹ *Hotchkiss v. English*, 4 Hun (N. Y.) 369, 6 Thomp. & C. (N. Y.) 658.

²¹² *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoven*, 1 Exch. 382.

defendant must prove notice as well as fraud.²¹³ And, where fraud is alleged, an injunction will be granted to restrain the negotiation of the bill by a holder for value, who had notice that the acceptance had been improperly given in the firm name.²¹⁴

Until, however, fraud is shown, the authority of the partner to make the paper in dispute is presumed.²¹⁵ If it is shown to have been made in a business outside of that of the firm, fraud will be presumed against a holder with notice.²¹⁶ But the purchaser has no grounds for suspicion in the fact that the note in question was made in one firm name and indorsed in another, by one who is the common partner of both firms, and such purchaser will not be required to prove the assent of either firm.²¹⁷ And this is true, although both signatures are in the same handwriting, and the note is payable to the partner who obtained the discount and wrote the signatures.²¹⁸ Suspicious circumstances are, in such case, only material as evidence of bad faith on the holder's part.²¹⁹ And the rule is the same as to gross negligence.²²⁰

But where a bill of exchange has been accepted by one partner in fraud of his firm, with a blank for the drawer's name, and the bill is delivered in this shape for value by a holder with notice to his partner in another firm without notice, and filled in by the latter with his own firm name as drawers, such last holder cannot recover against the firm purporting to have accepted the bill.²²¹ On the other hand, a bill of exchange executed in blank by one partner in the firm name and for partnership purposes, and left negligently within the control of a clerk, who dates it back and negotiates it

²¹³ *Musgrave v. Drake*, 5 Q. B. 185.

²¹⁴ *Hood v. Aston*, 1 Russ. 412.

²¹⁵ *Carrier v. Cameron*, 31 Mich. 373.

²¹⁶ *Eastman v. Cooper*, 15 Pick. 276.

²¹⁷ *Ihmsen v. Negley*, 25 Pa. St. 297. And the firms defrauded by such act will have no right to demand contribution from one another by reason of the fraud of their common partner. *Grubb v. Cottrell*, 62 Pa. St. 23.

²¹⁸ *Miller v. Bank*, 48 Pa. St. 514.

²¹⁹ *Chit. Bills*, 60; *Goodman v. Harvey*, 4 Adol. & E. 870, 6 Nev. & M. 372. In the earlier view of this question, see *Down v. Halling*, 4 Barn. & C. 330.

²²⁰ *Chit. Bills*, 60; *Crook v. Jadis*, 5 Barn. & Adol. 909, 3 Nev. & M. 237; *Backhouse v. Harrison*, 5 Barn. & Adol. 1098, 3 Nev. & M. 188.

²²¹ *Hogarth v. Latham*, 3 Q. B. Div. 643.

in fraud of the firm after the death of the partner drawing it, will bind the surviving partners.²²²

Where fraud is shown on the part of the firm seeking exoneration, the burden is upon the holder to prove his own good faith.²²³ In such case he must also prove himself to be a holder for value, and this is especially true if he has taken the paper under suspicious circumstances.²²⁴

Dissolution of Firm.

§ 424. After the dissolution of a partnership the partners have no longer power to bind one another by their contracts. On the other hand, dissolution of the firm will not affect a partnership liability already incurred.²²⁵ So, if the dissolution of a firm be unknown to the holder of its paper, his subsequently taking a renewal of the paper from one partner in the firm name will not discharge the original partners.²²⁶ Nor will the holder of a partnership note be affected by the subsequent dissolution of the firm with an agreement between the partners that its debts should be paid by one of them.²²⁷

Action against Surviving Partners.

§ 425. In general, an action for a partnership debt lies against the surviving partners only, upon dissolution of the firm by the death of any partner. Yet, if the surviving partner is a certificated bankrupt, it has been held that an action may be maintained against the executor of the deceased partner.²²⁸ And, on the other hand,

²²² *Usher v. Dauncey*, 4 Camp. 97.

²²³ *Byles, Bills*, 48; 1 Pars. Notes & B. 128; *Hogg v. Skeen*, 34 Law J. C. P. 153; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Carrier v. Cameron*, 31 Mich. 373; *Munroe v. Cooper*, 5 Pick. (Mass.) 412; *National Exch. Bank v. White*, 30 Fed. 412.

²²⁴ *Heath v. Sansom*, 2 Barn. & Adol. 291. In this case the maker of the note gave it for an individual debt to another firm of which he was also a member.

²²⁵ *Gulick v. Gulick*, 16 N. J. Law, 186.

²²⁶ *Miller v. Miller*, 8 W. Va. 542.

²²⁷ *Mogelin v. Westhoff*, 33 Tex. 788.

²²⁸ *Lang v. Keppele*, 1 Bin. (Pa.) 123; *Caldwell v. Stileman*, 1 Rawle (Pa.) 212.

a surviving partner is entitled to the partnership assets and may recover possession of a note in trover from the representatives of a deceased partner, notwithstanding an agreement between the maker of the note and the deceased partner for a set-off of such partner's individual debt against the note, the agreement not having been carried out in the deceased partner's lifetime.²²⁹ If several partners give their joint and several note, although at law the administrator of a deceased partner will be liable upon it, yet his separate estate will be protected in equity by application in the first instance of the partnership assets to the payment of such note.²³⁰

After Dissolution—No Power to Draw Bills.

§ 426. After the dissolution of a firm has been made publicly known, the partners have no longer power to bind one another by bill or note.²³¹ Such a note would, however, bind the individual

²²⁹ *Stearns v. Houghton*, 38 Vt. 583. And such surviving partner will not be restrained from using the name of the deceased partner in the old business. *Webster v. Webster*, 3 Swanst. 490.

²³⁰ *Filley v. Phelps*, 18 Conn. 301.

²³¹ *Byles, Bills*, 51; *Chit. Bills*, 65; 1 *Daniel, Neg. Inst.* 345; 1 *Edw. Bills & N.* § 113; 1 *Pars. Notes & B.* 144; *Heath v. Sansom*, 4 *Barn. & Adol.* 172, 1 *Nev. & M.* 104; *Woodworth v. Downer*, 13 Vt. 522; *Haddock v. Croch-eron*, 32 *Tex.* 276; *Kendall v. Riley*, 45 *Tex.* 20; *Mitchell v. Ostrom*, 2 *Hill (N. Y.)* 520; *Meyer v. Atkins*, 29 *La. Ann.* 586; *Merritt v. Pollys*, 16 *B. Mon. (Ky.)* 355; *Fowler v. Richardson*, 3 *Sneed (Ky.)* 508; *Hurst v. Hill*, 8 *Md.* 399; *Ransom v. Loyless*, 49 *Ga.* 471; *Morrison v. Perry*, 11 *Hun (N. Y.)* 33; *Montague v. Reakert*, 6 *Bush (Ky.)* 393; *Curry v. White*, 51 *Cal.* 530; *Carlton v. Jenness*, 42 *Mich.* 110, 3 *N. W.* 284; *Bryant v. Lord*, 19 *Minn.* 396 (*Gil.* 342); *Lusk v. Smith*, 8 *Barb.* 570; *Bank of Montreal v. Page*, 98 *Ill.* 109; *Tombeekbee Bank v. Dumell*, 5 *Mason*, 56, *Fed. Cas. No.* 14,081. But where an acceptance was given on the 23d day of April, 1861, by one member of a firm divided and dissolved by the war, the period of dissolution was fixed by the president's proclamation on the 16th day of August, 1861, and the acceptance was held to be binding on the firm. *Matthews v. McStea*, 91 *U. S.* 7. Where a note is given, after dissolution, in the firm name, the partnership may be discharged, and the individual signer held. *Ransom v. Loyless*, 49 *Ga.* 471. If, on the other hand, such note be given in renewal and on surrender of a former partnership note, the original liability of the firm will not be discharged. *Turnbow v. Broach*, 12 *Bush (Ky.)* 455. As to this, see, also, chapter on Payment by Note, *infra*. But the relation of the partner assuming to pay the debts of the dissolved firm, as to the

partner executing it.²³² Where a firm has been dissolved and its debts have been assumed by another firm having in it one of the partners of the original firm, he has no power to give a note in the name of the original firm for its debt.²³³ So, if goods have been ordered by a firm, and have been delivered after its dissolution to one of the former partners doing business in his own name, and a bill of exchange has been drawn on the firm after such dissolution and accepted by the partner receiving and using the goods, such acceptance will not bind the other partners.²³⁴ And it makes no difference, as a general rule, that the partnership note given after its dissolution was in settlement of its debts. If the holder knew of the dissolution, the note will not bind the partners who did not assent to it.²³⁵ And if one partner on the dissolution of the firm agrees to pay its debts, and afterwards draws a bill of exchange in the firm name for that purpose, it will not bind the other partners.²³⁶

Implied Powers After Dissolution—Admissions.

§ 427. Power to bind the firm, however, by a bill or note may be given by implication after the dissolution of the firm.²³⁷ And, in Pennsylvania at least, a partnership still exists after its dissolution, for the purpose of closing its business, and one partner may bind the firm by a note given for that purpose;²³⁸ especially where he

other partners, has been held to be that of principal to surety, and an extension given to him on a note in the firm name made by him after dissolution has been held to discharge the others. *Smith v. Sheldon*, 35 Mich. 42.

²³² *Robb v. Mudge*, 14 Gray (Mass.) 534.

²³³ *Brown v. Broach*, 52 Miss. 536.

²³⁴ *Ex parte Harris*, 1 Madd. 583. So, where the acceptance was given in the firm name, but the vendor brought suit and recovered judgment only against the accepting partner. *Cambefort v. Chapman*, 19 Q. B. Div. 229.

²³⁵ *Martin v. Walton*, 1 McCord (S. C.) 16; *Bank of South Carolina v. Humphreys*, Id. 388; *Perrin v. Keene*, 19 Me. 355; *Hamilton v. Seaman*, 1 Ind. 185. Nor for goods ordered by the firm before its dissolution. *Goodspeed v. Plow Co.*, 45 Mich. 237, 7 N. W. 810.

²³⁶ *Le Roy v. Johnson*, 2 Pet. 186; *Brown v. Chancellor*, 61 Tex. 427. So, of a bill drawn to borrow money to pay such debts. *Hayden v. Cretcher*, 75 Ind. 108. But see, contra, *Siegfried v. Ludwig*, 102 Pa. St. 547.

²³⁷ *Graves v. Merry*, 6 Cow. (N. Y.) 701.

²³⁸ *Ward v. Tyler*, 52 Pa. St. 393. See, too, remarks of Savage, C. J., in *McPherson v. Rathbone*, 11 Webd. (N. Y.) 96.

remains in possession of the place of business of the firm and attends to the collection of its debts. And in such case he may bind the firm by a note given in settlement of its debt without any express authority from the others.²³⁹ But one partner cannot bind the others after dissolution of the firm by a note in the firm name given under a previous power of attorney, where the dissolution is known to the payee.²⁴⁰ Nor can one partner after dissolution bind the others by a fresh promise to pay a note, on which their liability as indorsers had been discharged by want of proper notice of protest.²⁴¹

§ 428 — But it has been held that, even after dissolution of the firm, all the partners will be bound by an admission made by one in relation to a previous transaction of the firm.²⁴² And such admission may be used in evidence against all in an action of assumpsit for moneys loaned to the firm, and bills accepted by the plaintiff on its behalf.²⁴³ So, an acknowledgment, made by one partner after dissolution of the firm, as to the amount of a balance due to the firm, is admissible to charge all the partners.²⁴⁴ But, where a partnership note has been given by one of the partners after its dissolution, his admissions as to the transactions of the firm for which the note was given have been held not to be binding upon the others.²⁴⁵ And the admission of one partner, made after dissolution of the firm, to the effect that a draft indorsed by him in the firm name has been duly protested, will not amount to proof of notice against the others.²⁴⁶

²³⁹ *Robinson v. Taylor*, 4 Pa. St. 242. See, too, *McCowin v. Cubbison*, 72 Pa. St. 358; *Estate of Davis*, 5 Whart. 530. In this last case the money for which the note was given was loaned on the credit of the firm by one who knew of its dissolution, and was applied for its benefit.

²⁴⁰ *Schlater v. Winpenny*, 75 Pa. St. 321.

²⁴¹ *Schoneman v. Fegley*, 7 Pa. St. 433. Or by the statute of limitations, *Casebolt v. Ackerman*, 46 N. J. Law, 169.

²⁴² *Wood v. Braddick*, 1 Taunt. 104; *Halliday v. Ward*, 3 Camp. 32.

²⁴³ *Parker v. Merrill*, 6 Me. 41; *Cady v. Shepherd*, 11 Pick. (Mass.) 400.

²⁴⁴ *Ide v. Ingraham*, 5 Gray (Mass.) 106. But see, contra, *Kendall v. Riley*, 45 Tex. 20.

²⁴⁵ *Maxey v. Strong*, 53 Miss. 280.

²⁴⁶ *Bank of Vergennes v. Cameron*, 7 Barb. (N. Y.) 143.

Ratification after Dissolution—Consent.

§ 429. It is said that one partner after dissolution may bind the other by receiving a note in payment of a debt due to the firm and discharging the debtor.²⁴⁷ And if a partnership note is given after dissolution, by consent of all the partners, for a partnership debt, it will be binding on them all.²⁴⁸ And they will be bound in like manner by their subsequent ratification of such a note given without their authority.²⁴⁹ And, in the case of such a note given without authority, a partner's subsequent acknowledgment of his liability, and promise to pay the note, will be binding on him, especially where, on the dissolution of the firm, he had assumed such debt and agreed to pay it.²⁵⁰ And such note may be afterwards ratified by the other partners by their making a payment on account of it, and will then bind them.²⁵¹ So, an indorsement by one partner in the name of his firm after dissolution will be ratified by, and binding upon, another partner who knowingly receives his share of the proceeds of discounting such note.²⁵² Knowledge and consent will amount to ratification,²⁵³ but full knowledge of the act to be ratified is necessary.²⁵⁴

Powers of Liquidating Partner.

§ 430. Mere authority to settle the affairs of a firm will not, in general, include the power to bind it by commercial paper given in its name.²⁵⁵ Nor will an authority "to settle all demands in favor

²⁴⁷ *Riddle v. Etting*, 32 Pa. St. 412. In this case the ex partner's action was specially authorized by the articles of dissolution.

²⁴⁸ *Randolph v. Peck*, 1 Hun (N. Y.) 138. And see *McPherson v. Rathbone*, 11 Wend. (N. Y.) 96.

²⁴⁹ *Draper v. Bissel*, 3 McLean, 275, Fed. Cas. No. 4,068.

²⁵⁰ *Peet v. Riley*, 26 La. Ann. 712.

²⁵¹ *Eaton v. Taylor*, 10 Mass. 54; *Chase v. Kendall*, 6 Ind. 304.

²⁵² *First Nat. Bank of Mankato v. Parsons*, 19 Minn. 289 (Gil. 246).

²⁵³ *Sanborn v. Stark*, 31 Fed. 18.

²⁵⁴ *Brown v. Bamberger*, 110 Ala. 342, 20 South. 114.

²⁵⁵ *Myatts v. Bell*, 41 Ala. 222; *Potter v. Tolbert* (Mich.) 71 N. W. 849; *Brown v. Chancellor*, 61 Tex. 437. Or to renew a matured bill. *Id.*; *Martin v. Walton*, 1 McCord (S. C.) 16. And authority to give notes for the

of or against said firm" confer such power;²⁵⁶ nor even, it has been held, authority to settle the business of the firm and "to sign the name of the firm for that purpose."²⁵⁷ In like manner, the partner engaged in winding up the concerns of a firm derives no authority from that fact to bind it by renewals of its notes in the firm name.²⁵⁸ So, a partner who is authorized, after dissolution of the firm, to receive and pay its debts, has no power to bind it by an indorsement, although given for the purpose of paying a firm debt.²⁵⁹ On the other hand, the general power of all the partners to receive payment of debts due to the firm before its dissolution will authorize one of the partners to take an acceptance from a debtor of the firm; and the fact that the partners have agreed among themselves that another partner should collect the debts will constitute no defense for such acceptor.²⁶⁰ Power given to the partner charged with settling up the business of a firm after its dissolution does not extend, in general, to the others. Such partner is therefore the only one who can bind the firm after its dissolution by a firm note given for money borrowed to pay its debts.²⁶¹

The power of a partner to bind his firm after its dissolution by a renewal note may be implied from his authority to settle the firm business and to use its name in such settlement.²⁶² And, in such case, the other partners may be bound by an admission on their part that they had left the assets of the firm in the hands of such acting partner for the purpose of winding up its affairs, and that they "had no objection to his using the partnership name" for that purpose; and the jury may infer from such admission a power to indorse and transfer a note belonging to the firm left in the hands

firm debts will not cover a stipulation for attorney's fees. *Brown v. Bamberger*, 110 Ala. 342, 20 South. 114.

²⁵⁶ *Lockwood v. Comstock*, 4 McLean. 383, Fed. Cas. No. 8,449.

²⁵⁷ *National Bank v. Norton*, 1 Hill (N. Y.) 572.

²⁵⁸ *White v. Tudor*, 24 Tex. 639.

²⁵⁹ *Chit. Bills*, 69; *Kilgour v. Finlyson*, 1 H. Bl. 155; *Abel v. Sutton*, 3 Esp. 108; *Smith v. Winter*, 4 Mees. & W. 454; *Anderson v. Weston*, 6 Bing. N. C. 296. But see, as to an indorsement given in carrying out a specific prior agreement, *Star Wagon Co. v. Swezey*, 52 Iowa, 391, 3 N. W. 421, 59 Iowa. 609, 13 N. W. 749.

²⁶⁰ *King v. Smith*, 4 Car. & P. 108.

²⁶¹ *McCowin v. Cubbison*, 72 Pa. St. 358; *Fulton v. Bank*, 92 Pa. St. 112.

²⁶² *Myers v. Huggins*, 1 Strob. (S. C.) 473.

of such partner.²⁶³ And, where a firm on its dissolution authorizes a partner to use the firm name for the purpose of liquidating its debts, the other partners will be bound by a note indorsed by him without their knowledge in the firm name, and discounted and used for that purpose.²⁶⁴ It has been held, however, in many cases, that the power given to a partner, on dissolution of the firm, to use its name in settlement of its affairs, will not extend to an indorsement in its name of a new note in renewal of a former indorsement of the firm.²⁶⁵

Antedating Dissolution—Blank Instruments.

§ 431. Where the firm is dissolved, and a note or bill is afterwards given in its name without authority, and dated back so as to antedate the dissolution of the firm, it will not be binding upon the firm even in the hands of a bona fide holder for value.²⁶⁶ So, if a bill or check is drawn before the dissolution of a firm, and not delivered until afterwards, it will not be binding upon the firm.²⁶⁷

Where a note has been indorsed in the partnership name by one partner in blank, and transferred by him after the dissolution of the firm, it will be presumed to have been properly indorsed and transferred to such partner at the time of its date.²⁶⁸ So, where one partner drew and indorsed a blank bill of exchange in the name of his firm, and the blanks were, after the death of such partner, filled up and the bills negotiated, the other partners were held liable upon it.²⁶⁹

Renewals after Dissolution.

§ 432. Power to bind a firm by renewal of its paper, like the original power to make such paper, expires on the dissolution of the

²⁶³ *Smith v. Winter*, 4 Mees. & W. 454.

²⁶⁴ *Lloyd v. Thomas*, 79 Pa. St. 68.

²⁶⁵ *Martin v. Kirk*, 2 Humph. (Tenn.) 529; *Parker v. Cousins*, 2 Grat. (Va.) 372; *Long v. Story*, 10 Mo. 636; *Palmer v. Dodge*, 4 Ohio St. 21.

²⁶⁶ *Wrightson v. Pullan*, 1 Starkie, 375; *Lansing v. Gaine*, 2 Johns. (N. Y.) 300.

²⁶⁷ *Woodford v. Dorwin*, 3 Vt. 82; *Gale v. Miller*, 54 N. Y. 536, affirming 1 Lans. 451, 44 Barb. 420.

²⁶⁸ *Fletcher v. Anderson*, 11 Iowa, 228.

²⁶⁹ *Usher v. Dauncey*, 4 Camp. 97.

firm.²⁷⁰ And this is so, although the firm, before its dissolution, had arranged with the officers of the bank holding the paper for leave to renew it until a certain time, and the renewal in dispute was given within such time, but after the dissolution of the firm.²⁷¹ But to discharge the firm's liability for a debt secured by its note, which had been renewed by one partner after dissolution of the firm, the holder must have had notice of such dissolution before taking the renewal and relinquishing the original note given for the debt.²⁷² Where one firm owes money to another, and upon its dissolution one partner assumes the debt, and on the dissolution of the other firm a balance is found due from it to one of its partners, a note afterwards made by the partner assuming the debt of the first firm in the name of his firm to the individual partner of the other firm, in whose favor the balance stood, for such debt, is not in the usual course of business, and will not be binding on the other members of either firm.²⁷³

Transfer of Assets after Dissolution.

§ 433. After dissolution of a firm, one partner can no longer transfer bills and notes belonging to the firm so as to bind the others by his indorsement,²⁷⁴ even though he be the liquidating part-

²⁷⁰ *Vernon v. Manhattan Co.*, 17 Wend. (N. Y.) 524, affirmed 22 Wend. (N. Y.) 183; *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Palmer v. Dodge*, 4 Ohio St. 21, approved in *Wilson v. Forder*, 20 Ohio St. 89; *Moore v. Lackman*, 52 Mo. 323; *Nix v. Bank*, 23 Colo. 511, 48 Pac. 522; *Lumberman's Bank v. Pratt*, 51 Me. 563. Especially where the original indorsement was for accommodation, and renewal had been expressly refused by the other partners. *Wilson v. Richards*, 28 Minn. 337, 9 N. W. 872.

²⁷¹ *Bank of South Carolina v. Humphreys*, 1 McCord (S. C.) 388.

²⁷² *Brown v. Clark*, 14 Pa. St. 469; *First Nat. Bank of Pueblo v. Newton*, 10 Colo. 161, 14 Pac. 428.

²⁷³ *Hicks v. Russell*, 72 Ill. 230.

²⁷⁴ *Byles, Bills*, 53; *Chit. Bills*, 66; 1 *Daniel, Neg. Inst.* 345; 1 *Edw. Bills & N.* § 126; 1 *Pars. Notes & B.* 146; *Dolman v. Orchard*, 2 *Car. & P.* 104; *Anderson v. Weston*, 6 *Bing. N. C.* 296; *Abel v. Sutton*, 3 *Esp.* 108; *Kilgour v. Finlyson*, 1 *H. Bl.* 155; *Sanford v. Mickles*, 4 *Johns. (N. Y.)* 224; *Stair v. Richardson*, 108 *Ind.* 429, 9 *N. E.* 300; *Woodson v. Wood*, 84 *Va.* 478, 5 *S. E.* 277. See, however, *Lewis v. Reilly*, 1 *Q. B.* 349.

ner,²⁷⁵ and though the transfer be made in payment of a debt due by the firm before its dissolution.²⁷⁶

After dissolution of a firm by bankruptcy, the partners will not be rendered liable by an indorsement by one of their number.²⁷⁷ So, after dissolution by the outbreak of war, rendering the former partners alien enemies.²⁷⁸ But it has been held that an indorsement by one in the firm name after its dissolution will, at least, bind him individually.²⁷⁹ And in England it is held that such indorsement will be valid as a transfer of the paper, although not binding upon the partners as an indorsement.²⁸⁰ And the same rule has been adopted in this country in favor of holders without notice,²⁸¹ and in support of indorsements "without recourse" made under an express authority to sell such paper.²⁸² Power to indorse partnership securities after dissolution may be implied, like the power to make such instruments.²⁸³ And, where the firm was bound by agreement to indorse certain notes received by it as agent, it was held that the liquidating partner could render the others liable by an indorsement and guaranty in the firm name.²⁸⁴

²⁷⁵ *Whitworth v. Ballard*, 56 Ind. 279.

²⁷⁶ *Humphries v. Chastain*, 5 Ga. 166.

²⁷⁷ *Byles, Bills*, 54; *Thomason v. Frere*, 10 East, 418.

²⁷⁸ *Bank of New Orleans v. Matthews*, 49 N. Y. 12.

²⁷⁹ *White v. Insurance Co.*, 1 Nott & McC. (S. C.) 561. Although the indorsement was signed, "B. & H., old firm in liquidation." *Fassin v. Hubbard*, 55 N. Y. 465.

²⁸⁰ *King v. Smith*, 4 Car. & P. 108; *Lewis v. Reilly*, 1 Q. B. 349. But such an indorsement after maturity of the note was held to pass no legal title in *Parker v. Macomber*, 18 Pick. (Mass.) 505. And the same has been held as to notes not yet due in the hands of a liquidating partner, *Geortner v. Trustees*, 2 Barb. (N. Y.) 625; especially where the transfer was made for the partner's individual debt, *Fellows v. Wyman*, 33 N. H. 351; unless the instrument is payable to such partner individually, *Temple v. Seaver*, 11 Cush. (Mass.) 314. And such indorsement by the liquidating partner to the new firm, which is entitled to the assets, will pass title, although it omitted the words "without recourse," prescribed by the power given him. *Murray v. Ayer*, 16 R. I. 665, 19 Atl. 241.

²⁸¹ *Cony v. Wheelock*, 33 Me. 366; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361.

²⁸² *Yale v. Eames*, 1 Mete. (Mass.) 486; *Waite v. Foster*, 33 Me. 424.

²⁸³ *Byles, Bills*, 53; *Smith v. Winter*, 4 Mees. & W. 454.

²⁸⁴ *Star Wagon Co. v. Swezey*, 52 Iowa, 391, 3 N. W. 421.

Dissolution by Death—Power of Surviving Partner.

§ 434. Where an action is brought upon a firm note against the estate of a deceased partner, it is a good defense that the note was executed by the other partner after the dissolution of the firm.²⁸⁵ Where a partnership has been dissolved by death, the surviving partner may indorse and transfer notes belonging and payable to the firm.²⁸⁶ But in Missouri, though he may transfer such notes in payment of the firm debts, yet, if he fail to give the security required of administrators by law, the personal representative of the deceased partner may, upon giving the required bond, recover the possession and control of such note from the surviving partner.²⁸⁷

Where a firm has been dissolved by the death of one partner, one of two surviving partners has no power to make an assignment of partnership assets for the benefit of creditors without consent of the other.²⁸⁸ And, where a firm has been dissolved by the death of one member, one survivor cannot bind the others by indorsing a note, even for a debt of the firm, without the consent or ratification of the others.²⁸⁹ But, if a surviving partner makes a transfer of firm assets in the name of the firm, it will dispose of his own entire interest in the property.²⁹⁰

The surviving partner cannot by delivery transfer the legal title of his firm in a note made payable to the partnership and indorsed by the deceased partner.²⁹¹ And where a surviving partner, in payment of a firm debt, makes a note payable to the firm, and indorses it in the firm name to the creditor, it is the same as though it were made payable to a fictitious person (the firm having then no exist-

²⁸⁵ *Floyd v. Miller*, 61 Ind. 224; *Bank of Port Gibson v. Baugh*, 9 Smedes & M. (Miss.) 290.

²⁸⁶ *Johnson v. Berlzheimer*, 84 Ill. 54; *Bredow v. Institution*, 28 Mo. 181.

²⁸⁷ *Bredow v. Institution*, *supra*.

²⁸⁸ *Egberts v. Wood*, 3 Paige (N. Y.) 517.

²⁸⁹ *Carleton v. Jenness*, 42 Mich. 110, 3 N. W. 284. Neither can a surviving partner renew an accommodation partnership indorsement, so as to bind the estate of a deceased partner, which has been discharged by the holder's failure to protest the original note, on its maturing after such partner's death. *Central Sav. Bank v. Mead*, 52 Mo. 546.

²⁹⁰ *Jones v. Thorn*, 2 Mart. N. S. (La.) 463.

²⁹¹ *Glasscock v. Smith*, 25 Ala. 474.

ence), and the partner making the same will be liable as maker in an action brought on it against him by the payee.²⁹²

But, where one partner on the dissolution of the firm has been authorized to settle its debts and other affairs, he may transfer a note belonging to it and payable to bearer by his indorsement without recourse.²⁹³ And he may assign to a firm creditor a debt due to the firm in payment of such creditor's claim.²⁹⁴ But it is not a debt of the firm where goods have been ordered by a firm, but are delivered after its dissolution to one of the partners, and, if they are paid for by an acceptance by him of a bill of exchange drawn on both, the other partner will not be liable on such acceptance.²⁹⁵

Dissolution—When Admissible as a Defense.

§ 435. Where a bill or note is signed by one partner after the dissolution of the firm, it will be binding upon all in the hands of a bona fide holder for value without notice of the dissolution.²⁹⁶ And this is true, also, of indorsements and acceptances.²⁹⁷ But in such case the indorsee must prove that he took the paper for value and before maturity and without notice.²⁹⁸

Where a note is given in the firm name by one member after its dissolution, for money loaned by an old customer on the faith and credit of the firm, and actually applied by the partner obtaining it to the business of the firm, the lender, having no notice of the dissolution, may recover on it.²⁹⁹ And, even where the payee of such

²⁹² *Cavitt v. James*, 39 Tex. 189.

²⁹³ *Parker v. Macomber*, 18 Pick. (Mass.) 505.

²⁹⁴ *Milliken v. Loring*, 37 Me. 408.

²⁹⁵ *Ex parte Harris*, 1 Madd. 583.

²⁹⁶ *Buffalo City Bank v. Howard*, 35 N. Y. 500; *Van Eps v. Dillaye*, 6 Barb. (N. Y.) 244; *Holtgreve v. Wintker*, 85 Ill. 470; *Merritt v. Pollys*, 16 B. Mon. (Ky.) 355; *Stall v. Cassady*, 57 Ind. 284; *Davis v. Willis*, 47 Tex. 154; *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Mauldin v. Bank*, 2 Ala. 502; *Long v. Garnett*, 59 Tex. 229; *Clement v. Clement*, 69 Wis. 602, 35 N. W. 17; *Ewing v. Trippe*, 73 Ga. 776. And this is true notwithstanding a subsequent invalid renewal of the note after notice of dissolution. *Hammond v. Aiken*, 3 Rich. Eq. (S. C.) 119.

²⁹⁷ *Laey v. Woolecott*, 2 Dowl. & R. 458; *Wagner v. Freschl*, 56 N. H. 495.

²⁹⁸ *Clark v. Dearborn*, 6 Duer (N. Y.) 309.

²⁹⁹ *Hunt v. Hall*, 8 Ind. 215.

a note knew at the time that the firm had been dissolved, it would still be binding upon all the partners in the hands of a bona fide indorsee for value before maturity.³⁰⁰ Although this has been held in New York not to be the rule where the indorsee took such paper merely as collateral for a precedent debt.³⁰¹ But a note made after dissolution of the firm will not be binding upon it in the hands of the payee, although he had no knowledge of the dissolution of the firm, and took the paper in payment of an existing debt due from the firm.³⁰² And such payees are not entitled to come in for a share of the assets of the firm with the firm creditors.³⁰³ On the other hand, where a firm has been dissolved by a secret act of bankruptcy, the solvent partner may, by accepting a bill of exchange for a previous partnership debt, render the firm liable, and such acceptance in the hands of an innocent holder may be proved against the joint estate of both partners on the subsequent bankruptcy of the solvent partner.³⁰⁴

It is no defense that a bill of exchange has been made after the dissolution of the firm, if it is in the hands of a holder with notice deriving his title from a holder for value and without notice before maturity.³⁰⁵ And it has been held in Pennsylvania that the plaintiff is not obliged to prove himself a bona fide holder for value before maturity, unless the defense of dissolution of the firm has been specially pleaded.³⁰⁶

Notice of Dissolution.

§ 436. Where a firm is dissolved, it is the duty of the partners to give notice of that fact to all old customers of the firm, in order

³⁰⁰ *Albietz v. Mellon*, 37 Pa. St. 367.

³⁰¹ *Bristol v. Sprague*, 8 Wend. (N. Y.) 423, where the indorser had agreed to pay part of the debt if the note should not be collected. But it would be otherwise, if received in payment and discharge of the former debt. *Bank of St. Albans v. Gilliland*, 23 Wend. (N. Y.) 311.

³⁰² *Morrison v. Perry*, 11 Hun (N. Y.) 33.

³⁰³ *Haggerty v. Taylor*, 10 Paige (N. Y.) 261.

³⁰⁴ *Ex parte Robinson*, 1 Mont. & A. 18, 3 Deac. & C. 376; *Ex parte Ellis*, Mont. & B. 249, 2 Deac. & C. 555.

³⁰⁵ *Byles*, Bills, 52; *Rooth v. Quin*, 7 Price, 193; *Boyd v. McCann*, 10 Md. 18.

³⁰⁶ *Albietz v. Mellon*, 37 Pa. St. 367.

to avoid liability for contracts afterwards made by one another in the firm name.³⁰⁷ In general, such customers include only those who have dealt directly with the firm, and not one who has merely dealt in paper drawn or indorsed by the firm.³⁰⁸ But any creditor of the firm, who has taken its note in payment, is a customer entitled to more particular notice than the mere public advertisement of dissolution.³⁰⁹ And where a firm has accepted a bill of exchange before its maturity, but after dissolution of the firm and after transfer of the bill by indorsement, a holder who had taken previous acceptances of the firm is entitled to notice of dissolution, and, in the absence of such notice, can hold the firm.³¹⁰ Two previous transactions have been held to be sufficient to constitute one an old customer and entitle him to such notice.³¹¹ In the absence of such notice, he can hold all the original partners, especially where the business is carried on after dissolution and the new debt contracted without any change of the firm name.³¹²

In general, where a firm is dissolved by the death of a partner, notice of the fact is unnecessary.³¹³ So, if it is dissolved by operation of law, or by any event of public notoriety, such as an act of

³⁰⁷ Chit. Bills. 64; 1 Daniel, Neg. Inst. 324; 1 Edw. Bills & N. § 117; 1 Pars. Notes & B. 142; *Parkin v. Carruthers*, 3 Esp. 248; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 514, affirming 45 Barb. 663; *Wardwell v. Haight*, 2 Barb. (N. Y.) 549; *Simonds v. Strong*, 24 Vt. 642; *Dickinson v. Dickinson*, 25 Grat. (Va.) 321; *National Shoe & Leather Bank v. Herz*, 89 N. Y. 629; *Buffalo City Bank v. Howard*, 35 N. Y. 500; *Dundass v. Gallagher*, 4 Pa. St. 205.

³⁰⁸ *City Bank v. McChesney*, 20 N. Y. 240; *Hutchins v. Bank*, 8 Humph. (Tenn.) 418. But a bank which was in the habit of discounting for the firm notes and bills indorsed by them is entitled to notice as an old customer or dealer. *Id.*; *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458. Strangers cannot be notified, and take such paper at their own peril. *Rocky Mountain Nat. Bank v. McCaskill*, 16 Colo. 408, 26 Pac. 821.

³⁰⁹ *Graves v. Merry*, 6 Cow. (N. Y.) 701. *Sinclair v. Hollister*, 14 Misc. Rep. 607, 36 N. Y. Supp. 460; *White v. Hudson* (Tex. Civ. App.) 36 S. W. 332.

³¹⁰ *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458.

³¹¹ *Wardwell v. Haight*, 2 Barb. (N. Y.) 549.

³¹² *Clapp v. Rogers*, 12 N. Y. 283.

³¹³ *Byles, Bills*, 85; 1 Daniel, Neg. Inst. 343; 1 Pars. Notes & B. 143; *Vulliamy v. Noble*, 3 Mer. 619.

bankruptcy or the outbreak of a war.³¹⁴ In like manner, notice of dissolution is not, in general, necessary to relieve a secret partner from liability.³¹⁵ If, however, such secret or dormant partner was known to the customer as a member of the firm, notice to him would be necessary as much as in the case of a general partner.³¹⁶ But where, after dissolution of a firm consisting of one active and one dormant partner, a note is made by the active partner in the name of himself and of the dormant partner to one who had no notice either of the existence of such firm or of its dissolution, the dormant partner will not be bound.³¹⁷

Whether the plaintiff had actual notice of the dissolution of a firm, where no formal notice was given, is a question of fact for the jury.³¹⁸ So, where notice has been given merely by publication in the newspapers, its sufficiency as notice to a new customer is a question for the jury, and such publication is admissible as evidence of notice for the jury to consider.³¹⁹ As regards new customers, public notice in the newspapers is sufficient notice of dissolution, and constitutes a good defense in favor of the several partners, without the necessity of an injunction for their protection.³²⁰ As regards old

³¹⁴ 1 Daniel, Neg. Inst. 343.

³¹⁵ Byles, Bills, 53; Chit. Bills, 64; 1 Daniel, Neg. Inst. 322, 343; 1 Edw. Bills & N. § 118; 1 Pars. Notes & B. 142; Carter v. Whalley, 1 Barn. & Adol. 11; Evans v. Drummond, 4 Esp. 89; Newmarch v. Clay, 14 East, 239; Heath v. Sansom, 4 Barn. & Adol. 172, 1 Nev. & M. 104; Kelley v. Hurlburt, 5 Cow. (N. Y.) 534; Vaccaro v. Toof, 9 Heisk. (Tenn.) 194; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Nussbaumer v. Becker, 87 Ill. 281; Armstrong v. Hussey, 12 Serg. & R. (Pa.) 315; Grosvenor v. Lloyd, 1 Mete. (Mass.) 19.

³¹⁶ Carter v. Whalley, 1 Barn. & Adol. 11; Thompson v. Pereival, 3 Nev. & M. 167, 5 Barn. & Adol. 925; Nussbaumer v. Becker, 87 Ill. 281.

³¹⁷ Cregler v. Durham, 9 Ind. 375.

³¹⁸ Dickinson v. Dickinson, 25 Grat. (Va.) 321.

³¹⁹ Byles, Bills, 52; Chit. Bills, 67; 1 Edw. Bills & N. § 119; Godfrey v. Turnbull, 1 Esp. 371; Newsome v. Coles, 2 Camp. 617; Farrar v. Deffinne, 1 Car. & K. 580. So, Lansing v. Gaine, 2 Johns. (N. Y.) 300; the note in this case being given in a matter foreign to the partnership business.

³²⁰ Chit. Bills, 66; Newsome v. Coles, 2 Camp. 617; Wrightson v. Pullair, 1 Starkie, 375; Ex parte Liddiard, 2 Mont. & A. 87, 4 Deac. & C. 603; Mowatt v. Howland, 3 Day (Conn.) 353; Dickinson v. Dickinson, 25 Grat. (Va.) 321. And an injunction will not be granted to restrain the surviving partners from the use of a deceased partner's name. Webster v. Webster, 3 Swan. 490.

customers, such notice is insufficient, without proof that the newspaper is taken by them.³²¹ And, where such customer is a corporation, it is not sufficient to prove that the paper was taken or seen by one of its directors.³²² The usual and prudent course as to old customers of the firm is to announce the dissolution by an actual notice or circular.³²³ And a retiring partner should give notice for his protection in the same way, as well as by public notice in the newspapers.³²⁴

Implied Notice.

§ 437. Notice of dissolution of a firm may be implied from circumstances.³²⁵ As regards a new customer, it may be shown to be a matter of public notoriety.³²⁶ But mere local notoriety will have no effect as notice to a nonresident customer.³²⁷ Nor will it be sufficient notice to an old customer or creditor of the firm.³²⁸

Where a banking firm has changed its firm name, this will be sufficient notice to one using checks with the new name.³²⁹ Where a note is signed by a partnership "in liquidation," this will be a sufficient notice of its dissolution.³³⁰ And mere lapse of time may dispense with the necessity for notice, as has been held in the case

³²¹ Byles, Bills, 52; Chit. Bills, 67; Godfrey v. Turnbull, 1 Esp. 371; Leeson v. Holt, 1 Starkie, 186; Graham v. Hope, Peake, 154; Gorham v. Thompson, Id. 42; Rex v. Holt, 5 Term R. 443; Williams v. Keats, 2 Starkie, 290; Martin v. Walton, 1 McCord (S. C.) 16. But, contra, if taking proved. Bank of South Carolina v. Humphreys, 1 McCord (S. C.) 388. See, too, Ex parte Osborne, 1 Glyn & J. 358; Munn v. Baker, 2 Starkie, 255. And, even if the paper be shown to have been taken by the party, this will not always suffice for proof of notice; e. g. in case of a carrier's notice limiting his responsibility. Rowley v. Horne, 3 Bing. 3.

³²² National Bank v. Norton, 1 Hill (N. Y.) 572.

³²³ Jenkins v. Blizard, 1 Starkie, 418.

³²⁴ Simonds v. Strong, 24 Vt. 642.

³²⁵ Merrit v. Pollys, 16 B. Mon. (Ky.) 355.

³²⁶ Lovejoy v. Spafford, 93 U. S. 430.

³²⁷ Southwick v. Allen, 11 Vt. 75.

³²⁸ Lamb v. Singleton, 2 Brev. (S. C.) 490.

³²⁹ Byles, Bills, 52; Chit. Bills, 67; Barfoot v. Goodall, 3 Camp. 147. See, too, Vise v. Fleming, 1 Younge & J. 227.

³³⁰ Speake v. Barrett, 13 La. Ann. 479; Woodson v. Wood, 84 Va. 478, 5 S. E. 277.

of a note drawn in a firm name 11 years after its dissolution, and discounted by a bank in another state without any inquiry.³³¹

But the formation of a new partnership is not necessarily the dissolution of the old one, and notice of such new firm being formed will not take the place of notice of the dissolution of the former firm.³³² So, the mere fact that a partnership store had been transferred, and the firm had ceased to do business, is not sufficient evidence of its dissolution, even to a person living in the same place.³³³ Where, however, an attorney has drawn a deed of dissolution, this will be sufficient notice to him of the dissolution, although the deed was not executed so far as he knew; and, if he afterwards takes a note made in the name of the firm, the burden is on him to prove that the intention to dissolve was abandoned.³³⁴

But a notice may be defeated by the conduct of the parties who seek the benefit of it. Thus, where partners have left their old firm name over the door, they may be liable to a bona fide indorsee of their paper given for subsequent transactions in the firm name, although such indorsee be a new customer, and notwithstanding a public notice of dissolution in the newspapers.³³⁵ So, where the partner seeking to be relieved from liability has informed the customer that the firm was dissolved, but his name would continue in the business for a time.³³⁶ So, where a firm has been dissolved by bankruptcy, but the former partners afterwards continue to hold themselves out as such.³³⁷ And, in like manner, where a former partner declares that the assets of the firm have been left in the hands of the other partner for the purpose of winding up the con-

³³¹ *Farmers' Bank v. Green*, 30 N. J. Law, 316.

³³² *Southwick v. Allen*, 11 Vt. 75.

³³³ *Brown v. Clark*, 14 Pa. St. 469.

³³⁴ *Paterson v. Zachariah*, 1 Starkie, 71.

³³⁵ *Byles, Bills*, 54; *Williams v. Keats*, 2 Starkie, 290. See, too, *Newsome v. Coles*, 2 Camp. 617; *Stables v. Eley*, 1 Car. & P. 614.

³³⁶ *Brown v. Leonard*, 2 Chit. Bills, 120. So, where the notice created a natural misimpression that it was a mere change of firm name, by a statement that the business would be continued in another name. *Thayer v. Goss*, 91 Wis. 90, 64 N. W. 312.

³³⁷ *Byles, Bills*, 54; 1 *Daniel, Neg. Inst.* 343; *Lacy v. Woolcott*, 2 Dowl. & R. 458.

cern, and that he has no objection to the use of the firm name for that purpose, a jury may infer authority on his part, as we have seen, to indorse and transfer the assets of the old firm.³³⁸

³³⁸ Smith v. Winter, 4 Mees. & W. 454; Graves v. Merry, 6 Cow. (N. Y.) 701.

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II. PERSONAL REPRESENTATIVES.

§ 438. Executors and Administrators—Liability of Estate.

439. — Personal Liability.

440. — Rights as Payee.

441. — Transfer by.

443. Guardians and Trustees—As Maker.

444. — As Payee.

Executors and Administrators—Liability of Estate.

§ 438. An executor or administrator cannot bind the estate of the deceased person whom he represents by giving a bill or note signed by him as executor or administrator.³³⁹ Nor will the estate be bound by the executor's acceptance of a draft drawn on him for a distributive share of the estate, although the funds of the estate are still in his hands.³⁴⁰ Nor can an executor bind his testator's estate by giving a renewal of a note of the testator, which has matured;³⁴¹ nor by giving his note as executor for goods purchased under the express authority of the testator's will.³⁴²

On the other hand, an executor, by giving his own note for a debt of the estate, does not ordinarily discharge the estate from liability, but he may still be sued as executor, in equity at least,³⁴³ unless the executor's note has been taken in absolute payment of the note or debt of the testator.³⁴⁴ And, in general, where an executor has given his note in payment of a debt of the estate which he represents, the estate will remain liable for the consideration of such note.³⁴⁵ And a promise on the part of an executor or administrator to pay a debt of the testator may be in consideration of assets

³³⁹ *Lynch v. Kirby*, 65 Ga. 279; *Funderburk v. Gorham*, 46 Ga. 296; *Dunne v. Deery*, 40 Iowa, 251; *Kirkman v. Benham*, 28 Ala. 501; *Gregory v. Leigh*, 33 Tex. 813; *Curtis v. Bank*, 39 Ohio St. 579; *Boggs v. Wann*, 58 Fed. 681; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70.

³⁴⁰ *Wisdom v. Becker*, 52 Ill. 342.

³⁴¹ *Cornthwaite v. Bank*, 57 Ind. 268; *Erwin v. Carroll*, 1 Yerg. (Tenn.) 145.

³⁴² Even though the note be signed, "A. B., Executor of the Estate of C. D., Deceased." *Christian v. Morris*, 50 Ala. 585.

³⁴³ *Douglas v. Fraser*, 2 McCord, Eq. (S. C.) 105.

³⁴⁴ *Yerger v. Foote*, 48 Miss. 62.

³⁴⁵ *Dunne v. Deery*, 40 Iowa, 251.

of the estate in his hands, and will in such case support a judgment against him *de bonis testatoris*.³⁴⁶

Personal Liability of Executor.

§ 439. Where a note or bill is given by an executor or administrator as such, he will, in general, be individually liable for its payment.³⁴⁷ So, upon an indorsement by him as executor;³⁴⁸ or upon his written promise to pay such debt, he having assets of the estate in his hands at the time of giving the promise.³⁴⁹ This is true also where he has given his note in renewal of one made by his testator.³⁵⁰ In like manner, an administrator will be individually liable on a note given by him for property purchased for the benefit of the estate.³⁵¹

But a note given by an administrator, and expressed to be "for value received by A. [the intestate] and his heirs," has been held to be void for want of consideration.³⁵² And, in general, an executor or administrator will not be personally liable on his bill or note given as such beyond the amount of assets actually received by him, unless his promise is founded upon other sufficient consideration.³⁵³ But where the note is given in settlement with a creditor of the estate, and in satisfaction of the debt, and is made payable at a future day, the discharge of the debt against the estate and

³⁴⁶ *Faxon v. Dyson*, 1 Cranch, C. C. 441, Fed. Cas. No. 4,705; *Dixon v. Ramsay*, 1 Cranch, C. C. 472, Fed. Cas. No. 3,932.

³⁴⁷ *Harrison v. McClelland*, 57 Ga. 531; *McFarlin v. Stinson*, 56 Ga. 396; *Kirkman v. Benham*, 28 Ala. 501; *Christian v. Morris*, 50 Ala. 585; *Rittenhouse v. Ammerman*, 64 Mo. 197; *Gregory v. Leigh*, 33 Tex. 813; *Winthrop v. Jarvis*, 8 La. Ann. 434; *Beatty v. Tete*, 9 La. Ann. 129; *Hellier v. Lord*, 55 N. J. Law, 367, 26 Atl. 986; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804. Especially if not shown to be for the benefit of the estate. *First Nat. Bank of White Sulphur Springs v. Collins*, 17 Mont. 433, 43 Pac. 499.

³⁴⁸ *Livingston v. Gausson*, 21 La. Ann. 286.

³⁴⁹ *Sleighter v. Harrington*, 4 N. C. 679.

³⁵⁰ *Cornthwaite v. Bank*, 57 Ind. 268; *Erwin v. Carroll*, 1 Yerg. (Tenn.) 145.

³⁵¹ *Funderburk v. Gorham*, 46 Ga. 296. Unless the note was made under an order of the probate court. *McCalley v. Wilburn*, 77 Ala. 549.

³⁵² *Ten Eyck v. Vanderpoel*, 8 Johns. (N. Y.) 93. See § 134, supra.

³⁵³ *Byrd v. Holloway*, 6 Smedes & M. (Miss.) 199; *Davis v. French*, 20 Me. 21. See, too, *Walker v. Patterson*, 36 Me. 273; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804.

the indulgence to the administrator are consideration enough to support his personal liability.³⁵⁴ Especially where the executor gave his own note to take up that of his testator in consideration of a definite agreement for an extension of time.³⁵⁵ Some new consideration other than the original indebtedness of the deceased is always necessary.³⁵⁶ But an executor's note is itself presumptive evidence of sufficient assets of the estate in his hands, which may, however, be rebutted by evidence of want of assets or other consideration.³⁵⁷

Where an executor gives a note as such, he is presumed in Louisiana to intend to become personally liable on it, and the burden of proving the contrary rests on him.³⁵⁸ And in North Carolina, where such note was given for legal advice rendered to him in his official capacity, he was held personally liable upon it, and parol evidence was not admitted to discharge him from the liability.³⁵⁹ An executor may even become liable as member of a firm upon its paper, where he represents a deceased partner, and continues to receive a share of the profits of the business in the interest of the estate.³⁶⁰

Rights of Executor as Payee.

§ 440. In like manner, where commercial paper is given to one as executor or administrator, such words are held to be merely *descriptio personæ*, and the bill or note will be the individual property of the payee named.³⁶¹ This is true, also, where one is designated as "lawful attorney for A., widow of D., deceased"; and such attor-

³⁵⁴ *Thompson v. Maugh*, 3 G. Greene (Iowa) 342.

³⁵⁵ *Mosely v. Taylor*, 4 Dana (Ky.) 543.

³⁵⁶ *Hester v. Wesson*, 6 Ala. 415.

³⁵⁷ *Bank of Troy v. Topping*, 13 Wend. (N. Y.) 557. *Germanla Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804.

³⁵⁸ *Livingston v. Gaussen*, 21 La. Ann. 286.

³⁵⁹ *Kessler v. Hall*, 64 N. C. 60.

³⁶⁰ And this is true although his name does not appear in the firm. *Wightman v. Townroe*, 1 Maule & S. 412.

³⁶¹ *Cravens v. Logan*, 7 Ark. 103; *Thomas v. Relfe*, 9 Mo. 377. A note must not, however, be made payable to the deceased, with the intention of vesting it in his personal representative. *Valentine v. Holloman*, 63 N. C. 475.

ney may maintain an action on the note in his own name.³⁶² So, where the note is made to one as executor or administrator, he may sue on it in his own name.³⁶³

He may also sue on it in his representative capacity. And, if he has renounced the executorship without bringing such action, the administrator de bonis non may bring the suit on it.³⁶⁴ And it has been held that no one but such administrator de bonis non can sue in such a case.³⁶⁵ If the note is given to the executor for a debt due his testator, it will go to such administrator.³⁶⁶ But a suit brought by an executor in his own right on a bond given to him as executor will survive on his death to his representative, and not to the administrator de bonis non of his testator.³⁶⁷ This has been also held as to a note so given, the note being held to be payable to the executor individually, but the suit being carried on by his representative for the use of the administrator de bonis non of his testator.³⁶⁸ At common law, where a note or bill is made to an executor as such, he may not only sue on it in his representative capacity, but in such action may join other counts on promises to the testator.³⁶⁹

Transfer by Executor.

§ 441. An executor or administrator has power in general to transfer and dispose of the personal property of the deceased, and this power extends to notes taken by him in payment for property sold. He may transfer such note to a distributee of the estate in payment of his share of the estate, and such transferee may thereupon maintain an action in his own name.³⁷⁰ But such notes are held by the executor under the same trust as the property represent-

³⁶² Austell v. Rice, 5 Ga. 472.

³⁶³ Clappitt v. Newport, 8 La. Ann. 124; Gilman v. Horsley, 5 Mart. (N. S.; La.) 661; Carter v. Saunders, 2 How. (Miss.) 851.

³⁶⁴ Sheets v. Pabody, 6 Blackf. (Ind.) 120.

³⁶⁵ Leach v. Lewis, 38 Ind. 160.

³⁶⁶ Catherwood v. Chabaud, 1 Barn. & C. 150, 2 Dowl. & R. 271; Court v. Partridge, 7 Price, 591.

³⁶⁷ Hemphill v. Hamilton, 11 Ark. 425.

³⁶⁸ Cravens v. Logan, 7 Ark. 103.

³⁶⁹ King v. Thom, 1 Term R. 487.

³⁷⁰ Clark v. Moses, 50 Ala. 326.

ed by them, and cannot be assigned by him to a creditor of the estate as collateral or otherwise in preference to and exclusion of other creditors.³⁷¹

An executor cannot transfer a bill or note made to him as executor for a debt due the estate in payment of his individual debts.³⁷² And, where he has transferred for such purpose a note made to him in payment for property of the estate which he has sold, a subsequent administrator de bonis non may file a bill in equity against the assignee of such note, and obtain an injunction against its collection or transfer.³⁷³ And in such case both executor and assignee may be held liable in equity for the breach of trust, especially where the character of the note is shown on its face.³⁷⁴ And, where an indorsee has taken a note under such circumstances with notice of its character, the indorsement will be set aside as void. And the fact of its being payable to the payee as executor or administrator will be sufficient notice of its character.³⁷⁵

Although one of several executors may transfer personal property belonging to the estate of his testator, yet, if a note be made to "the executors of A. B.," all must join in transferring it.³⁷⁶ It has been held that, if a note be made or transferred to one who is dead by a person ignorant of that fact, it will amount to a making or transfer of the instrument to his personal representative.³⁷⁷ But such a transfer made knowingly, with the intention of investing the executors with the property, is null and void.³⁷⁸

On the death of the holder of a bill of exchange or note, the right to transfer it passes to his executors or administrators.³⁷⁹ And an indorsement by them is as effectual as if made by the deceased

³⁷¹ *Payne v. Flourney*, 29 Ark. 500.

³⁷² *Booyer v. Hodges*, 45 Miss. 78.

³⁷³ *Scott v. Searles*, 7 Smedes & M. (Miss.) 498.

³⁷⁴ *Barwick v. White*, 2 Del. Ch. 284.

³⁷⁵ *Booyer v. Hodges*, 45 Miss. 78; *Miller v. Helm*, 2 Smedes & M. (Miss.) 687.

³⁷⁶ *Sanders v. Blain*, 6 J. J. Marsh. (Ky.) 446; *Smith v. Whiting*, 9 Mass. 334; *Johnson v. Mangum*, 65 N. C. 146.

³⁷⁷ *Murray v. East India Co.*, 5 Barn. & Ald. 204.

³⁷⁸ *Valentine v. Holloman*, 63 N. C. 475.

³⁷⁹ *Rawlinson v. Stone*, 3 Wils. 1, 3 Strange, 1260; *Clark v. Moses*, 50 Ala. 326; *Owen v. Moody*, 29 Miss. 79; *Hamrick v. Craven*, 39 Ind. 241; *Makepeace v. Moore*, 10 Ill. 474; *Cahoon v. Moore*, 11 Vt. 604.

payee.³⁸⁰ An executor may transfer a note belonging to his testator as collateral security for a judgment rendered against the testator.³⁸¹ But he cannot transfer without indorsement a note payable to the order of his testator, so as to pass a legal title.³⁸²

§ 442. — On the other hand, where the testator has transferred a negotiable note before its maturity by delivery without indorsement, it may be subsequently indorsed by his administrator with the same effect as if done by himself.³⁸³ And, if such delivery was made upon good consideration, with an agreement for indorsement, which the testator afterwards refused to perform, his executor may be compelled, by a bill in equity, to make such indorsement.³⁸⁴ But an executor cannot, by delivery, complete the transfer of a bill which has been indorsed, and not delivered, by his testator.³⁸⁵ Nor can he deliver a note payable to his testator, and indorsed in blank by him.³⁸⁶ Nor can an executor complete an accommodation indorsement of his testator which was delivered after the testator's death, in ignorance of that event, to one who discounted the note so indorsed on the strength of it; and the estate of the testator will not be bound by a fresh delivery by the executor.³⁸⁷

As has been said, one of several executors may transfer a note or bill payable to their testator,³⁸⁸ although this has been questioned.³⁸⁹ And in California his power is restricted to public sale, under order of the probate court.³⁹⁰ A transfer by an executor in the state where he is appointed will enable the transferee to sue in another

³⁸⁰ *Watkins v. Maule*, 2 Jac. & W. 243.

³⁸¹ *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34.

³⁸² *Taylor v. Surget*, 14 Hun (N. Y.) 116.

³⁸³ *Malbon v. Southard*, 36 Me. 147.

³⁸⁴ *Smith v. Pickering*, Peake, 50.

³⁸⁵ *Bromage v. Lloyd*, 1 Exch. 32; *Clark v. Boyd*, 2 Ohio, 57.

³⁸⁶ *Clark v. Sigourney*, 17 Conn. 510.

³⁸⁷ *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11.

³⁸⁸ *Dwight v. Newell*, 15 Ill. 333. See, too, *Johnson v. Mangum*, 65 N. C. 146.

³⁸⁹ *Winterbottom's Case*, 1 Denison, Cr. Cas. 51, 2 Car. & K. 37. In this case the indorsement was held sufficient to sustain an indictment for forgery.

³⁹⁰ *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89; Code Civ. Proc. § 1524.

state in his own name.³⁹¹ Where the executor adds to his signature in an assignment the words "Executor and Devisee," this will be notice to the assignee of the will and its contents; and, if the transfer be made in consideration of an individual debt of the executor or a partnership debt of his firm, the assignee will take the instrument with notice of the breach of trust on the executor's part.³⁹² But, where an executor charges himself with the amount of a note belonging to his testator, he thereby becomes the owner of it.³⁹³ He cannot, however, acquire claims against the estate for less than their actual value by false representation as to the responsibility and sufficiency of the estate, and then hold them against the estate; but a claim so acquired will be held by him for the benefit of the estate.³⁹⁴

Guardians and Trustees—As Maker.

§ 443. The rule as to guardians and trustees is the same as that which governs executors or administrators. Where a guardian gives a note, he will be personally liable for its payment,³⁹⁵ and may be sued upon it as his individual note.³⁹⁶ More especially he cannot render the estate of his ward liable by giving a note as surety for a third person.³⁹⁷ And he will be individually liable even upon a note given for services rendered to his ward, although he may in such case charge the ward's estate with the amount paid.³⁹⁸ In Louisiana it has been held that a guardian will not incur an individual liability for a draft given for the benefit of his ward in the management of the ward's plantation, even though the draft be not signed

³⁹¹ *Grace v. Hannah*, 51 N. C. 94; *Mackay v. St. Mary's Church*, 15 R. I. 121.

³⁹² *Miller v. Williamson*, 5 Md. 219; *Nugent v. Laduke*, 87 Ind. 482. But the maker cannot defend on the ground of misappropriation of the note by the administrator. *Rogers v. Squires*, 98 N. Y. 49. So *Dorr v. Davis*, 76 Me. 301.

³⁹³ *Dunlap v. Newman*, 47 Ala. 429; *Buie v. Pollock*, 54 Miss. 9.

³⁹⁴ *Burton v. Slaughter*, 26 Grat. (Va.) 914.

³⁹⁵ *Forster v. Fuller*, 6 Mass. 58.

³⁹⁶ *Robertson v. Banks*, 1 Smedes & M. (Miss.) 666.

³⁹⁷ *McGavock v. Whitfield*, 45 Miss. 452; *Shiff v. Shiff*, 20 La. Ann. 269.

³⁹⁸ *Poole v. Wilkinson*, 42 Ga. 539.

by him as guardian.³⁹⁹ In Texas, where a note is given by a guardian as such, and action brought upon it, execution will be rendered against the guardian without reference to the course of administration of the estate.⁴⁰⁰ But, in a suit to recover on such a note against the estate of the ward, judgment should not be rendered against the guardian personally.⁴⁰¹ Where drafts are signed by commissioners as such, they have been held to bind them individually.⁴⁰² So, a note indorsed or signed, "A. B., Receiver;"⁴⁰³ but not a note signed, "C. D., by Her Trustee, A. B."⁴⁰⁴ A guardian cannot bind his ward's estate in Louisiana by giving a note as such without judicial authority, and without benefit accruing to the estate.⁴⁰⁵ But in that state the maker of a note, signed without any word which designates him as guardian, may prove by parol that the note was given by him as such in consideration of a debt due from his ward.⁴⁰⁶

Guardian or Trustee as Payee.

§ 444. A guardian, like an executor, may transfer a note made to him as such; and one who takes it without notice of any breach of trust will acquire a good title by such transfer.⁴⁰⁷ But, where he has transferred such a note in payment of an individual debt of his own to one having knowledge of that fact, there can be no recovery.⁴⁰⁸

Where a note is made to one as guardian, he may sue upon it in his own name and right,⁴⁰⁹ even after the expiration of his office;⁴¹⁰ and after his death his executor may sue on it.⁴¹¹ But a guardian

³⁹⁹ *Lapeyre v. Weeks*, 28 La. Ann. 664.

⁴⁰⁰ *Gibson v. Irby*, 17 Tex. 173.

⁴⁰¹ *McDaniel v. Mann*, 25 Tex. 101.

⁴⁰² *Eaton v. Bell*, 5 Barn. & Ald. 34.

⁴⁰³ *Towne v. Rice*, 122 Mass. 67.

⁴⁰⁴ *Taylor v. Shelton*, 30 Conn. 122.

⁴⁰⁵ *Succession of Johnson*, 4 La. Ann. 253.

⁴⁰⁶ *Leonard v. Hudson*, 12 La. Ann. 840.

⁴⁰⁷ *Fountain v. Anderson*, 33 Ga. 372; *Thornton v. Rankin*, 19 Mo. 193; *Dorr v. Davis*, 76 Me. 301.

⁴⁰⁸ *Coons v. Kendall*, 27 La. Ann. 443.

⁴⁰⁹ *Bingham v. Calvert*, 13 Ark. 399.

⁴¹⁰ *Zachary v. Gregory*, 32 Tex. 452.

⁴¹¹ *Chitwood v. Cromwell*, 12 Heisk. (Tenn.) 658. But his successor in

cannot surrender or cancel a note made to his ward, and take a worthless security in lieu of it.⁴¹² Nor can a guardian, who has taken a note to himself in such capacity, credit upon it an individual debt of his own to the maker of the note, although then solvent.⁴¹³ But, where a note is made to a guardian, the debts of his ward are a proper set-off against it.⁴¹⁴ Where a guardian has loaned funds belonging to his ward, and taken a note for the loan, payable to himself individually, he cannot afterwards, upon the insolvency of the borrower, show that the note was taken by him, as guardian, for the funds of his ward.⁴¹⁵

A bill or note made to one as "trustee" has been held not to be commercial paper, and an indorsement by the trustee transfers it subject to the trust.⁴¹⁶ But, where a note is made to one as trustee of his wife, it has been held that he may make a transfer of it without her joining in the transfer.⁴¹⁷

the guardianship can accept it as assets only at his own peril. *State v. Greensdale*, 106 Ind. 364, 6 N. E. 926.

⁴¹² *Smith v. Dibrell*, 31 Tex. 239.

⁴¹³ *Baughn v. Shackelford*, 48 Miss. 255.

⁴¹⁴ *Nickerson v. Gilliam*, 29 Mo. 456.

⁴¹⁵ *Knowlton v. Bradley*, 17 N. H. 458. As to making such note payable to himself individually, as evidence of fraud, see *Slauter v. Favorite*, 107 Ind. 291, 4 N. E. 880.

⁴¹⁶ *Third Nat. Bank of Baltimore v. Lange*, 51 Md. 138; *Sturtevant v. Jaques*, 14 Allen (Mass.) 523. So, of a certificate of stock. *Shaw v. Spencer*, 100 Mass. 382.

⁴¹⁷ *Westmoreland v. Foster*, 60 Ala. 448.

CHAPTER XIII.

CONSIDERATION—SUFFICIENCY.

I. GENERAL PRINCIPLES.

II. MONEY CONSIDERATIONS.

III. CONSIDERATIONS OTHER THAN MONEY.

I. GENERAL PRINCIPLES.

- § 445. General Principles—Accommodation.
- 446. Subsequent Indorsement—Guaranty.
- 447. Consideration—By and to Whom Given.
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- 449. — Currency—Confederate Notes—Advances.
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- 453. Love and Affection.
- 454. Donatio Causa Mortis.
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General Principles—Accommodation.

§ 445. All commercial paper, like other contracts, requires the support of a valid consideration. The rules governing other contracts in this respect apply also to negotiable instruments, except that in many foreign countries the consideration must itself be a mercantile transaction.

Total want of consideration as well as of contracting intent—which occurs where the paper has never been regularly delivered, but has been obtained by accident, fraud, or theft—constitutes matter of defense, to be considered by itself in a later part of this work.¹

An instrument is often indorsed by way of accommodation to the maker, and is thus apparently without consideration. Such instru-

¹ See section 1799 et seq., *infra*.

ment is, however, binding upon the indorser except at suit of the party accommodated;² provided the indorsement is contemporaneous with the making of the note, and not subsequent to it.³ In such case the loan of credit to the maker constitutes a sufficient consideration for the indorsement.⁴ And it is immaterial that the indorsement was made after the paper was signed by the maker, if before its delivery. In all such cases the indorsement forms part of the original agreement, and shares in the original consideration.⁵ In like manner, a check may be indorsed by a third party at the time of its delivery for the purpose of accommodation.⁶ So, a contemporaneous guaranty indorsed on the note will be supported by the consideration of the note.⁷ So, too, the signature of a surety at or before delivery of the note.⁸

Every contract in a negotiable instrument, whether that of the maker, drawer, acceptor, indorser, or surety, requires the support of a valid consideration. Where, however, a note after being signed by a surety is altered by his consent, no fresh consideration is necessary for this consent.⁹ So, if an indorser agree to an extension of a note indorsed by him, and thereby waive notice of protest, this

² *Cady v. Shepard*, 12 Wis. 639; *Harris v. Bradley*, 7 Yerg. (Tenn.) 310; *Hawkins v. Neal*, 60 Miss. 256. Or a holder with notice who is not a holder for value. *Powers v. French*, 1 Hun (N. Y.) 582. See section 472 et seq., *infra*.

³ *Brenner v. Gundershiemer*, 14 Iowa, 82.

⁴ *Kracht v. Obst*, 14 Bush (Ky.) 34; *Palmer v. Field*, 76 Hun, 229, 27 N. Y. Supp. 736.

⁵ *Austin v. Boyd*, 24 Pick. (Mass.) 64.

⁶ *Emery v. Hobson*, 62 Me. 578; *Colburn v. Averill*, 30 Me. 310; *Bickford v. Gibbs*, 8 Cush. (Mass.) 154.

⁷ *Leonard v. Vredenburgh*, 8 Johns. (N. Y.) 29; *Bailey v. Freeman*, 11 Johns. (N. Y.) 220; *D'Wolf v. Rabaud*, 1 Pet. 476; *Simons v. Steele*, 36 N. H. 73; *Rogers v. Kneeland*, 10 Wend. (N. Y.) 218, 13 Wend. (N. Y.) 114; *Leonard v. Sweetzer*, 16 Ohio, 1; *Colston v. Pemberton*, 20 Misc. Rep. 410, 45 N. Y. Supp. 1034; s. c. 21 Misc. Rep. 619, 47 N. Y. Supp. 1110; *Osborne & Co. v. Gullikson*, 64 Minn. 218, 66 N. W. 965; *Dillman v. Nadelhoffer*, 160 Ill. 121, 43 N. E. 378.

⁸ *Clark v. Clark*, 86 Mo. 114; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 45 N. E. 1094.

⁹ *Pelton v. Prescott*, 13 Iowa, 567.

agreement will not require a fresh consideration;¹⁰ or if he confirms a note originally obtained by fraud.¹¹

An acceptance does not, however, require a consideration moving to the acceptor from the drawer, but may be supported by that which passes between drawer and payee.¹² And, in general, the maker of a note cannot set up want of consideration between the holder and his immediate assignor, in the absence of other defenses touching its validity.¹³ Indeed, if the note was merely transferred to the holder without any consideration for the purpose of bringing suit, this fact alone would furnish no defense to the maker.¹⁴ Except where otherwise provided by statute, any holder in possession may bring suit upon a bill or note for the use of the owner, and want of value paid by such holder is of itself no matter of defense.¹⁵

Subsequent Indorsement—Guaranty.

§ 446. Although an indorsement by a third person at the time of the delivery of a bill or note is supported by the consideration for the original promise, nevertheless, if such indorsement is made after delivery, the plaintiff must prove a new consideration for it.¹⁶ An indorsement by a third person for the purpose of guarantying a bill

¹⁰ *Sheldon v. Horton*, 43 N. Y. 93. But a new promise to pay an old note, except as a ground for extending the statute of limitations, requires a fresh consideration to support it. *Gilmore v. Green*, 14 Bush (Ky.) 772.

¹¹ *Lyon v. Phillips*, 106 Pa. St. 57.

¹² *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25; *Hunt v. Johnson*, 96 Ala. 130, 11 South. 387; *Heuertematte v. Morris*, 101 N. Y. 63, 4 N. E. 1, reversing 28 Hun, 77.

¹³ *Shane v. Lowry*, 48 Ind. 205.

¹⁴ *McWilliams v. Bridges*, 7 Neb. 419. So, as to municipal bonds and their detached coupons. *Dudley v. Lake Co.*, 26 C. C. A. 82, 80 Fed. 672. The original consideration for the note is sufficient consideration for the indorsement as against the maker. *Frederick v. Winans*, 51 Wis. 472, 8 N. W. 301.

¹⁵ *Middlebury v. Case*, 6 Vt. 165.

¹⁶ *Good v. Martin*, 95 U. S. 90. And, where the statute of frauds requires the consideration to be expressed in a promise to answer for the debt of another, this is necessary to an indorsement after delivery by way of accommodation, *Hood v. Robbins*, 98 Ala. 484, 13 South. 574; or guaranty, *Hall v. Farmer*, 5 Denio (N. Y.) 484; but not for a contemporaneous indorsement, *Moses v. Bank*, 149 U. S. 298, 13 Sup. Ct. 900.

or note is presumptively contemporaneous with the making of the instrument.¹⁷ But, where it is shown to have been made after the delivery of the instrument, a new and independent consideration is necessary to give it force.¹⁸ Thus, an indorsement by a wife, at her husband's deathbed, and on his request, of a note made by him 18 months before, without any fresh consideration, is not binding upon her.¹⁹ Nor will a subsequent admission by such an indorser that he has had security for so indorsing be sufficient of itself to render him liable.²⁰

As in other cases, however, the consideration, to be a valid one, need not move directly to the indorser or surety, but an indorsement after delivery of the note will be binding upon the indorser if there be a sufficient consideration for it between the principal debtor and the holder.²¹ But it is held that the surety or indorser must be cognizant at least of such consideration, and will not be bound by an indorsement taken on the strength of an agreement not known to him, for further time, between the maker and payee.²²

The signature of a co-maker likewise after the delivery of a bill or note requires a fresh consideration.²³ And this must be proved by the holder to entitle him to recover against such co-maker.²⁴

¹⁷ *Benthall v. Judkins*, 13 Metc. (Mass.) 265.

¹⁸ *Howe v. Taggart*, 133 Mass. 284; *Crossan v. May*, 68 Ind. 242; *Williams' Adm'r v. Williams*, 67 Mo. 661; *Jackson v. Cooper* (Ky.) 39 S. W. 39, as surety. So, a guaranty indorsed after delivery requires a fresh consideration, *Beebe v. Moore*, 3 McLean, 387, Fed. Cas. No. 1,202; *Green v. Thornton*, 49 N. C. 230; *Greer v. Jones*, 52 N. C. 581; *Pfeiffer v. Kingsland*, 25 Mo. 66; *Joslyn v. Collinson*, 26 Ill. 61; *Briggs v. Latham*, 36 Kan. 205, 13 Pac. 129; *Bank of Commerce v. Ross*, 91 Wis. 320, 64 N. W. 993; *Ware v. Adams*, 24 Me. 177; *Armstrong v. Canal Co.*, 14 Utah. 450, 48 Pac. 600.

¹⁹ *Sawyer v. Fernald*, 59 Me. 500; *Mecorney v. Stanley*, 8 Cush. (Mass.) 85; *Union Bank v. Willis*, 8 Metc. (Mass.) 504; *Benthall v. Judkins*, 13 Metc. (Mass.) 265; *Tenney v. Price*, 4 Pick. (Mass.) 385; *Stone v. White*, 8 Gray (Mass.) 589.

²⁰ *Tenney v. Prince*, 7 Pick. (Mass.) 243.

²¹ *Gay v. Mott*, 43 Ga. 252; *Crawford v. Shaw*, 18 Ind. 495.

²² *Pratt v. Hedden*, 121 Mass. 116. The consideration or motive of the promise must be known to the promisor. *Ellis v. Clark*, 110 Mass. 392.

²³ *Green v. Shepherd*, 5 Allen (Mass.) 589; *Clopton v. Hall*, 51 Miss. 482. Although the second maker was partner of the first and the proceeds went to the firm. *Leverone v. Hildreth*, 80 Cal. 100, 22 Pac. 72.

²⁴ *Green v. Shepherd*, *supra*.

So, a contract of suretyship, made after delivery of the paper to the payee, requires a new consideration.²⁵ But a previous agreement of the maker to furnish such surety or indorser, relied on by the payee, is a sufficient consideration.²⁶ Although, as we have seen, this agreement should be known to the person signing or indorsing as surety. So, an agreement made at the execution of a note, that the surety would afterwards sign it, will support the subsequent contract of the surety without fresh consideration.²⁷ And it has been held in a recent case that a promise by the maker of a note that another person should sign it, made to a person taking the note for valuable consideration on the strength of such promise, will support the promise of such third person made two years afterwards, although he had no knowledge of the maker's agreement with the payee for his signature; the question whether such act amounted to an authority for or a ratification of the maker's promise being left as a question of fact to the jury.²⁸

Consideration—By and to Whom Given.

§ 447. Although commercial paper must be supported by a legal consideration, it is not necessary that the consideration should be one moving to the party himself. Thus, a consideration to one of two joint makers may bind both.²⁹ So, a joint note may be sup-

²⁵ *Briggs v. Downing*, 48 Iowa, 550; *Clark v. Small*, 6 Yerg. (Tenn.) 418; *Wipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. 537; *Savage v. Bank*, 112 Ala. 508, 20 South. 398. Where the contract on which the note was given was about to be rescinded for fraud, and was reaffirmed upon the surety's afterwards signing the note, such reaffirmance is sufficient consideration to hold the surety. *Harwood v. Johnson*, 20 Ill. 367.

²⁶ *Moies v. Bird*, 11 Mass. 436; *Pauly v. Murray*, 110 Cal. 13, 42 Pac. 313; *Winders v. Sperry*, 96 Cal. 194, 31 Pac. 6.

²⁷ *McNaught v. McClaughry*, 42 N. Y. 22; *Williams v. Perkins*, 21 Ark. 18. Although the maker knew nothing of the agreement, *Hawkes v. Phillips*, 7 Gray (Mass.) 284.

²⁸ *Harrington v. Brown*, 77 N. Y. 72. But see, contra, *Howard v. Jones*, 10 Mo. App. 81.

²⁹ *Hoxie v. Hodges*, 1 Or. 251; *Briggs v. Bank*, 41 Neb. 17, 59 N. W. 351. A joint note implies a joint consideration. *Kinsman v. Birdsall*, 2 E. D. Smith (N. Y.) 395. But it need not be actually paid to both. *Moyer v. Brand*, 102 Ind. 301, 26 N. E. 125.

ported by debts due the joint payees, jointly and severally.³⁰ So, a consideration to the principal will support the surety's obligation to the payee.³¹ So, the consideration need not come from the party claiming under it. Thus, a consideration from principal to surety will bind the surety to the holder.³² So, a purchaser after acceptance need not show any fresh consideration between him and the acceptor.³³ And the payee may hold the acceptor, notwithstanding a failure of consideration between acceptor and drawer.³⁴ So, the maker may be bound to the payee by a consideration coming from a third party.³⁵

Where a draft is purchased by an agent for his principal, and indorsed simply for the purpose of transfer to the principal, the indorsement is without consideration, and the indorser is not liable as such to his principal.³⁶ And, where a note is transferred in this way, the principal taking it by indorsement from his agent is not a bona fide holder for value, but stands in the same position as his indorser as to prior parties and equities.³⁷ So, where one of two joint vendors of land, acting for himself and as agent for the other, takes a note in payment, and transfers it by indorsement to the other, such indorsee is not a bona fide holder for value, to the exclusion of a defense arising out of the fraud of his partner and agent.³⁸

³⁰ *Hapgood v. Polley*, 35 Vt. 649. And a release of one maker by the payee may be supported by a consideration from one maker to the other. *Hunt v. Dederick*, 105 Ind. 555, 5 N. E. 710.

³¹ *Brewster v. Baker*, 97 Ind. 260.

³² *Tenny v. Porter*, 61 Ark. 329, 33 S. W. 211.

³³ *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 8 Atl. 472; *Heuertematte v. Morris*, 101 N. Y. 63, 4 N. E. 1, reversing 28 Hun, 77.

³⁴ *Flournoy v. Bank*, 79 Ga. 814, 2 S. E. 547; *American Boiler Co. v. Foutham* (Sup.) 50 N. Y. Supp. 351.

³⁵ *Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. 875. So, for an injury to property of a third person in payee's hands as bailee. *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321. And see § 466 et seq., *infra*.

³⁶ *Byers v. Harris*, 9 Heisk. (Tenn.) 652; *National Bank v. Brush*, 6 Fed. 132.

³⁷ *Rickle v. Dow*, 39 Mich. 91.

³⁸ *Kelly v. Pember*, 35 Vt. 183.

Adequacy—When Necessary—Evidence of Good Faith.

§ 448. Although a sufficient and valuable consideration is necessary, as we have seen, to negotiable instruments, it is not necessary that such consideration should be adequate or equal in value to the amount of the promise, and inadequacy alone constitutes no defense to the instrument.³⁹ Thus, a note for \$10,000 to a housekeeper, in consideration of services rendered, may bind the maker, although the amount greatly exceeds the value of the services.⁴⁰ A distinction is to be observed in this regard between considerations in money and considerations of other character, such as services, property sold, agreement to do or abstain from certain actions. In the latter case it is said that the slightest consideration will support a promise to pay the largest amount. In the case of a money consideration, however, the consideration will support a promise only to the extent of the money forming the consideration.⁴¹

The inadequacy of the consideration, in the sense here employed, is not material, unless the good faith of the transaction is impeached.⁴² It is, however, often an important element in determining whether the holder of an instrument is a bona fide holder for value.⁴³ For this purpose the inadequacy of the consideration is admissible as evidence of fraud to be passed upon by the jury.⁴⁴ And gross inadequacy is held to be "very strong, if not conclusive, evidence of mala fides."⁴⁵ It has been held that gross inadequacy of

³⁹ Byles, Bills, 211; Chit. Bills, 92; 1 Edw. Bills & N. § 463; 1 Pars. Notes & B. 211; 1 Daniel, Neg. Inst. 182; Morgan v. Richardson, 7 East, 482; Tye v. Gwynne, 2 Camp. 346; Obbard v. Betham, Moody & M. 483; Tricky v. Larne, 6 Mees. & W. 278; Cowee v. Cornell, 75 N. Y. 91; Miller v. McKenzie, 95 N. Y. 575. Mere inadequacy will not support a plea of want of consideration. Wheelock v. Barney, 27 Ind. 462.

⁴⁰ Earl v. Peck, 64 N. Y. 596.

⁴¹ Welles, J., in Sawyer v. McLouth, 46 Barb. (N. Y.) 353.

⁴² Rooker v. Rooker, 29 Ohio St. 1; Heath v. Smelting Co., 39 Wis. 146; Kitchen v. Loudonback, 48 Ohio St. 177, 26 N. E. 979; Maas v. Chatfield, 90 N. Y. 303; Boggs v. Wann, 58 Fed. 681. Buying paper below its face value is not a taking out of "usual course." Tod v. Wick, 36 Ohio St. 370.

⁴³ Lay v. Wissman, 36 Iowa, 305; Tod v. Wick, 36 Ohio St. 370.

⁴⁴ Green v. Lowry, 38 Ga. 548.

⁴⁵ De Witt v. Perkins, 22 Wis. 474; Murray v. Beckwith, 48 Ill. 391; Proctor

consideration is prima facie notice to the buyer of fraud in the instrument, and under this presumption a purchaser for \$200 of paper to the amount of \$1,700 will not be allowed to prove his claim as a bona fide holder in bankruptcy.⁴⁶

Currency—Confederate Notes—Advances.

§ 449. Where, however, a note was payable in coin worth at its maturity a premium of 15 per cent., the release after maturity of such note was held to constitute a sufficient consideration for a new promise to pay the larger amount in currency.⁴⁷ So, a note for the currency value of a loan in gold has been held to be supported by a sufficient consideration, although for a much larger amount than the nominal value of the gold.⁴⁸ But a note for coin containing a stipulation that, if it is not paid at maturity, judgment shall be rendered for the value of the coin at the time of rendering the judgment, is in the nature of a penalty, and cannot be upheld.⁴⁹ Although it has been held that a note may be made for a larger sum than the amount of the debt, because of its being payable in Confederate currency.⁵⁰

The note may be given for advances to be made by the payee, and such consideration is valid and sufficient, although the advances do not equal the face of the note at the time of its maturity.⁵¹ A maker cannot, however, sell his own note for less than its face, and thereby bar himself from the defense of want of consideration.⁵²

Property Purchased—Bad Title—Quality.

§ 450. Where a note or bill is given in payment for property purchased, the seller's title to the property, as well as the value or worthlessness of the property itself, sometimes comes into question

v. Cole, 104 Ind. 373, 3 N. E. 106, and 4 N. E. 303; *Fuller v. Goodnow*, 62 Minn. 163, 64 N. W. 161; *Jordan v. Grover*, 99 Cal. 194, 33 Pac. 889.

⁴⁶ *In re Gomersall*, 1 Ch. Div. 137, affirmed *Jones v. Gordon*, 2 App. Cas. 616.

⁴⁷ *Smith v. McKinney*, 22 Ohio St. 200.

⁴⁸ *Cox v. Smith*, 1 Nev. 161, in the absence of usury laws.

⁴⁹ *Hastings v. Johnson*, 2 Nev. 190.

⁵⁰ *Williams v. Boozeman*, 18 La. Ann. 532.

⁵¹ *Lanata v. Bayhi*, 31 La. Ann. 229.

⁵² *Musselman v. McElhenny*, 23 Ind. 4.

as affecting the sufficiency of the consideration and the validity of the promise, although it more frequently comes up as a failure of consideration.⁵³ Thus, if a note is given for the purchase of lands, the title to which is not in the payee, but in the United States government, the note is without consideration.⁵⁴ This is true of such a note, although the land in question may have been conveyed to the maker of the note with covenants of warranty, although it is said that the damages for breach of the covenant, if it was part of the consideration for the note, may be available to reduce the amount of recovery on the note.⁵⁵ It is said, however, by Professor Parsons, that sale and possession of land, to which the payee has no title, will, in the absence of fraud, constitute a sufficient consideration for a note to him for the purchase money, and this view is supported by some authority.⁵⁶ But it has been held in Massachusetts that a note given to a married woman in consideration of a deed of land by her, which was void on account of her coverture, is without consideration, even though the purchaser had possession of the land, and had, while in possession, cut wood upon it equal in value to the purchase money for which the note was given.⁵⁷

If a note is given for the purchase of goods which are absolutely

⁵³ See § 547 et seq., *infra*.

⁵⁴ *Scudder v. Andrews*, 2 McLean, 464, Fed. Cas. No. 12,564. So, where the title totally failed by reason of a subsequent sale under an earlier judgment, no recovery was allowed on the note given for the purchase money. *Frisbee v. Hoffnagle*, 11 Johns. (N. Y.) 50. So, in case of failure by reason of the coverture of the grantor rendering the deed void. *Fowler v. Shearer*, 7 Mass. 22. In this case the deed contained covenants, but the grantor was not liable on them. So, too, *Knapp v. Lee*, 3 Pick. (Mass.) 452, the deed containing a covenant of warranty, but the vendor having died insolvent, and the purchaser having suffered an eviction. And see *Reed v. Litsey* (Ky.) 33 S. W. 827, where the grantee claimed that the land for which the notes were given was a gift, but was barred of the defense by his previous conduct.

⁵⁵ *Cook v. Mix*, 11 Conn. 432. See § 546, *infra*.

⁵⁶ 1 Pars. Notes & B. 210; *Perkins v. Bumford*, 3 N. H. 522. Especially if the purchaser be in possession without an eviction, *Hoy v. Taliaferro*, 8 Smedes & M. (Miss.) 727; or if there be a covenant of warranty and no fraud, *Young v. Triplett*, 5 Litt. (Ky.) 247; *Lloyd v. Jewell*, 1 Me. 360; or if there be a covenant of warranty and no eviction, *Vining v. Leeman*, 45 Ill. 248, overruling *Slack v. McLagan*, 15 Ill. 242.

⁵⁷ *Fowler v. Shearer*, 7 Mass. 22; *Warner v. Crouch*, 14 Allen (Mass.) 163.

without value, it is without consideration.⁵⁸ The contrary was held, however, in the case of a note given for decayed mulberry trees sold to the maker, which were of no market value by reason of the decay. But in this case the property purchased was still admitted to have some value.⁵⁹ So, a note given for the purchase of a lottery ticket, which was rumored to have drawn a prize, but had actually drawn a blank (the drawing being not yet published, and the lottery being authorized by law), was held to be upon sufficient consideration.⁶⁰ But a check given in a frolic for a watch worth but a twentieth part of the face of the check is without consideration.⁶¹ On the other hand, a note given for a policy of insurance in an insolvent company, not then known to be insolvent, is valid.⁶²

Void Patent—Notes Exchanged—Fraudulent Invoice.

§ 451. If a note is given for the purchase of a patent right which is void, it will not be binding upon the maker for want of consideration.⁶³ So, also, a note for a license to sell a patented article

⁵⁸ *Sill v. Rood*, 15 Johns. (N. Y.) 230; *Arnold v. Wilt*, 86 Ind. 367; or worthless mining stock, *Snyder v. Hargus*, 26 Kan. 416. And it need not be shown that the goods were returned, *Shepherd v. Temple*, 3 N. H. 455; although, if it have any value, there should be at least an offer to return it, *Perley v. Balch*, 23 Pick. (Mass.) 283. But in *Reed v. Prentiss*, 1 N. H. 174, recovery was had on such a note, in the absence of warranty and of fraud. And see § 541, *infra*.

⁵⁹ *Johnson v. Titus*, 2 Hill (N. Y.) 606. In this case Cowen, J., quotes with approval from *Perley v. Balch*, 23 Pick. (Mass.) 286: "If a chattel mortgage be of no value to any one, it cannot be the basis of a bargain; but, if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it be a loss to the seller, he is entitled to remuneration for his loss." To this Cowen, J., adds: "There is something which the vendor may be said to part with, of some value to him, however worthless to the defendant." See, too, *Welsh v. Carter*, 1 Wend. (N. Y.) 185; *Wright v. Hart*, 18 Wend. (N. Y.) 454.

⁶⁰ *Barnum v. Barnum*, 8 Conn. 469. In the words of Daggett, J., in this case: "This ticket was, at the time of the sale, worth its original price, and probably would have then sold for that sum. There was a benefit to the promisor, and that is always a good consideration."

⁶¹ *Keller v. Holderman*, 11 Mich. 248, an offer being made at the trial to return the watch.

⁶² *Lester v. Webb*, 5 Allen (Mass.) 539.

⁶³ *Van Ostrand v. Reed*, 1 Wend. (N. Y.) 225; *Jolliffe v. Collins*, 21 Mo.

manufactured under a void patent.⁶⁴ But in Vermont the fact that a patent is both useless and void is held to be merely a partial failure of consideration, and, as such, no defense to a note given for that consideration.⁶⁵ If, however, a note be given for an interest in a valid patent, it will be good notwithstanding any inadequacy in the value of the patent;⁶⁶ and even, it has been held, although the patent have no value.⁶⁷ Many authorities hold, however, that a note given for the purchase of a useless patent is without consideration,⁶⁸ even though the patent was thought to be good at the time of the sale.⁶⁹ And in such case the maker may avail himself of the want of consideration without offering to rescind the sale.⁷⁰ The renewal of a note given for a worthless patent has no better consideration to support it than the original note.⁷¹ In all such

338; *Dunbar v. Marden*, 13 N. H. 317; *First Nat. Bank v. Peck*, 8 Kan. 661; *Snyder v. Kurtz*, 61 Iowa, 593, 16 N. W. 722. And see § 548, *infra*. So, *Dickinson v. Hall*, 14 Pick. (Mass.) 217, notwithstanding a covenant of title (Shaw, C. J., saying that the consideration was "not a mere covenant, but the conveyance of a patent right"), and notwithstanding the vendor's belief in the validity of the patent. So, too, although the sale of the patent included a covenant warranting "all the right and privilege conveyed," *Bliss v. Negus*, 8 Mass. 46; and although certain materials, etc., were included in the sale, useful only for work under the patent, *Id.* And it has been held in Indiana that an assignment of patent and a note given therefor are both void, if the assignment be not recorded, as required by the act of congress. *Higgins v. Strong*, 4 Blackf. 182; *McFarl v. Wilson*, 6 Blackf. 260; *Mullikin v. Latchem*, 7 Blackf. 136; *Louden v. Birt*, 4 Ind. 566. But see, *contra*, *McKernan v. Hite*, 6 Ind. 428.

⁶⁴ *Wilson v. Hentges*, 26 Minn. 288, 3 N. W. 338.

⁶⁵ *Williams v. Hicks*, 2 Vt. 36. And it has been held that money paid for a void patent, both parties being innocent of all fraud, cannot be recovered by the purchaser. *Taylor v. Hare*, 1 Bos. & P. (N. R.) 260. In this case, however, the purchaser had paid for the patent, and had the use of it for seven years.

⁶⁶ *Nash v. Lull*, 102 Mass. 60.

⁶⁷ *Myers v. Turner*, 17 Ill. 179.

⁶⁸ *Mooklar v. Lewis*, 40 Ind. 1; *Rowe v. Blanchard*, 18 Wis. 441; *Bierce v. Stocking*, 11 Gray (Mass.) 174; *Clough v. Patrick*, 37 Vt. 423.

⁶⁹ *Lester v. Palmer*, 4 Allen (Mass.) 145.

⁷⁰ *Moore v. Moore*, 39 Iowa, 461.

⁷¹ *Geiger v. Cook*, 3 Watts & S. (Pa.) 266.

cases the question of worthlessness and consequent failure or want of consideration is one of fact for the jury to determine.⁷²

Where a note is given for the purchase of other notes, the consideration is a sufficient one, whether the notes purchased are afterwards paid or not.⁷³ So, if a bill be accepted for honor in consideration of an assignment to the acceptor of a bill of lading, which proved to be fraudulent and of little value, this is still a legal, though it may be an inadequate, consideration; and the acceptor cannot avail himself of the defense at suit of a bona fide holder for value.⁷⁴

Adequacy—How It Affects Indorsement.

§ 452. The rule as to adequacy of consideration, applied already to bills and notes, extends also to the contract of indorsement.⁷⁵ And inadequacy of consideration is no ground for avoiding the transfer of a note or bill otherwise valid.⁷⁶ So, too, a broker may transfer commercial paper for less than its face, and the indorsee, taking it without knowledge of the character of the indorser as an agent for the maker, will not be affected by the statute against usury.⁷⁷

The amount paid for a transfer by indorsement is not, in the absence of other defense, the measure of recovery on a note,⁷⁸ although between the immediate parties to an indorsement only the amount paid to the indorser can be recovered against him.⁷⁹ It may now be regarded as an established rule of commercial law that a purchaser of commercial paper at a discount from its nominal value, having no knowledge of existing defenses, is not a bona fide holder for value beyond the amount actually paid by him, but is only pro-

⁷² *Benton v. Klien*, 42 Mo. 97.

⁷³ *Padfield v. Padfield*, 68 Ill. 210. See § 479, *infra*.

⁷⁴ *Kelly v. Lynch*, 22 Cal. 661.

⁷⁵ *Roark v. Turner*, 29 Ga. 455.

⁷⁶ *Brown v. Penfield*, 36 N. Y. 473; *City Bank of New Haven v. Perkins*, 29 N. Y. 554. And the holder of a promissory note may bring suit on it in his own name, for the use of the real party in interest, even without his knowledge or consent. *Gage v. Kendall*, 15 Wend. (N. Y.) 640.

⁷⁷ *Taylor v. Bruce, Gilmer* (Va.) 42.

⁷⁸ *Lee v. Pile*, 37 Ind. 107.

⁷⁹ *Ingalls v. Lee*, 9 Barb. (N. Y.) 647; *Braman v. Hess*, 13 Johns. (N. Y.) 52; *Fant v. Miller*, 17 Grat. (Va.) 77. But see, *contra*, *National Bank of Michigan v. Green*, 33 Iowa, 140.

tected against such defenses to the extent of the consideration paid by him.⁸⁰ And where the purchaser of a bill or note has only paid part of the amount before receiving notice of fraud affecting it in the hands of the seller, and afterwards pays the balance, he will only be protected against the defense of fraud as a bona fide holder for value to the extent of the amount paid by him before receiving notice of the fraud.⁸¹ So, where negotiable paper is given as collateral for a loan, the taker is only a holder for value to the amount loaned;⁸² or to the amount secured, if it be given as collateral for an indorsement to be made;⁸³ or, if for moneys to be advanced, only to the extent of the advances made.⁸⁴

It has been held, on the contrary, however, that a purchaser of commercial paper at a discount, with no notice of fraud in it, may recover the face of the paper.⁸⁵ So, too, of one who takes such

⁸⁰ 1 Pars. Notes & B. 191; *Edwards v. Jones*, 7 Car. & P. 633, 2 Mees. & W. 413; *Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbert*, 2 Starkie, 304; *Simpson v. Clark*, 2 Crompt. M. & R. 342; *Holcomb v. Wyckoff*, 35 N. J. Law, 35; *Allaire v. Hartshorne*, 21 N. J. Law, 665; *Duncan v. Gilbert*, 29 N. J. Law, 527; *Dresser v. Construction Co.*, 93 U. S. 92; *Colliger v. Francis*, 2 Baxt. (Tenn.) 422; *Petty v. Hannum*, 2 Humph. (Tenn.) 102; *Holeman v. Hobson*, 8 Humph. (Tenn.) 127; *Bethune v. McCrary*, 8 Ga. 114. See, too, *Brown v. Mott*, 7 Johns. (N. Y.) 361; *Baily v. Smith*, 14 Ohio St. 402. So, too, *Sweet v. Chapman*, 7 Hun (N. Y.) 576, *Noxon, J.*, saying that a note delivered in violation of a condition on which it was to take effect "cannot be rendered valid by a sale to a bona fide purchaser at a rate of interest exceeding seven per cent." To the same effect, see *De Witt v. Perkins*, 22 Wis. 473, where the amount paid by the indorsee was merely nominal, and there was no recovery, the note being originally without consideration. See, too, *Clark v. Sisson*, 22 N. Y. 312; *Bossange v. Ross*, 29 Barb. (N. Y.) 576. But see, contra, *Sully v. Goldsmith*, 32 Iowa, 397.

⁸¹ *Dresser v. Construction Co.*, 93 U. S. 92; *Crandall v. Vickery*, 45 Barb. (N. Y.) 156; *Weaver v. Barden*, 49 N. Y. 291.

⁸² *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Chicopee Bank v. Chapin*, 8 Mete. (Mass.) 40; *Exchange Bank v. Butner*, 60 Ga. 654; Ga. Code, § 3696; *Grant v. Kidwell*, 30 Mo. 455.

⁸³ *Williams v. Smith*, 2 Hill (N. Y.) 301.

⁸⁴ *Hubbard v. Chapin*, 2 Allen (Mass.) 328. In like manner, an accommodation maker is in such case liable to the extent only of the money advanced by the plaintiff. *Gordon v. Boppe*, 55 N. Y. 665.

⁸⁵ *Lay v. Wissman*, 36 Iowa, 305. And, as such bona fide holder, he takes the note independent of a defense of payment made to his assignor, *Schoen v. Houghton*, 50 Cal. 528.

paper in good faith as collateral for a smaller sum due.⁸⁶ And where a bank has discounted a note at a usurious rate of interest, and the indorser afterward takes it up at its maturity, he is a bona fide holder for value, notwithstanding the taint of usury in the title of the bank.⁸⁷ And, in like manner, an indorser for the maker's accommodation, who purchases a note at its maturity for one-half of the amount of its face from a bona fide holder for value, can recover the whole amount against the maker, in the absence of other defense to the note.⁸⁸

Consideration—Love and Affection.

§ 453. A maker cannot make a gift of his own note or bill without other consideration than mere love or friendship, and such a gift, *inter vivos*, furnishes no consideration for the paper. It is therefore not enforceable against the maker.⁸⁹ Neither is natural affection a sufficient consideration for commercial paper.⁹⁰ Thus, a note given to the maker's mother for her support is without consideration, and not binding upon the maker.⁹¹ So, a father's affec-

⁸⁶ *Smith v. Hiscock*, 14 Me. 449.

⁸⁷ *National Bank of Gloversville v. Wells*, 15 Hun (N. Y.) 51.

⁸⁸ *Fowler v. Strickland*, 107 Mass. 552.

⁸⁹ *Byles, Bills*, 126; *Chit. Bills*, §9; *Milnes v. Dawson*, 5 Exch. 948; *Hill v. Wilson*, 8 Ch. App. 894. But see *Holliday v. Atkinson*, 5 Barn. & C. 501, 8 Dowl. & R. 163; *Woodbridge v. Spooner*, 3 Barn. & Ald. 235; *Tate v. Hilbert*, 2 Ves. Jr. 111; *Tracy v. Alvord* (Cal.) 50 Pac. 757; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 608; *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608. This rule applies also to an indorsement for the purpose of a gift. *Easton v. Pratchett*, 1 Crompt., M. & R. 798, 3 Dowl. 472, 2 Crompt., M. & R. 542. But the presumption of a valuable consideration is not destroyed by the words "for value received and for love and affection." *Cotton v. Graham*, 84 Ky. 672, 2 S. W. 647.

⁹⁰ A mere gift is not a sufficient consideration. *Byles, Bills*, 127; *Chit. Bills*, §86; *Holliday v. Atkinson*, 5 Barn. & C. 501; *Arnold v. Franklin*, 3 Ill. App. 141; *Johnson v. Griest*, 85 Ind. 503; *Mullen v. Rutland*, 55 Vt. 77; *Rice's Adm'r v. Rice*, 68 Ala. 216; *Selby v. Case* (Md.) 39 Atl. 1041. Although intended to rectify an inequality in the maker's will. *West v. Cavins*, 74 Ind. 265. Nor although relied on as assets by the donee; e. g. a note to aid a church "in its publishing interest." *Foust v. Board*, 8 Lea (Tenn.) 552. For notes given for services, see § 482, *infra*.

⁹¹ *Kirkpatrick v. Taylor*, 43 Ill. 207. So, even a joint note (not paid by either maker) for such purpose. *Cotton v. Graham*, 84 Ky. 672, 2 S. W. 647.

tion for his son is no sufficient consideration for a note to him.⁹² And even the necessities which have been furnished to an indigent father form no consideration for a note by the son.⁹³ So, acts of kindness and hospitality which have been rendered gratuitously form no consideration for a subsequent note.⁹⁴ So, if a guaranty be transferred for a consideration of love and affection merely, the assignee would not be a holder for value under a statute authorizing such assignee to bring suit in his own name.⁹⁵ And a note which is itself only a gift can form no sufficient consideration for any part of a larger note substituted for it.⁹⁶

It has been held, however, in England, that the surrender of a note originally given to the child of a friend as a gift constitutes a sufficient consideration for a renewal of the note, so far at least as to be binding on the maker's estate prior to legacies contained in his will.⁹⁷ On the other hand, where a note is given by a child or heir as mere evidence or memorandum of advancements made to him, it cannot be enforced against the maker, and, if a note in anything more than form, is without consideration.⁹⁸

Donatio Causa Mortis.

§ 454. Gifts of a note or bill to take effect at the giver's death are not infrequent, and such gift may sometimes be supported as a donatio causa mortis.⁹⁹ Such gift may be made by the payee of a

⁹² *Fink v. Cox*, 18 Johns. (N. Y.) 145.

⁹³ *Edwards v. Davis*, 16 Johns. (N. Y.) 282; *In re James*, 146 N. Y. 78, 40 N. E. 876; *In re Kern's Estate*, 171 Pa. St. 55, 33 Atl. 129.

⁹⁴ *Hamor v. Moore's Adm'rs*, 8 Ohio St. 239.

⁹⁵ *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547.

⁹⁶ *Copp v. Sawyer*, 6 N. H. 386. But a money gift may be borrowed back from the donee by the donor and be good consideration for his note. *Rice v. Rice*, 106 Ala. 636, 17 South. 628.

⁹⁷ *Dawson v. Kearton*, 3 Smale & G. 186.

⁹⁸ *Hardin v. Wright*, 32 Mo. 452; *Harris v. Harris*, 69 Ind. 181; *Peabody, Guardian, v. Peabody*, 59 Ind. 556. So, for property previously given to the son by way of advancement. *Marsh v. Chown* (Iowa) 73 N. W. 1046.

⁹⁹ Although left in trust for delivery at the drawer's death, if it has a valuable consideration, it is not a gift causa mortis. *Whitehouse v. Whitehouse* (Me.) 38 Atl. 374.

bill or note,¹⁰⁰ or bond,¹⁰¹ or certificate of deposit;¹⁰² and the donee may sue on it, if necessary, in the name of the donor's executor.¹⁰³

But, in general, a donation causa mortis cannot be made by the maker or drawer of his own note,¹⁰⁴ or check,¹⁰⁵ or draft,¹⁰⁶ or sealed bill.¹⁰⁷ The donor's check given causa mortis will be revoked by his death before its acceptance or payment.¹⁰⁸

Consideration—Subscriptions.

§ 455. An apparent exception to the rule that a note or bill cannot be the subject of a gift inter vivos by the maker is often made in favor

¹⁰⁰ Wells v. Tucker, 3 Bin. (Pa.) 366; Bates v. Kempton, 7 Gray (Mass.) 382; Jones v. Deyer, 16 Ala. 226; Stephenson's Adm'r v. King, 81 Ky. 425; Kiff v. Weaver, 94 N. C. 274. But see, contra, as to a stock certificate, transferable only on the company's books, Pennington v. Gittings, 2 Gill & J. (Md.) 208.

¹⁰¹ Coutant v. Schuyler, 1 Paige (N. Y.) 316, disapproving the English distinction as to bonds in Miller v. Miller, 3 P. Wms. 358; Snellgrove v. Bailly, 3 Atk. 214; Gardner v. Parker, 3 Madd. 184.

¹⁰² Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415; Conner v. Root, 11 Colo. 183, 17 Pac. 773.

¹⁰³ Grover v. Grover, 24 Pick. (Mass.) 261; Sessions v. Moseley, 4 Cush. (Mass.) 87; Brown v. Brown, 18 Conn. 410.

¹⁰⁴ Whitaker v. Whitaker, 52 N. Y. 368; Sheldon v. Button, 5 Hun (N. Y.) 110; Irish v. Nutting, 47 Barb. (N. Y.) 370; Flint v. Pattee, 33 N. H. 520; Holley v. Adams, 16 Vt. 206; Raymond v. Sellick, 10 Conn. 480; Warren v. Durfee, 126 Mass. 338; Loring v. Sumner, 23 Pick. (Mass.) 98; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Phelps v. Phelps, 28 Barb. (N. Y.) 121; Dodge v. Pond, 23 N. Y. 69; Carr v. Silloway, 111 Mass. 24; Parish v. Stone, 14 Pick. (Mass.) 198; Tracy v. Alvord, 118 Cal. 654, 50 Pac. 757; Shaw v. Camp, 160 Ill. 425, 43 N. E. 608. Although nominally "for services" not performed. Smith v. Kittridge, 21 Vt. 238; Williams v. Forbes, 114 Ill. 167, 28 N. E. 463. But see, contra, Bowers v. Hurd, 10 Mass. 427; Wright v. Wright, 1 Cow. (N. Y.) 598.

¹⁰⁵ Second Nat. Bank v. Williams, 13 Mich. 282; In re Smither, 30 Hun (N. Y.) 632; In re Kern's Estate, 171 Pa. St. 55, 33 Atl. 129. But see Clement v. Cheesman, 27 Ch. Div. 631, and Veal v. Veal, 27 Beav. 303, as to check payable to the donor's order and not indorsed.

¹⁰⁶ Harris v. Clark, 3 N. Y. 93.

¹⁰⁷ In re Luebbe's Estate, 179 Pa. St. 447, 36 Atl. 322.

¹⁰⁸ Hewitt v. Kaye, L. R. 6 Eq. 198; In re Kern's Estate, 171 Pa. St. 55, 33 Atl. 129; Simmons v. Society, 31 Ohio St. 457; Cloyes v. Cloyes, 36 Hun (N. Y.) 145. Although the contrary has been held, as equivalent to a gift of cash, in Burke v. Bishop, 27 La. Ann. 465.

of notes by way of subscription for the endowment or other aid of public charities. Thus, a note for a gift to the trustees of an orphan school, having authority to receive funds and apply them to the charitable uses contemplated, has been held to be valid and binding on the maker.¹⁰⁹ So, the accomplishment of the objects of an educational institution has been held a sufficient consideration for a note given to it.¹¹⁰ So, the fact that the purposes for which a subscription to a charitable fund was made are being executed forms a sufficient consideration for a subscriber's note.¹¹¹ So, any responsibility incurred on the strength of the subscription for which the note is given will support the note.¹¹² And the contract of other subscribers is itself a sufficient consideration for the note of a subscriber.¹¹³

But it has been held in a recent case that a note given by way of gift or offer of gift merely, for the purchase of a church bell, is without consideration, and cannot be enforced, notwithstanding the purchase of the bell, in the absence of all evidence of liability having been incurred on account of the note.¹¹⁴ So, a note given to the deacons of a church for its benefit, and for the support of its

¹⁰⁹ Trustees of Kentucky Female Orphan School v. Fleming, 10 Bush (Ky.) 234; Collier v. Society, 8 B. Mon. (Ky.) 68.

¹¹⁰ Roche v. Roanoke Seminary, 56 Ind. 198. So, Wesleyan Seminary v. Fisher, 4 Mich. 515, where "stock" was issued to the maker of the note. But a note for an endowment fund without other gifts, or expense incurred, is not enforceable, Simpson Centenary College v. Tuttle, 71 Iowa, 596, 33 N. W. 74; In re Bartlett, 163 Mass. 509, 40 N. E. 899.

¹¹¹ Trustees of Amherst Academy v. Cowles, 6 Pick. (Mass.) 427.

¹¹² Simpson Centenary College v. Bryan, 50 Iowa, 293; School Dist. of Kansas City v. Sheidley, 138 Mo. 672, 40 S. W. 656.

¹¹³ Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500; affirming 31 Hun, 159; George v. Harris, 4 N. H. 533; Cook v. McNaughton, 128 Ind. 410, 24 N. E. 361; Irwin v. Lombard University (Ohio Sup.) 46 N. E. 63; Lafayette Co. Monument Corp. v. Magoon, 73 Wis. 627, 42 N. W. 17; Trustees of Seventh Day Baptist Memorial Fund v. Saunders, 84 Wis. 570, 54 N. W. 1094. But see, contra, as to a joint note for a private subscription which is not performed by either maker, Cotton v. Graham, 84 Ky. 672, 2 S. W. 647. So in Re Smith's Estate (Vt.) 38 Atl. 66, of a single subscription, unsupported by other subscriptions or expense incurred. So, where the location at a particular place is a condition of which the performance serves as consideration, Rogers v. College, 64 Ark. 627, 44 S. W. 454.

¹¹⁴ Pratt v. Society, 93 Ill. 475.

pastor, is without consideration, the deacons having no authority to receive notes or money for such purposes.¹¹⁵ Where a subscriber, however, receives back the amount of his subscription as a loan, his acknowledgment of the loan, together with a promise to pay interest on it, evidenced by his note, amounts to an admission, which estops him from denying the consideration.¹¹⁶ In like manner, where money collected by a relief committee from voluntary subscribers is loaned to a sufferer by fire, for whose benefit the relief was partly intended, and he gives his note for it, he cannot afterwards deny a sufficient consideration.¹¹⁷

Subscriptions for stock in an incorporated company are also a sufficient consideration for notes given by the subscriber, and the maker of such notes cannot afterwards question the organization of the company.¹¹⁸ So, the renewal of a note given for a stock subscription to a banking corporation is founded upon sufficient consideration, although United States securities were required by the statute for banking investments.¹¹⁹ So, a subscription to a partnership for the maker's share of the partnership capital is a sufficient consideration for his note.¹²⁰

¹¹⁵ *Boutell v. Cowdin*, 9 Mass. 254.

¹¹⁶ *Fisher v. Ellis*, 3 Pick. (Mass.) 322.

¹¹⁷ *Town of Bayou Sara v. Harper*, 15 La. Ann. 233.

¹¹⁸ *Chetlain v. Insurance Co.*, 86 Ill. 220; *Goodrich v. Reynolds*, 31 Ill. 490; *Des Moines Valley R. Co. v. Graff*, 27 Iowa, 99, the completion of the railroad for which it was given being the consideration. But a subscription for stock illegally issued is not a valid consideration. *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638. So, for stock issued in violation of a statute prohibiting other than cash subscriptions. *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 South. 522; *Boyer v. Fenn*, 19 Misc. Rep. 128, 43 N. Y. Supp. 533.

¹¹⁹ *Little v. O'Brien*, 9 Mass. 423.

¹²⁰ *Kimmins v. Wilson*, 8 W. Va. 584. Or notes of stockholders given to raise money for the use of their company. *Reed v. Bank*, 23 Colo. 380, 48 Pac. 507.

II. MONEY CONSIDERATIONS.

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Consideration—Money Loaned.

§ 456. The most usual consideration for commercial paper, and that for which it is generally employed, is money due either for a debt already incurred,¹²¹ or for a loan made at the time of giving

¹²¹ A debt already existing is a sufficient consideration for the transfer of a note. *Bostwick v. Dodge*, 1 Doug. (Mich.) 413. And a transfer on such consideration will defeat a subsequent attachment against the assignor. *Davis v. Carson*, 69 Mo. 609; *Mayberry v. Morris*, 62 Ala. 113. Such consideration is likewise sufficient for a new note by a surety. *Harrell v. Tenant*, 30 Ark. 684. And money belonging to an estate used by the executor is sufficient consideration for his note. *Faulkner v. Faulkner*, 73 Mo. 327. So, money belonging to a principal, and received and invested by his agent in his own name, *Estis v. Simpson*, 13 Nev. 472; or advances by a commission merchant on purchases for his principal, *Powell v. McCord*, 121 Ill. 330, 12 N. E. 262; or advances by a father for legal expenses incurred by the maker, *Glanton v. Whitaker*, 75 Ga. 523.

the paper.¹²² And such paper given as collateral for a debt contemporaneously incurred is prima facie for a valuable consideration,¹²³ and constitutes the holder a holder for value.¹²⁴ It is a sufficient consideration for the transfer of such paper.¹²⁵ And delivery after the making of the contract, to which it is collateral, is sufficient without fresh consideration, if it was previously stipulated for when the contract was made.¹²⁶ But if a note is given and credited on an account which is less than the note, there is no consideration for the excess over and above the account.¹²⁷ So, where a note is given for money paid to the maker, but is made too large by reason of a false representation as to the amount paid, it is still good for the amount actually paid.¹²⁸ But, if a note is given by the maker to his creditor to be discounted, it cannot be delivered by the creditor to the payee,

¹²² *Barton v. Bank*, 122 Ill. 354, 13 N. E. 503. But a pretended loan by the president of a corporation which is in reality an advance made to relieve a third party from his subscription to the company's stock, is no consideration for a note by the company. *Hodson v. Glass Co.*, 156 Ill. 397, 40 N. E. 971.

¹²³ *Griswold v. Davis*, 31 Vt. 390; *Miller v. Pollock*, 99 Pa. St. 202; *Bank v. Stockell*, 92 Tenn. 252, 21 S. W. 523.

¹²⁴ *Allaire v. Hartshorne*, 21 N. J. Law, 665; *Griswold v. Davis*, 31 Vt. 390; *Curtis v. Mohr*, 18 Wis. 645; *State Savings Ass'n of St. Louis v. Hunt*, 17 Kan. 532; *Black v. Reno*, 59 Fed. 917; *Brown v. Callaway*, 41 Ark. 418; *Helmer v. Bank*, 28 Neb. 474, 44 N. W. 482; *State Nat. Bank v. Cason*, 39 La. Ann. 865; *Greenway v. Grain Co.*, 29 C. C. A. 330, 85 Fed. 536; *Thompson v. Maddux (Ala.)* 23 South. 157; *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483, 28 N. E. 955; *Thompson v. Bank*, 113 N. Y. 325, 21 N. E. 57; *Holton v. Hubbard*, 49 La. Ann. 715, 22 South. 338; *Forstall v. Fussell*, 50 La. Ann. 272, 23 South. 273. The debt secured is the measure of the damages recoverable. *Brown v. Callaway*, *supra*; *Forstall v. Fussell*, *supra*; *Anderson v. Bank*, 98 Mich. 543, 57 N. W. 808.

¹²⁵ *Rowe v. Haines*, 15 Ind. 445.

¹²⁶ *Fenby v. Pritchard*, 2 Sandf. (N. Y.) 151.

¹²⁷ *Robson v. McKoin*, 18 La. Ann. 544.

¹²⁸ *Griffiths v. Parry*, 16 Wis. 231. So, where a note is given for goods fraudulently overcharged, it is valid for the correct value of the goods, *Haycock v. Rand*, 5 Cush. (Mass.) 26; and the excess may be set up as a partial failure of consideration, *Hammatt v. Emerson*, 27 Me. 308; *Coburn v. Ware*, 30 Me. 202. But in *Brown v. North*, 21 Mo. 528, the entire note was rendered void by the fraud, which embraced far the largest part of the consideration.

on his refusal to discount it, to collect and put to the maker's credit; and, if so delivered, it will be without consideration as to the maker.¹²⁹

Credit on Account—Fluctuating Balance.

§ 457. A credit on an unsettled account is sufficient in like manner for the transfer of a note.¹³⁰ And if so credited, with the understanding that it is to be afterwards discounted and drawn against in the meantime, it constitutes a pledge so far as drawn against, and is held for valuable consideration to that extent, to the exclusion of all equities.¹³¹ But where a stolen note has been deposited with a bank, and credited to the depositor, but not drawn against, it is not sufficient to constitute the bank a holder for value.¹³² Nor is a bank a holder for value of a note sent to it for collection, under an agreement that it shall remain the property of the sender, although the bank holds an overdrawn account against the sender.¹³³ But money deposited for the use of A., to be paid him in installments for work to be done, is sufficient consideration for a note by him.¹³⁴ So, an acceptance will be supported by funds to be afterward received by him, and chargeable in his hands.¹³⁵

Moreover, a note or bill may be given as collateral for a fluctuating balance of account, and this will be a sufficient consideration for it,¹³⁶ and will constitute the taker a holder for value to the amount

¹²⁹ *Winkelman v. Choteau*, 78 Ill. 107.

¹³⁰ *Davenport v. Elliott*, 10 Kan. 592.

¹³¹ *Platt v. Beebe*, 57 N. Y. 339. See, too, *Bank of State of New York v. Vanderhorst*, 32 N. Y. 553. But, where notes are discounted and credited by a bank, the bank is not a holder for value until it pays out the proceeds. *Fox v. Bank*, 30 Kan. 441, 1 Pac. 789; *Dreilling v. Bank*, 43 Kan. 197, 23 Pac. 94.

¹³² *Fulton Bank v. Phoenix Bank*, 1 Hall (N. Y.) 619.

¹³³ *McBride v. Bank*, 26 N. Y. 450.

¹³⁴ *Melvin v. Fellows*, 33 N. H. 401.

¹³⁵ *Herter v. Goss*, 57 N. J. Law, 42, 30 Atl. 252.

¹³⁶ *Byles, Bills*, 128; *Pease v. Hirst*, 10 Barn. & C. 122, 5 Man. & R. 88; *Richards v. Macey*, 14 Mees. & W. 484; *Collenridge v. Farquharson*, 1 Starke, 259. And the holder in such case is a holder for value up to the amount that may be due at any time on such balances. *Bank of Metropolis v. New England Bank*, 1 How. 234, 17 Pet. 174. But such note is without

of his actual account, whenever there is a balance in his favor.¹³⁷ Such paper is, however, *prima facie* only collateral for the balance due at the time it is given, and the burden is on the payee to show an agreement covering fluctuating balances.¹³⁸ Even an accommodation acceptor is liable to the holder of a bill on an acceptance taken for a balance of account, although at the time of its maturity there was no balance due to the holder, but the bill was not withdrawn and a balance subsequently became due, which the drawer, becoming a bankrupt, was unable to meet. In this case the holder of the acceptance is still a holder for value.¹³⁹

Estimated Liability—Mistake.

§ 458. Moreover, a note may be given by a principal to a surety in consideration of the surety's promise to pay the debt for which he has become liable.¹⁴⁰ So, a note may be given by the surety of a deceased guardian to the newly-appointed guardian, in anticipation of settlement; and balance due on account when settled will be a sufficient consideration *pro tanto* for the note.¹⁴¹ So, an arbitrator's award will support a note given to the arbitrator contingent on the award.¹⁴² So, a note given by a married woman for property purchased by her while under statutory disability by reason of coverture will support a renewal given by her after the removal of the disability.¹⁴³

But where a note is given for the purchase money upon a contract and interest, and the contract provides for no interest, there is no consideration so far as the interest is concerned.¹⁴⁴ So, where an

consideration where the account has been already transferred, and is afterwards paid to another. *Johnson v. Mitchell*, 14 Colo. 227, 23 Pac. 452.

¹³⁷ Byles, Bills, 128; *Bosanquet v. Dudman*, 1 Starkie, 1. And see *Bolland v. Bygrave*, Ryan & M. 271.

¹³⁸ *In re Boys*, L. R. 10 Eq. 467.

¹³⁹ Byles, Bills, 128; *Atwood v. Crowdie*, 1 Starkie, 483; *Woodroffe v. Hayne*, 1 Car. & P. 600.

¹⁴⁰ *Little v. Little*, 13 Pick. (Mass.) 426. But in such case the payee can only recover the amount actually paid by him before judgment. *Id.*

¹⁴¹ *Blankenship's Adm'r v. Nimmo's Adm'r*, 50 Ala. 506.

¹⁴² *Woodrow v. O'Conner*, 28 Vt. 776.

¹⁴³ *Barton v. Beer*, 35 Barb. (N. Y.) 78; *Hubbard v. Bugbee*, 55 Vt. 506.

¹⁴⁴ *Jennison v. Stone*, 33 Mich. 99.

execution has been settled by a third person's note, and satisfied of record by the sheriff, and the defendant has afterwards repaid the maker of the note, a new note given by the defendant's executor to the sheriff, to prevent him from setting aside the satisfaction for nonpayment of the first note, is based on a mistake, and is without consideration.¹⁴⁵ So, where the purchaser of a negotiable instrument pays a part only of the consideration at the time, and agrees to pay the balance afterwards, but ascertains the illegality of the note before making such payment, only the amount first advanced can be recovered by him as a bona fide holder for value.¹⁴⁶

Consideration—Other Bill or Note.

§ 459. The surrender of one note is a good consideration for the making¹⁴⁷ or transfer¹⁴⁸ of another note, although the original note may have been based on a disputed claim.¹⁴⁹ It is a sufficient consideration, whether the new note is given in renewal and on surrender of the maker's own note,¹⁵⁰ or in payment¹⁵¹ or purchase of the note of a third party,¹⁵² or in discharge of his own liability in a

¹⁴⁵ *Holt v. Robinson*, 21 Ala. 106. In this case, the sheriff, by accepting the note in satisfaction of the execution, had rendered himself liable to the plaintiff.

¹⁴⁶ *Hubbard v. Chapin*, 2 Allen (Mass.) 328.

¹⁴⁷ *Brewster v. Baker*, 97 Ind. 260; whether the original note was secured by collateral, *O'Keefe v. Handy*, 31 La. Ann. 832; or not, *Dunn v. Weston*, 71 Me. 270. And see section 479, *infra*.

¹⁴⁸ *Clary v. Sunency*, 58 Ga. 83.

¹⁴⁹ *Keyes v. Mann*, 63 Iowa, 560, 19 N. W. 666. But where the original note was released by the deceased payee for valuable consideration, a new note to the administrator for the original debt is without consideration. *Hancock v. Twyman* (Ky.) 45 S. W. 68.

¹⁵⁰ *Wooley v. Cobb*, 165 Mass. 503, 43 N. E. 497; together with the discharge of an indorser, *Gatzmer v. Pierce*, 13 Phila. (Pa.) 88; and even without surrender of the old note, *Murphy v. Carey*, 89 Hun, 106, 34 N. Y. Supp. 1038; *Low v. Learned*, 13 Misc. Rep. 150, 34 N. Y. Supp. 68. And recovery may be had in such case on the renewal without an indemnity bond, on proof that the original note was not transferred by indorsement before maturity. *Mackey v. Mackey*, 16 Colo. 134, 26 Pac. 554.

¹⁵¹ *Lookout Bank of Morristown v. Aull*, 93 Tenn. 645, 27 S. W. 1014; *Scribner v. Hanke*, 116 Cal. 613, 48 Pac. 714; *Wright v. McKittrick*, 2 Kan. App. 508, 43 Pac. 977.

¹⁵² *Cameron v. Romele*, 53 Tex. 238.

different capacity on the other paper.¹⁵³ So, the debt represented by a note then given or already outstanding is sufficient consideration for another note taken as collateral to secure it.¹⁵⁴ And he is a holder for value who obtains a note or bill either by surrender of other valid notes held by him,¹⁵⁵ or by making and delivery of his own negotiable note or bill.¹⁵⁶ And where a note already dishonored is surrendered by the holder, and one of the makers released, and forbearance given to the other, this is sufficient consideration for new paper transferred by the latter, and constitutes the taker a holder for value, whether the original note was given as mere collateral or in payment of the debt of the maker.¹⁵⁷

§ 460. — The consideration which belongs to the original paper belongs to a renewal also.¹⁵⁸ This is true also of a note given by the maker of the original note, with its payee as surety, to a subsequent holder of such note, in renewal of it.¹⁵⁹ It follows that a

¹⁵³ E. g. by A. for B.'s note indorsed by A. *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864; *Hayes v. Mestaniz*, 2 App. Div. 135, 37 N. Y. Supp. 748; *Dykman v. Northridge*, 1 App. Div. 26, 36 N. Y. Supp. 962; *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16; *Bromley v. Hawley*, 60 Vt. 46, 12 Atl. 220; or for B.'s note with A. as surety, *Pauly v. Murray*, 110 Cal. 13, 42 Pac. 313; or by A. and B. in renewal of such note, *Judd v. Martin*, 97 Ind. 173; or by A. as principal and B. as surety, in renewal of note of B. as principal and A. as surety, *First Nat. Bank of Galesburg v. Davis*, 108 Ill. 633; or by A. as principal and B. as surety, in renewal and surrender of A.'s note, *Churchill v. Bradley*, 58 Vt. 403, 5 Atl. 189; or by A. to C. on his paying and procuring the surrender of a note of B., on which A. was accommodation indorser and C. a subsequent indorser, *Wyckoff v. De Graaf*, 98 N. Y. 134.

¹⁵⁴ *Spencer v. Sloan*, 108 Ind. 183, 9 N. E. 150. So, where the collateral note was given to secure the payee as indorser on another note of the makers, *Hapgood v. Wellington*, 136 Mass. 217. But see, contra, *Taylor v. Slator*, 16 R. I. 86, 12 Atl. 727, where the collateral note was for interest on the first note, if not paid.

¹⁵⁵ *Brown v. Leavitt*, 31 N. Y. 113; *Mechanics' & Traders' Nat. Bank of New York v. Crow*, 60 N. Y. 85; *Cowing v. Altman*, 71 N. Y. 435, reversing 5 Hun (N. Y.) 556; *Montross v. Clark*, 2 Sandf. (N. Y.) 115. So, where the holder of an accommodation note which had been diverted and indorsed by the payee to him, without notice to him of its character, surrenders it for a new note by the same maker. *Goodwin v. Conklin*, 85 N. Y. 21.

¹⁵⁶ *Pratt v. Coman*, 37 N. Y. 440; *Cameron v. Romele*, 53 Tex. 238.

¹⁵⁷ *Muirhead v. Kirkpatrick*, 21 Pa. St. 237.

¹⁵⁸ *Gates v. Bank*, 12 Heisk. (Tenn.) 325; *Howard v. Iron Co.*, 64 Me. 93.

¹⁵⁹ *Lott v. Dysart*, 45 Ga. 355.

note given in renewal of one which is already paid, or which is without consideration, has no sufficient consideration to support it.¹⁶⁰ But, where a bill is given to take up a note in the hands of an indorsee, a defect in the original consideration of the note has been held not to affect the new instrument.¹⁶¹

As we have seen the liability of a maker or surety on negotiable instruments already existing to be sufficient consideration for a new instrument, so the liability of an acceptor on an acceptance not paid is sufficient to support a note given by him.¹⁶² And where, as in New York, the drawer's liability on notice of dishonor is for damages in addition to the face of the bill of exchange, and he has been released by the holder from the damages on giving his check for the amount of the bill, such payment forms a sufficient consideration for the release.¹⁶³ So, an agreement between first and second indorsers for the payment of a note at its maturity by the first indorser, being the liability already incurred by him, has nevertheless been held sufficient consideration to support an agreement for transfer of goods by the second indorser to the first.¹⁶⁴

Existing Debt—When Sufficient to Constitute a Holder for Value.

§ 461. As we have seen, an existing debt is a sufficient consideration for the giving or transferring of commercial paper. It was for many years, however, questioned in this country, if not in England, whether such a consideration was of itself sufficient, in the case of transfer of commercial paper, to render the transferee a bona fide holder for value in such sense as to free him from all defenses existing between the original parties. It has never been questioned that such existing debt to the transferee renders him a holder for value,

¹⁶⁰ *Smith v. Taylor*, 39 Me. 242. But if usury is purged out of the original note, and a new note given for principal and legal interest, it will be valid. *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, and 37 S. W. 569.

¹⁶¹ *Estep v. Burke*, 19 Ind. 87; *Judd v. Martin*, 97 Ind. 173, where the maker joined with the indorser of the first note, and received security for signing the second note.

¹⁶² *Hodge's Ex'r v. Bank*, 22 Grat. (Va.) 51.

¹⁶³ *Pesant v. Pickersgill*, 56 N. Y. 650. And in such case the drawer has no claim for recovery of damages against the acceptor.

¹⁶⁴ *Sanders v. Gillespie*, 59 N. Y. 250; *Jordan v. Cobb*, 47 Ala. 132.

if collateral held by him for such debt be relinquished in consideration of such transfer;¹⁶⁵ especially if the transfer be made in discharge both of the existing debt and of the collateral securing it.¹⁶⁶ So, too, if the collateral be only paper similar to that transferred, with the addition of another indorser, and such collateral be surrendered on receiving the new note.¹⁶⁷ So, if the collateral surrendered be the note of a third person.¹⁶⁸ And the surrender of such collateral has been held to constitute the transferee of the new paper a holder for value, even though the new paper was given merely as collateral for the existing debt, which was not yet due, and although the collateral surrendered was of no value.¹⁶⁹ So, where the consideration paid for the discount of a note is part cash and part a surrender of an overdue note, it has been held sufficient to constitute the indorser a holder for value.¹⁷⁰

¹⁶⁵ *Meads v. Bank*, 25 N. Y. 143; *Allaire v. Hartshorne*, 21 N. J. Law, 665; *Stevens v. Campbell*, 13 Wis. 375; *Justh v. Bank*, 56 N. Y. 478; *Le Breton v. Peirce*, 2 Allen (Mass.) 8; *First Nat. Bank of Rochester v. Bentley*, 27 Minn. 87, 6 N. W. 422. So, if given only as collateral for the precedent debt on surrender of other collaterals. *Robbins v. Richardson*, 2 Bosw. (N. Y.) 248; *Chrysler v. Renois*, 43 N. Y. 209; *Knox v. Clifford*, 38 Wis. 651; *Nichol v. Bate*, 10 Yerg. (Tenn.) 429; *Park Bank v. Watson*, 42 N. Y. 490; or in satisfaction of a judgment against the indorser, *Blair v. Hagemeyer*, 26 App. Div. 219, 49 N. Y. Supp. 965; or on such surrender, coupled with forbearance, *Western Nat. Bank of New York v. Flannagan*, 14 Misc. Rep. 317, 35 N. Y. Supp. 848; *Bank of Commerce v. Wright*, 63 Ark. 604, 40 S. W. 81; or without surrender, but with extension, *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713; unless the extension is too indefinite, *Atlantic Nat. Bank of New York v. Franklin*, 55 N. Y. 235.

¹⁶⁶ *Emanuel v. White*, 34 Miss. 56.

¹⁶⁷ *Mohawk Bank v. Corey*, 1 Hill (N. Y.) 513. But an accommodation note given to take up another note, on which the accommodation maker was liable as a surety, will not render the new holder a holder for value. *Lintz v. Howard*, 18 Hun (N. Y.) 424.

¹⁶⁸ *Stettheimer v. Meyer*, 33 Barb. (N. Y.) 215; *Pratt v. Coman*, 37 N. Y. 440; *Youngs v. Lee*, 12 N. Y. 551, affirming 18 Barb. (N. Y.) 187; *Heath v. Smelting Co.*, 39 Wis. 146; *Hand v. Dinniny*, 85 Hun. 380, 32 N. Y. Supp. 980.

¹⁶⁹ *Park Bank v. Watson*, 42 N. Y. 490. But see, as to this case, *Stevens v. Bank*, 3 Hun (N. Y.) 150; *Huff v. Wagner*, 63 Barb. (N. Y.) 215. In both of these cases the consideration was in other property, held to be of insufficient value, and the holder of the paper on such consideration was protected against equities only to the value paid by him.

¹⁷⁰ *Brown v. Leavitt*, 31 N. Y. 113; *Mechanics' & Traders' Nat. Bank of City*

Existing Debt—And Forbearance.

§ 462. This is still more clearly the case where, in addition to the existing debt and the surrender of collateral, there is a further consideration of forbearance as to the original debtor.¹⁷¹ So, the existing debt and forbearance as to it, if plainly agreed upon, constitute the holder of the new paper a holder for value, although he have taken it only as collateral for the existing debt.¹⁷² So, the extension of an existing debt renders the purchaser of an accommodation note a holder for value.¹⁷³ It was held, however, in an early New York case, that where a note had been transferred in fraud of the maker to a holder who took it as collateral for an existing debt, agreeing to forbear the prosecution of such debt and surrendering other collateral held for it, such holder was, notwithstanding, not a holder for value.¹⁷⁴ This case is not supported by more recent authorities. But an agreement "to allow the loan to remain a little

of *New York v. Crow*, 60 N. Y. 85. The surrender of the debtor's own note by the creditor has been held in New York sufficient to create the latter a bona fide holder of the new note transferred to him therefor, whether the original note was overdue or not. *Youngs v. Lee*, supra; *Day v. Saunders*, 1 Abb. Dec. (N. Y.) 495; *Brown v. Leavitt*, supra; *Pratt v. Coman*, supra. "In view of this long line of authorities, it must be regarded as the settled doctrine in this state that the surrender by a creditor of the past-due notes of a debtor, upon receiving from him in good faith, before maturity, the note of a third person in place of the note surrendered, constitutes the creditor a holder for value of the note thus taken, and protects him against the defenses and equities of the antecedent parties, and that it is immaterial whether the note surrendered was given to the creditor for goods sold or money loaned, or under circumstances which would leave the original debt represented by the note in existence enforceable against the debtor, or whether, by surrendering the note, the creditor parted with his entire right of action." *Andrews, J., in Phoenix Ins. Co. v. Church*, 81 N. Y. 225. But in this case the surrender of a check of the debtor which had been drawn without funds was distinguished from a note, and held not to constitute the creditor surrendering it a bona fide holder for value.

¹⁷¹ *Kingsland v. Pryor*, 33 Ohio St. 19. And see § 491, *infra*.

¹⁷² *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602. But mere forbearance to issue an attachment is not sufficient. *Bone v. Tharp*, 63 Iowa, 224, 18 N. W. 906; *Oates v. Bank*, 100 U. S. 239.

¹⁷³ *Grocers' Bank of City of New York v. Penfield*, 7 Hun (N. Y.) 279.

¹⁷⁴ *Francia v. Joseph*, 3 Edw. Ch. 182.

longer" has been held in New York too indefinite to render the holder taking the paper for a precedent debt a holder for value.¹⁷⁵

Existing Debt—No Surrender of Collateral or Forbearance.

§ 463. But, where there is no relinquishment of collateral nor any question of forbearance, it is often denied that a precedent debt alone constitutes the holder of commercial paper a bona fide holder for value; and, by the authorities which deny such holder to be a holder for value, it is said that he should have parted with value at the time of taking the paper, in order to constitute himself a holder for value in the commercial sense. The weight of authorities both in England and in the United States is plainly in favor of treating such holder as a holder for value.¹⁷⁶ This has been held to be so in the case of a postdated check transferred in settlement of an already existing debt.¹⁷⁷ So, where a note taken was credited in the ordinary course of business on an existing debt.¹⁷⁸ And the same has been held of accommodation paper transferred in consideration of a debt due to the maker.¹⁷⁹ Where a note has been fraudulently transferred by the maker's agent, partly for cash and partly in settlement of an existing debt of the maker himself, the holder will, of course, be a holder for value.¹⁸⁰

¹⁷⁵ *Atlantic Nat. Bank v. Franklin*, 55 N. Y. 235.

¹⁷⁶ *Byles, Bills*, 127; *Chit. Bills*, 88; 1 *Daniel, Neg. Inst.* 185; 1 *Pars. Notes & B.* 221; *Story, Prom. Notes*, § 195; *Percival v. Frampton*, 2 *Crompt. M. & R.* 180, 3 *Dowl.* 748; *Foster v. Pearson*, 1 *Crompt. M. & R.* 849, 5 *Tyrw.* 255; *Brush v. Scribner*, 11 *Conn.* 388; *Bridgeport City Bank v. Welch*, 29 *Conn.* 475; *Oates v. Bank*, 100 U. S. 239; *Bush v. Peckard*, 3 *Har. (Del.)* 385; *Carlisle v. Wishart*, 11 *Ohio*, 172; *Ives v. Bank*, 2 *Allen (Mass.)* 236; *Outhwite v. Miner*, 13 *Mich.* 533; *Quinn v. Hard*, 43 *Vt.* 375; *Russell v. Splater*, 47 *Vt.* 273; *Saylor v. Daniels*, 37 *Ill.* 331; *Grocers' Bank of City of New York v. Penfield*, 69 N. Y. 502, affirming 7 *Hun (N. Y.)* 279; *Bardsley v. Delp*, 88 *Pa. St.* 420; *Stedman v. Carstairs*, 97 *Pa. St.* 234; *Green v. Kennedy*, 6 *Mo. App.* 577; *Smith v. Lockridge*, 8 *Bush (Ky.)* 423; *Citizens' Bank v. Payne*, 18 *La. Ann.* 222; *Farmers' Bank v. Willis*, 7 *W. Va.* 31; *Blum v. Loggins*, 53 *Tex.* 121.

¹⁷⁷ *Mayer v. Mode*, 14 *Hun (N. Y.)* 155.

¹⁷⁸ *Struthers v. Kendall*, 41 *Pa. St.* 214. But see, contra, *Central Nat. Bank of City of New York v. Valentine*, 18 *Hun (N. Y.)* 417.

¹⁷⁹ *Cole v. Saulpaugh*, 48 *Barb. (N. Y.)* 104.

¹⁸⁰ *Pond v. Agricultural Works*, 50 *Iowa*, 596.

Many cases, however, especially in the state of New York, have held the contrary doctrine as to the character of a holder in consideration of an existing debt only. This has been held also in England not to constitute a holder for value.¹⁸¹ The decisions in New York and other of the United States supporting this view extend down to a recent date.¹⁸² And the same rule has been applied to the assignment of a judgment on a note.¹⁸³ But, without any statement as to its being given as mere collateral or in absolute payment, a draft indorsed by A. to C., in consideration of an existing debt from A. to B., and of another debt from B. to C., is given upon sufficient consideration to constitute the indorsee a holder for value.¹⁸⁴

Existing Debt—Absolute or Conditional Payment.

§ 464. A distinction has been made, more especially in the New York cases, between paying an existing debt by the transfer of commercial paper and merely securing it. And a further distinction

¹⁸¹ *De La Chaumette v. Bank of England*, 9 Barn. & C. 208. And it has been held that an accommodation acceptor may recover such acceptance in trover from a holder who received it from the absconding drawer as security for a prior debt. *Chit. Bills*, 273; *Smith v. De Witts*, 6 Dowl. & Ry. 120.

¹⁸² *Buhrman v. Baylis*, 14 Hun (N. Y.) 608; *Chesbrough v. Wright*, 41 Barb. (N. Y.) 28; *Rosa v. Brotherson*, 10 Wend. (N. Y.) 86; *Ontario Bank v. Worthington*, 12 Wend. (N. Y.) 600; *Riley v. Johnson*, 8 Ohio, 527; *Jones v. Schreyer*, 49 N. Y. 674; *Royer v. Bank*, 83 Pa. St. 248; *Lenheim v. Wilmarding*, 55 Pa. St. 73; *Smith v. Hogeland*, 78 Pa. St. 252; *Reddick v. Jones*, 28 N. C. 107; *Rhea v. Allison*, 3 Head (Tenn.) 176; *Van Patton v. Beals*, 46 Iowa, 62; *Union Nat. Bank v. Barber*, 56 Iowa, 559; *Comstock v. Hier*, 73 N. Y. 269; *Turner v. Treadway*, 53 N. Y. 650; *Lawrence v. Clark*, 36 N. Y. 128; *Farrington v. Bank*, 24 Barb. (N. Y.) 554; *Cardwell v. Hicks*, 37 Barb. (N. Y.) 458. So, a precedent debt alone will not make a purchaser of stock a holder for value against prior equities or legal title. *Weaver v. Barden*, 49 N. Y. 286. And one who takes a note for an existing debt, and surrenders worthless collaterals, is not a holder for value. *Stewart v. Small*, 2 Barb. (N. Y.) 559. Neither is an assignee for the benefit of creditors a holder for value. *Fraker v. Cullum*, 21 Kan. 555.

¹⁸³ *Coleman v. Lansing*, 4 Lans. (N. Y.) 70. So, after judgment by default on a note, one who holds the note for an existing debt of his indorser is still subject to defense on the maker's part. *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329.

¹⁸⁴ *Poirier v. Morris*, 2 El. & Bl. 89. See, too, § 466, *infra*.

is made sometimes between absolute payment or satisfaction of the debt and conditional payment. But the soundness of these distinctions has been often questioned.

It may be considered as an established rule, acquiesced in generally even by the New York cases, that the transfer of commercial paper in payment of an existing debt of the indorser to the indorsee constitutes the latter a holder for value.¹⁸⁵ Especially if the precedent debt be thereby "extinguished," this being held in New York to be equivalent to paying value.¹⁸⁶ So, if the transfer be made and credited as a payment on account of an existing debt;¹⁸⁷ or on account of another note which is thereupon canceled, but not returned.¹⁸⁸ And this has been held in New York to be still more

¹⁸⁵ Chit. Bills, 88; 1 Pars. Notes & B. 221; *Swift v. Tyson*, 16 Pet. 1. This case came from the New York circuit, and was decided by Judge Story. His opinion is approved by Chancellor Kent (3 Kent, Comm. 81, note), who refers to it in the same note with his own opinion in *Bay v. Coddington*, 5 Johns. Ch. (N. Y.) 56, and evidently regards the two as not inconsistent. To the same effect, see *Ives v. Bank*, 2 Allen (Mass.) 236; *Smith v. Van Loan*, 16 Wend. (N. Y.) 659; *Armour v. McMichael*, 36 N. J. Law, 92; *Williams v. Little*, 11 N. H. 66; *Norton v. Waite*, 20 Me. 175; *New York Marbled Iron Works v. Smith*, 4 Duer (N. Y.) 362; *Gould v. Segee*, 5 Duer (N. Y.) 260; *Bardsley v. Delp*, 88 Pa. St. 420; *McCasky v. Sherman*, 24 Conn. 605; *Barney v. Earle*, 13 Ala. 106; *Bond v. Bank*, 2 Ga. 92; *Robinson v. Lair*, 31 Iowa. 9; *Russell v. Haddock*, 8 Ill. 233; *Stevenson v. Hyland*, 11 Minn. 198 (Gil. 128); *Homes v. Smyth*, 16 Me. 177; *Cecil Bank v. Heald*, 25 Md. 562; *Tabor v. Bank*, 48 Ark. 454, 3 S. W. 805; *Frank v. Quast*, 86 Ky. 649, 6 S. W. 909; *Herman v. Gunter*, 83 Tex. 66, 18 S. W. 428; *Garrettson v. Bank*, 39 Fed. 163; *Burroughs v. Ploof*, 73 Mich. 607, 41 N. W. 704. For a long list of American cases to the same effect, see note to *Swift v. Tyson*, 1 Ames, Bills & N. p. 650; also, 1 Pars. Notes & B. 221.

¹⁸⁶ *Bank of Sandusky v. Scoville*, 24 Wend. (N. Y.) 115; *Bank of St. Albans v. Gilliland*, 23 Wend. (N. Y.) 311. So, of other property. *Soule v. Shotwell*, 52 Miss. 236.

¹⁸⁷ *Purchase v. Mattison*, 3 Bosw. (N. Y.) 310.

¹⁸⁸ *Bank of Salina v. Babcock*, 21 Wend. (N. Y.) 499, Nelson, C. J., saying: "The court ought not to speculate about the probability of reviving these canceled securities in case the paper upon the strength of which they were canceled should turn out to be unavailable; much less ought we to go into a calculation of the chances of revival as the ground of defeating the substituted security. It is enough that the plaintiffs in good faith charged over and canceled them according to usage, and held them merely to be sent home. This is parting with value in the strictest sense of the term." So, too, *Dixon v. Dixon*, 31 Vt. 450.

clearly the case where the transfer was made in payment of a note which was thereupon surrendered.¹⁸⁹ And in England the surrender of a draft on payment to the holder by a check has been held to make the holder of the check a holder for value, even though it was not made payable in future, and no delay in prosecuting the original claim was to be inferred.¹⁹⁰

It has been held, however, both in England and in the United States, that even taking a note in absolute payment of an existing debt does not constitute the creditor a holder for value.¹⁹¹ And, where a note was given partly for cash and partly for an existing debt discharged thereby, the taker has been held in New York not to be a holder for value.¹⁹² So, too, in the case of a precedent debt paid and extinguished in part by the transfer of a note.¹⁹³ So, too, of a transfer in payment of an existing debt credited as such on the books of the transferee.¹⁹⁴ And where an earlier note representing

¹⁸⁹ *Clothier v. Adriance*, 51 N. Y. 322.

¹⁹⁰ *Currie v. Misa*, L. R. 10 Exch. 153. In this case Mr. Justice Lush says: "The title to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the court of common pleas in *Belshaw v. Bush*, 11 C. B. 191, as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. This is precisely the effect which both parties intended the security to have; and the doctrine is as applicable to one species of security as to another,—to a check payable on demand as to a running bill or a promissory note payable to order or bearer." And Lord Coleridge, C. J., in his dissenting opinion, says: "It is too late to dispute that a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value. But it seems equally clear that this is an exception to general rules,—an extraordinary protection given to such a holder on grounds of commercial policy only, and in order to favor the unrestricted use as currency of negotiable instruments."

¹⁹¹ *Smith v. De Witts*, 6 Dowl. & R. 120; *Ingerson v. Starkweather*, Walk. (Mich.) 346; *Ingram v. Morgan*, 4 Humph. (Tenn.) 66; *Ferriss v. Tavel*, 87 Tenn. 386, 11 S. W. 93. So, in case of a partnership note transferred after dissolution in payment of the debt of one of the partners. *Gale v. Miller*, 1 Lans. (N. Y.) 451.

¹⁹² *Cardwell v. Hicks*, 37 Barb. 458.

¹⁹³ *Scott v. Bank*, 23 N. Y. 289. For other cases to the same effect, see note to *Stalker v. McDonald*, 1 Ames, Bills & N. p. 668.

¹⁹⁴ *Spear v. Myers*, 6 Barb. (N. Y.) 445.

an existing debt has been paid by a transfer of negotiable paper, but has not been surrendered, the holder has been held in New York not to be a holder for value.¹⁹⁵ And this has even been held very recently in the case of a check given partly as conditional payment of a note for an existing debt surrendered thereon, and partly for a new note.¹⁹⁶ And it is more clearly the case where the intention of the transfer is not to extinguish a former debt, but simply to furnish means for its payment by the collection and appropriation of new paper to that end.¹⁹⁷

Existing Debt—Security Only.

§ 465. As has been said, many cases make a distinction between giving such paper in payment of a former debt and giving it merely as security. Thus, it has been held that the former is sufficient to constitute a holder for value, and the latter not.¹⁹⁸ But this distinction has been treated as unimportant in a New York case which held that the transfer of such paper in consideration of the existing debt, whether as payment or mere security, in the absence of a change in the transferee's position, either by surrender of other securities or by forbearance of the original debt, cannot constitute him a holder for value.¹⁹⁹

On the other hand, it has been held by numerous recent authorities that merely transferring such paper as collateral for an existing debt constitutes the taker a holder for value; and this must now be considered as the general rule of law, both in this country and in England.²⁰⁰ This rule has not been established, however, with-

¹⁹⁵ *Bright v. Judson*, 47 Barb. 29; *Farrington v. Frankfort Bank*, 24 Barb. 554. And even the cancellation of a note on receipt of a stolen bill in payment has been held not to be such "parting with value" as to make the taker a holder for value. *Goldsmid v. Bank*, 12 Barb. 410.

¹⁹⁶ *Phoenix Ins. Co. v. Church*, 81 N. Y. 218.

¹⁹⁷ *New York Exch. Co. v. De Wolf*, 3 Bosw. (N. Y.) 86. So, by giving a new note for payment of interest in case of default. *Leslie v. Bassett*, 129 N. Y. 523, 29 N. E. 834.

¹⁹⁸ *May v. Quimby*, 3 Bush (Ky.) 96; *Stevens v. Campbell*, 13 Wis. 375; *Pond v. Lockwood*, 8 Ala. 669; *Maynard v. Bank*, 98 Pa. St. 250.

¹⁹⁹ *Traders' Bank of Rochester v. Bradner*, 43 Barb. 379.

²⁰⁰ In *Redf. & B. Lead. Cas.* p. 206, the rule is thus stated in an extract from a note on *Le Breton v. Peirce*, 2 Allen (Mass.) 8, 1 Am. Law Reg. (N. S.) 35:

out considerable discussion. It has been denied in numerous cases, especially in the states of New York and Pennsylvania.²⁰¹ These

“All that is implied, then, by its being collateral, is that there is no agreement or implication that the original debt is extinguished. The creditor intends to hold onto his original debt and all other securities. The new security, then, is collateral to the previous debt; but the new security, as between the parties to it and the creditor, is not affected, by its being collateral to the previous debt, any differently from what it would be if it were received in extinguishment of it. It is negotiated in the fullest manner and subject to the law merchant, and with no restrictions upon its further negotiation. We think, therefore, that the English courts have taken the true view in saying that such paper passes for value and in the ordinary course of business, and excludes all existing equities, without regard to the understanding, agreement, or implication, as matter of fact, that the creditor should delay the enforcement of the existing debt until the maturity of the new security; and that they are also right in saying that it makes no difference in principle or legal effect whether the existing debt is extinguished or not, or whether the original evidence of debt or the existing securities are surrendered or not. *Kearslake v. Morgan*, 5 Term R. 514; *Baker v. Walker*, 14 Mees. & W. 465; *Belshaw v. Bush*, 11 C. B. 191, 200; *Ford v. Beech*, 11 Q. B. 852, 873.”

So, too. *Railroad Co. v. National Bank*, 102 U. S. 14. In this case Mr. Justice Harlan said (page 28): “The transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case the bona fide holder is unaffected by equities or defenses between prior parties of which he had no notice.” This was a New York case, but the supreme court refused to be bound by the New York decisions. So, too, *Maitland v. Bank*, 40 Md. 540; *Buchanan v. Mechanics’ Loan & Savings Inst.*, 84 Md. 430, 35 Atl. 1099; *Bank of Republic v. Carrington*, 5 R. I. 515; *Cobb v. Doyle*, 7 R. I. 550; *Rosemond v. Graham*, 54 Minn. 323, 56 N. W. 38; *Armour v. McMichael*, 36 N. J. Law, 92; *Hotchkiss v. Plaster Co.*, 41 W. Va. 357, 23 S. E. 576; *People’s Nat. Bank of Salem v. Clayton*, 66 Vt. 541, 29 S. E. 1020; *Helmer v. Bank*, 28 Neb. 474, 44 N. W. 482; *Atkinson v. Brooks*, 26 Vt. 569; *Boatman’s Sav. Inst. v. Holland*, 38 Mo. 49; *Gibson v. Conner*, 3 Ga. 47; *Partridge v. Williams*, 72 Ga. 807; *Bealle v. Bank*, 57 Ga. 274; *Giovanovich v. Citizens’ Bank*, 26 La. Ann. 15; *Succession of Dolhonde*, 21 La. Ann. 3; *McPherson v. Bondreau*, 48 La. Ann. 431, 19 South. 550; *Smith v. Isaacs*, 23 La. Ann. 454; *Wormer v. Agricultural Works*, 50 Iowa, 262; *Mallard v. Aillet*, 6 La. Ann. 93; *Messick v. Roxborough*, 1 Handy (Ohio) 348; *Payne v. Bensley*, 8 Cal. 260;

²⁰¹ See note 201 on following page.

cases seem to rest generally for their authority upon the early New York case of *Bay v. Coddington*, in which case the precedent debt secured by the paper in dispute was not due at the time of the transfer of the security, and was a mere contingent liability; and this seems to have been the ground on which the decision rested,

Robinson v. Smith, 14 Cal. 94; *Sackett v. Johnson*, 54 Cal. 107; *Harrison v. Pike*, 48 Miss. 46; *Fisher v. Fisher*, 98 Mass. 303; *Stoddard v. Kimball*, 4 Cush. (Mass.) 604; *Manning v. McClure*, 36 Ill. 490; *Mix v. Bank*, 91 Ill. 20; *Canadian Bank of Commerce v. Gurley*, 30 U. C. C. P. 583. See, too, 1 Pars. Notes & B. 223. So, if transferred in trust as collateral for precedent debts of payee. *Williams v. Cheney*, 3 Gray (Mass.) 215. And even states that hold the contrary rule as to the sufficiency of such consideration to constitute a bona fide holder exclude the defense of accommodation where an accommodation note was taken before maturity as collateral for an existing debt. *Continental Nat. Bank v. Townsend*, 87 N. Y. 8; *Grocers' Bank of City of New York v. Penfield*, 69 N. Y. 502; *Smith v. Wachob*, 179 Pa. St. 260, 36 Atl. 221. And it will not be presumed to be a mere collateral, although given for a debt of different amount. *Stevens v. Campbell*, 13 Wis. 419. And see *Dearman v. Trimmier*, 26 S. C. 506, 2 S. E. 501, where this rule is applied, as law merchant, to a note, and the contrary, as equity rule, to the mortgage securing it.

In the case of *Atkinson v. Brooks*, 26 Vt. 574, Redfield, C. J., enumerates the following exceptions to the rule that taking commercial paper in the due course of business as collateral security for a debt due constitutes the holder a holder for value, viz.: "(1) A note or bill negotiated in security for a debt not yet due is not upon sufficient consideration, ordinarily, unless the creditor wait in faith of the collateral after his debt becomes due. (2) If the debtor is notoriously insolvent before the note or bill is negotiated as collateral security, it is said the creditor can only stand upon the rights of his debtor. (3) If a note or bill is taken merely to collect for the debtor, to apply when collected, the creditor not becoming a party by indorsement, so as to be bound to pursue the rules of the law merchant in making demand of payment and giving notice back, the holder is merely the agent of the owner. *De La Chaumette v. Bank of England*, 9 Barn. & C. 208; *Allen v. King*, 4 McLean, 128, Fed. Cas. No. 226. (4) So, too, probably, if it were shown positively that the holder gave no credit to the indorsed bill, and did in no sense conduct differently on that account, he could not be regarded as a holder for value."

²⁰¹ *Prentiss v. Graves*, 33 Barb. (N. Y.) 621; *Manhattan Co. v. Reynolds*, 2 Hill (N. Y.) 140; *Stalker v. McDonald*, 6 Hill, 93; *Bowman v. Van Kuren*, 29 Wis. 209; *Greenbaum v. Megibben*, 10 Bush (Ky.) 419 (the instrument in this case being a negotiable warehouseman's receipt); *McLeod v. Bank*, 42 Miss. 100; *Ryan v. Chew*, 13 Iowa, 589; *Ruddick v. Lloyd*, 15 Iowa, 441; *Petrie v. Clark*, 11 Serg. & R. (Pa.) 377; *Cummings v. Boyd*, 83 Pa. St. 372; *Oakford v. Johnson*, 2 Miles (Pa.) 203; *Jackson v. Polack*, Id. 362; *McKenzie v.*

and not the fact that the paper was given as collateral only.²⁰² It has also been held in New York that a note transferred for an existing debt, which was thereupon receipted, but was recharged against the indorser on nonpayment of the note, was not transferred to him for value, the transfer not being intended as an absolute payment of the original debt.²⁰³ And the same rule has been applied to notes given in renewal or substitution for a note transferred as collateral.²⁰⁴

Consideration—Debt of Another.

§ 466. Commercial paper is frequently given by one person in payment of, or as security for, the debt of another. A debt already

Bank, 28 Ala. 606; Nutter v. Stover, 48 Me. 163; Bramhall v. Beckett, 31 Me. 205; Jenness v. Bean, 10 N. H. 266; Fletcher v. Chase, 16 N. H. 38; Wardell v. Howell, 9 Wend. (N. Y.) 170; Merriam v. Bank, 8 Gray (Mass.) 254; Maynard v. Bank, 98 Pa. St. 250; Liggett's Spring & Axle Co.'s Appeal, 111 Pa. St. 291, 2 Atl. 684; Altoona Second Nat. Bank v. Dunn, 151 Pa. St. 228, 25 Atl. 80; Carpenter v. Bank, 106 Pa. St. 170; Fenouille v. Hamilton, 35 Ala. 319; Haden v. Lehman, 83 Ala. 243, 3 South. 528; Thompson v. Maddux (Ala.) 23 South. 157; First Nat. Bank of Clarion v. Gregg, 79 Pa. St. 384; Trustees of Iowa College v. Hill, 12 Iowa, 478; Roxborough v. Messick, 6 Ohio St. 448; Trigg v. Saxton (Tenn. Ch. App.) 37 S. W. 567; Webster v. Machine Co., 54 Conn. 394, 8 Atl. 482; Noteboom v. Watkins (Iowa) 72 N. W. 766; Smith v. Bibber, 82 Me. 34, 19 Atl. 89; City Bank of Dowagiac v. Dill, 84 Mich. 549, 47 N. W. 1109; Leslie v. Bassett, 129 N. Y. 523, 29 N. E. 834; United States Nat. Bank v. Ewing, 131 N. Y. 506, 30 N. E. 501; Ayres v. Doying, 42 Hun (N. Y.) 630; Vietor v. Bauer, 70 Hun, 246, 24 N. Y. Supp. 428; Bank of Commerce v. Wright, 63 Ark. 604, 40 S. W. 81; McCarty v. Roots, 21 How. 432. For a longer list of American cases to the same effect, see note to *Stalker v. McDonald*, 1 Ames, Notes & B. p. 667. The rule is probably now changed in NEW YORK by §§ 51 and 52 (in COLORADO, CONNECTICUT, VIRGINIA, and FLORIDA, §§ 25 and 26), and MARYLAND, §§ 44, 45, of the Negotiable Instrument Law. The meaning of these sections is, however, open to question. See Appendix, vol. III., for text of statute.

²⁰² Bay v. Coddington, 5 Johns. Ch. 54, affirmed 20 Johns. 637. In deciding this case, Chancellor Kent says: "These notes were not negotiated in the usual course of business or trade, nor in payment of any antecedent debt, nor for cash or property advanced, debt created, or responsibility incurred on the strength and credit of the notes."

²⁰³ Potts v. Mayer, 74 N. Y. 594.

²⁰⁴ Kirkpatrick v. Muirhead, 16 Pa. St. 117.

contracted and due from A. is of itself no sufficient consideration for a note by B.²⁰⁵ But, if it be given in such a way as to extinguish the other debt, it is a sufficient consideration, although made payable on demand.²⁰⁶ Thus, a note given by a corporation officer for a debt of the corporation is without consideration, and involves no individual liability.²⁰⁷ So, a note given by a married woman for her husband's debt.²⁰⁸ It is otherwise, however, of a note given by her for a building erected by her husband's order on her land, he being her agent, and the credit having been given to her.²⁰⁹ So, a note given in settlement of a civil suit for damages against the maker's brother is upon a sufficient consideration.²¹⁰ But a supposed debt of the maker's son-in-law, which had no real existence, is no consideration for a note.²¹¹

A joint debt of the maker and a third person will support a note by the maker alone;²¹² and, conversely, a note of A. and B. payable in the future will be supported by an existing debt of A.²¹³ And, in general, a note payable in future for a debt of a third person already due amounts, as we have seen, to indulgence as to the latter debt, and has in that a sufficient consideration.²¹⁴ But a note which

²⁰⁵ *Bingham v. Kimball*, 17 Ind. 396. Unless it be taken in satisfaction, or unless credit have been given to the original debtor at the maker's request. *Crofts v. Beale*, 11 C. B. 172.

²⁰⁶ *Byles, Bills*, 128; 1 *Pars. Notes & B.* 196. See, too, *Chit. Bills*, 86. So, a sealed note by A. in consideration of the moral obligation of B., a married woman, *Leonard v. Duffin*, 94 Pa. St. 218; especially if made expressly for "value received," *Lines v. Smith*, 4 Fla. 47.

²⁰⁷ *Rogers v. Waters*, 2 Gill & J. (Md.) 64; *Sumwalt v. Ridgely*, 20 Md. 107; *Ward v. Barrows*, 86 Me. 147, 29 Atl. 922. And see chapter 5, *supra*.

²⁰⁸ *Alger v. Scott*, 54 N. Y. 14; *Williams v. Walker*, 18 S. C. 577. See chapter 9, *supra*. So, too, a note by the wife given after her husband had died insolvent, for a joint note of both, she having had no separate estate. *Coward v. Hughes*, 1 Kay & J. 443.

²⁰⁹ *Morse v. Mason*, 103 Mass. 560.

²¹⁰ *Smith v. Richards*, 29 Conn. 232. This is true of the settlement of a civil suit, but not of the withdrawal of a criminal prosecution. *Id.*

²¹¹ *Bullock v. Ogburn*, 13 Ala. 346.

²¹² *Heywood v. Watson*, 4 Bing. 496, 1 *Moore & P.* 268. So, a note of one partner for a debt of the firm. *McIntire v. Yates*, 104 Ill. 491.

²¹³ *Westphal v. Nevills*, 92 Cal. 545, 28 *Pac.* 678.

²¹⁴ *Byles, Bills*, 128; 1 *Pars. Notes & B.* 195; *Poplewell v. Wilson*, 1 *Strange*, 264; *Sowerby v. Butcher*, 2 *Crompt. & M.* 372, 4 *Tyrw.* 320; *Ridout v. Bristow*,

is given for a debt of another simply and without indulgence is without consideration, and will not bind the maker, although credited on such debtor's account.²¹⁵ And where two persons gave a draft for the debt of one of them to a third person, with an agreement that one of the drawers shall not be held liable, it has been held that he can avail himself of this agreement, and establish a want of consideration thereby in a suit brought against him by the payee of the draft.²¹⁶

As we have seen, it is not necessary that the consideration should move directly from the payee to the maker, but a note given by A. to C., in consideration of the debt of B. to C., and of B's note to A., is binding upon A.²¹⁷ So, where A. is indebted to B., and B. to C., and A. gives his note in extinguishment of both debts to C., this is sufficient, without regard to the adequacy of the consideration;²¹⁸ although the note given may be greater than A.'s debt to B., and less than B.'s debt to C., it having been received in payment of the latter debt.²¹⁹ So, it is a sufficient consideration for such a note that B. was indebted to the payee, C., and had on the other hand agreed with the maker, A., to do certain work for him.²²⁰ Or the note may be made to an appointee of the creditor.²²¹

Consideration—Debt of Estate—By Executor, Legatee, Etc.

§ 467. The same principle applies also in the absence of other consideration to notes given by an executor or administrator for a debt of the deceased testator or intestate. Such a note is in general without consideration, and not binding upon the executor or administrator individually.²²² If, however, there are assets in the hands

1 Crompt. & J. 231, 1 Tyrw. 84; *Coombs v. Ingram*, 4 Dowl. & R. 211; *Garnet v. Clarke*, 11 Mod. 226; *Wilders v. Stevens*, 15 Mees. & W. 208; *Baker v. Walker*, 14 Mees. & W. 465.

²¹⁵ *Stoudenmire v. Ware*, 48 Ala. 589; *Turle v. Sargent*, 63 Minn. 211, 65 N. W. 349.

²¹⁶ *McCulloch v. Hoffman*, 10 Hun (N. Y.) 133.

²¹⁷ *Gillett v. Ballou*, 29 Vt. 296.

²¹⁸ *Outlwhite v. Porter*, 13 Mich. 533; *Cadens v. Teasdale*, 53 Vt. 469.

²¹⁹ *Harrod v. Black*, 1 Duv. (Ky.) 180.

²²⁰ *South Boston Iron Co. v. Brown*, 63 Me. 139.

²²¹ *First Nat. Bank of Champlain v. Wood*, 128 N. Y. 35, 27 N. E. 1020.

²²² *Ten Eyck v. Vanderpeet*, 8 Johns. (N. Y.) 120; *Schoonmaker v. Roosa*, 17

of the executor or administrator applicable to the debt when the note is made, this will constitute a sufficient consideration for the note,²²³ to the extent of such assets.²²⁴ The possession of assets will, in like manner, support the note of an administrator *de son tort*.²²⁵ But assets of the deceased, or forbearance or discharge on the part of a creditor, must exist in order to form a consideration for such note.²²⁶ Thus, it is sufficient to support such a note if the estate of the deceased be charged with the amount and forbearance extended by the creditor.²²⁷

The fact that the debt of the ancestor is barred by the statute of limitations, still leaving the moral obligation, does not affect the validity of the administrator's note for the debt.²²⁸ On the other hand, the debt of an ancestor which is barred by the statute of limitations has been held to be no consideration for a note by the heir.²²⁹ But a note given by the widow of one partner, who is also his administratrix, for a partnership debt which legally survived as a debt of the surviving partner only, is without consideration.²³⁰

And, in general, the debt of a deceased person, without personal representatives, is no consideration for the note of a stranger to the estate.²³¹

If a testator has charged his debts on his estate generally or on a particular devise, this will be sufficient to support a note for such debt by his residuary legatee,²³² or by the devisee of the land *Johns. (N. Y.) 301; Bank of Troy v. Topping, 9 Wend. (N. Y.) 273; Rucker v. Wadlington, 5 J. J. Marsh. (Ky.) 238; Hill v. Buckminster, 5 Pick. (Mass.) 391; Lynch v. Kirby, 65 Ga. 279. And see § 439, supra.*

²²³ *Byrd v. Holloway, 6 Smedes & M. (Miss.) 199; McGrath v. Barnes, 13 S. C. 328; Stevenson v. Edwards, 27 La. Ann. 302.*

²²⁴ *Boyd v. Johnston, 89 Tenn. 284, 14 S. W. 804; Germania Bank v. Michaud, 62 Minn. 459, 65 N. W. 70.*

²²⁵ *French v. French, 91 Iowa, 140, 59 N. W. 21.*

²²⁶ *Rittenhouse v. Ammerman, 64 Mo. 197.*

²²⁷ *Thompson v. Maugh, 3 Iowa, 342. And forbearance may be implied from a mere promise to pay interest, Childs v. Monins, 2 Brod. & B. 460; or from the act of taking up intestate's note, Harrison v. McClelland, 57 Ga. 531.*

²²⁸ *Wheaton v. Wilmarth, 13 Metc. (Mass.) 422.*

²²⁹ *Didlake v. Robb, 1 Woods, 680, Fed. Cas. No. 3,899.*

²³⁰ *Robertshaw v. Hanway, 52 Miss. 713.*

²³¹ *Nelson v. Serle, 4 Mees. & W. 795, reversing Serle v. Waterworth, Id. 9, 6 Dowl. 684.*

²³² *McCormal v. Redden, 46 Neb. 776, 65 N. W. 881.*

charged,²³³ or by law subjected to the payment of debts.²³⁴ So, where a note is given by a devisee, upon an express agreement with testator in his lifetime to pay out of the property devised.²³⁵ So, the discharge of decedent's debts by a distributee or heir receiving assets of the estate has a sufficient consideration;²³⁶ but this is not the case where the estate is insolvent and the distributive share worthless.²³⁷

Debt of Estate—By Widow—Anticipation of Letters.

§ 468. A widow, without assets received from her husband, is not liable on her note given for a doctor's bill for attendance upon him, notwithstanding the bill may have been receipted on the giving of the note.²³⁸ But if there are assets on which she is entitled to administer, and the debt of the estate is released, it will be a sufficient consideration for her note given in payment.²³⁹ And, where the widow had an interest in community property which came to her, her note for a debt of her husband has been held sufficient.²⁴⁰ But, if a note for the husband's debt is obtained from the widow by false representations as to her liability, it is without consideration.²⁴¹

In like manner, the payee must be connected with the consideration. Thus, where a note was given for a debt due to a deceased person to one who afterwards administered on his estate, and who

²³³ Reynolds' Adm'r v. Reynolds, 92 Ky. 556, 18 S. W. 517.

²³⁴ Kayser v. Hodopp, 116 Ind. 428, 19 N. E. 297.

²³⁵ Buckingham v. Clark, 61 Conn. 204, 23 Atl. 1085.

²³⁶ Nye v. Chace, 139 Mass. 379, 31 N. E. 736; Bissinger v. Lawson, 57 Miss. 36; Whitney v. Clary, 145 Mass. 156, 13 N. E. 393 (administrator and sole heir).

²³⁷ Schroeder v. Fink, 60 Md. 436.

²³⁸ Williams v. Nichols, 10 Gray (Mass.) 83. So, too, where the estate was insolvent, but the widow had signed her husband's note as surety. Hetherington v. Hixon, 46 Ala. 297. So, where the estate was insolvent, but the creditor agreed to renew from time to time, the extension and claim being both without value. Paxson v. Nields, 137 Pa. St. 385, 20 Atl. 1016.

²³⁹ Carpenter v. Page, 144 Mass. 315, 10 N. E. 853; Taylor v. Clark (Tenn.) 35 S. W. 442. But see, contra, Watson v. Reynolds, 54 Ala. 192, where the widow had the legal possession only until administration granted.

²⁴⁰ Mull v. Van Trees, 50 Cal. 547, though the debt was outlawed, and the fact unknown to her.

²⁴¹ Maull v. Vaughn, 45 Ala. 134.

agreed, on taking the note, to give a receipt for the debt after administration, a mere failure on his part afterwards to perform this agreement will not defeat the note.²⁴² But a debt originally due to a deceased minor will not support a note given for it to the administrator of the guardian of such minor, the payee having in such case no interest in the debt.²⁴³ So, a debt due to the husband forms no consideration for a note made to his widow.²⁴⁴

Debt of Another—By Guardian—Parent.

§ 469. Where a note was given by the guardian of a lunatic for a debt of his estate, the discharge of the lunatic was held to be a sufficient consideration therefor.²⁴⁵ So, too, a note given by a guardian without assets, in extinguishment of his ward's debt,²⁴⁶ or in settlement of his account as guardian.²⁴⁷

The near relation of the parties to one another has sometimes been considered a sufficient moral obligation to make the debt of one a valid consideration for the note or bill of the other. In the absence, however, of a release of the original debtor, a forbearance of the original debt, or other sufficient consideration, a note given by a father for the debt of a son over 21 years old is without consideration.²⁴⁸ But a note given for a claim against the maker's son, which is discharged upon receiving the note, has been held sufficient to bind the maker.²⁴⁹ So, a note in payment of a defalcation of the maker's son.²⁵⁰ So, a note given by a mother to take up another note of her insolvent son, which note was surrendered to

²⁴² *Nelson v. Lovejoy*, 14 Ala. 568.

²⁴³ *Sowles v. Sowles*, 10 Vt. 181.

²⁴⁴ *Bryan v. Philpot*, 25 N. C. 467. But the maker cannot question the payee's right to recover where his original notes have been surrendered by her. *Riley v. Loughrey*, 22 Ill. 98.

²⁴⁵ *Thacher v. Dinsmore*, 5 Mass. 299.

²⁴⁶ *Wren v. Hoffman*, 41 Miss. 616.

²⁴⁷ *Coleman v. Davies*, 45 Ga. 489.

²⁴⁸ *Mansfield v. Corbin*, 2 Cush. (Mass.) 151; *Security Bank v. Bell*, 32 Minn. 409, 21 N. W. 470; or for money stolen by him, *Coumey v. Macfarlane*, 97 Pa. St. 361.

²⁴⁹ *Seymour v. Prescott*, 69 Me. 376; *Becker v. Fischer*, 13 App. Div. 555, 43 N. Y. Supp. 685.

²⁵⁰ *Popple v. Day*, 123 Mass. 520.

her and destroyed.²⁵¹ On the other hand, a note given to the mother of a son's bastard child, leaving an action still remaining against the maker's son, is not binding on the maker.²⁵² So, a note for necessities already furnished to a father is without sufficient consideration.²⁵³ And even the surrender of a note made by the maker's father has been held to be an insufficient consideration for a new note.²⁵⁴ And, with more reason, a note given by a son for a debt of his father who had died bankrupt has been held to be without consideration.²⁵⁵ So, too, a son's note for his father's debt, given by him for the payee's accommodation only.²⁵⁶

Debt of Third Person with Release of Other Security.

§ 470. In general, there is no question of the sufficiency of commercial paper given for the debt of a third person, where this is accompanied by the additional consideration of a release, or the surrender of other securities, or an extension of the original debt. Thus, where the maker gave his note to the payee in settlement, and on surrender of a note of a third person, who was really the maker's creditor, the consideration was held to be sufficient, although the former note was usurious.²⁵⁷ So, the release of the maker of another note, for which the new note is substituted, fur-

²⁵¹ *Myers v. Van Wagoner*, 56 Mo. 115.

²⁵² *Potter v. Earnest*, 45 Ind. 416.

²⁵³ *Cook v. Bradley*, 7 Conn. 57.

²⁵⁴ *Rowland v. Harris*, 55 Ga. 141.

²⁵⁵ *McElven v. Sloan*, 56 Ga. 208.

²⁵⁶ *Murphy v. Keyes*, 7 Jones & S. (N. Y.) 18.

²⁵⁷ *Sherwood v. Archer*, 10 Hun (N. Y.) 73; *Hand v. Dinniny*, 85 Hun, 380, 32 N. Y. Supp. 980; *Pauly v. O'Brien*, 69 Fed. 460; *D. M. Osborne & Co. v. Doherty*, 38 Minn. 430, 38 N. W. 111; *Dages v. Lee*, 20 W. Va. 584. So, the surrender of a chattel mortgage held by A. on property of B., brought into and held by B.'s firm, is a sufficient consideration for an indorsement by the firm, *Rust v. Hauselt*, 46 N. Y. Super. Ct. 22; or surrender of notes held for loans to a church, of which the maker of the new note was a member, *Rome Sav. Bank v. Kramer*, 19 N. Y. Wkly. Dig. 337. So, payment at A.'s request and surrender to him of certain orders on a corporation, of which he was treasurer, is a valid consideration for his individual note, *Wright v. Hughes*, 13 Ind. 109; or the surrender of a note of the corporation, *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320.

nishes a sufficient consideration for the new note.²⁵⁸ So, the renewal by a new firm, consisting of the partners A., B., and C., of a note given by the former firm, of which C. was not a member, is for a sufficient consideration.²⁵⁹ And, where a third person's debt to the payee is discharged by reason of the new note given at the payee's request, further consideration between the maker and the payee of the new note is unnecessary.²⁶⁰ So, the taking of an acceptance in discharge of the drawer's debt to the payee.²⁶¹ In like manner, the original debtor, having been once discharged by substitution of a new debtor, may be charged again by his new note given in release of his substitute.²⁶² So, a note given by the maker to obtain a release of his brother's land from the lien of an attachment is binding upon him.²⁶³ But an acceptance or a verbal promise to accept an order drawn by a third person, who was not a creditor of the acceptor, and was already secured by a mechanic's lien, which he did not release, is without consideration.²⁶⁴

Debt of Another and Forbearance—Novation.

§ 471. Forbearance of a third person's debt is, in like manner, as we have seen, a sufficient consideration for the making of a note or bill,²⁶⁵ or for an acceptance.²⁶⁶ So, an acceptance by a married

²⁵⁸ *Carpenter v. Murphree*, 49 Ala. 84.

²⁵⁹ *Maine Mut. Marine Ins. Co. v. Blunt*, 64 Me. 95.

²⁶⁰ *Railroad Co. v. Chamberlin*, 44 N. H. 497; *Horn v. Fuller*, 6 N. H. 512; *Nickerson v. Howard*, 19 Johns. (N. Y.) 113; *Holm v. Sandberg*, 32 Minn. 427, 21 N. W. 416. But whether the receipt was given as a release, or merely as a memorandum, to be used if the debt was paid, is a question for the jury. *Russel v. Smith*, 97 Ga. 287, 23 S. E. 5.

²⁶¹ *Bacon v. Bates*, 53 Vt. 30.

²⁶² *Compton v. Blair*, 27 Mich. 397.

²⁶³ *Bradbury v. Blake*, 25 Me. 397.

²⁶⁴ *Plummer v. Lyman*, 49 Me. 229.

²⁶⁵ *Silvis v. Ely*, 3 Watts & S. (Pa.) 420; *Meltzer v. Doll*, 91 N. Y. 365; *Paul v. Stevens*, 57 Hun, 171, 10 N. Y. Supp. 442; *Smith v. Spaulding*, 40 Neb. 339, 58 N. W. 952; *Nichols & Shepard Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110; *Union Banking Co. v. Martin's Estate* (Mich.) 71 N. W. 867. So, discontinuance of threatened bankruptcy proceedings against A., and A.'s agreement to secure the debt by a trust deed, are a valid consideration for B.'s indorse-

²⁶⁶ *Walker v. Sherman*, 11 Metc. (Mass.) 170.

woman is valid if given on account of the payee's forbearance towards the drawer of the bill.²⁶⁷ So, forbearance of a claim against a corporation is sufficient consideration for the individual note of the officers.²⁶⁸ So, forbearance of a suit against a co-assignee in bankruptcy for misapplication of assets is sufficient to support a note given by the other assignee.²⁶⁹ In like manner, forbearance in favor of a third person is sufficient consideration for a guaranty of the debt.²⁷⁰ So, forbearance towards a principal, for an indorsement by the surety.²⁷¹ So, extension of a partnership debt, for a note by the individual partners after dissolution of the firm.²⁷² So, forbearance to the personal representative of a deceased debtor.²⁷³ And an agreement for forbearance is said to be implied where a note, payable in future, is given for an existing debt.²⁷⁴ And the acceptance of a note with a guaranty implies forbearance towards the original debtor, and a sufficient consideration for the guaranty.²⁷⁵

Wherever the maker of the new paper is substituted in the place of the original debtor, the paper is valid and for sufficient consideration. *Bell v. Simpson*, 75 Mo. 485; *Jennison v. Stafford*, 1 Cush. (Mass.) 168; *Rood v. Jones*, 1 Doug. (Mich.) 188. But forbearance to attach property not belonging to the intended defendant constitutes no sufficient consideration. The burden is on the defendant, however, to show that the property threatened with such attachment is not the property of the debtor, for whose relief the note was given. *Id.* And, for extension of debt generally as a consideration, see § 491 et seq., *infra*.

²⁶⁷ *Pierce v. Kittredge*, 115 Mass. 374.

²⁶⁸ *Mechanics' & Farmers' Bank of Albany v. Wixson*, 42 N. Y. 438, affirming 46 Barb. (N. Y.) 218; *Fulton v. Loughlin*, 118 Ind. 286, 20 N. E. 796. So, too, for forbearance of the bank superintendent to press a bank for deficiency of assets. *Sickels v. Herold*, 15 Misc. Rep. 116, 36 N. Y. Supp. 488.

²⁶⁹ *Abbott v. Fisher*, 124 Mass. 414.

²⁷⁰ *Worcester Mechanics' Sav. Bank v. Hill*, 113 Mass. 25. Especially if coupled with an indemnity to the guarantor. *Howard v. Jones*, 13 Mo. App. 596.

²⁷¹ *Chaddock v. Vanness*, 35 N. J. Law, 518; *Hockenbury v. Meyers*, 34 N. J. Law, 347; *Hall v. Clopton*, 56 Miss. 555; *Hooper v. Pike* (Minn.) 72 N. W. 829.

²⁷² *Randolph v. Peck*, 1 Hun (N. Y.) 138.

²⁷³ *Ridout v. Bristow*, 1 Tyrw. 84, 1 Crompt. & J. 231.

²⁷⁴ *Thompson v. Gray*, 63 Me. 228; *Andrews v. Marrett*, 58 Me. 539; *York v. Pearson*, 63 Me. 587.

²⁷⁵ *Munson v. Adams*, 89 Ill. 450.

tion. This is true where the original credit is given to the maker.²⁷⁶ So, where the maker of a note had assumed the debt of another, the note given for it is binding upon him, as if given for his own debt.²⁷⁷ Again, a note given for the debt of a third person, upon his agreement to transfer certain stock to the maker, is binding, even though the agreement be not performed;²⁷⁸ and even though the maker be induced to give the note through a mistake as to securities held by him, the payee having credited the amount of the note to such third person.²⁷⁹

Accommodation Paper.

§ 472. Of a somewhat similar character to negotiable paper given for the debt of a third person is accommodation paper, which is sometimes said to be without consideration. This must be considered as meaning simply without consideration to the accommodation party directly. An accommodation bill of exchange is defined by Mr. Justice Byles to be "a bill to which the accommodating party, be he acceptor, drawer, or indorser, has put his name without consideration, for the purpose of benefit or accommodation to some other party, who desires to raise money on it, and is to provide for the bill when due."²⁸⁰ And the accommodation party in such paper is defined by Professor Parsons to be "one who puts his name there without any consideration with the intention of lending his credit to the accommodated party."²⁸¹ The contract is, in fact, a loan of credit, and in general is made without restriction as to its use.²⁸²

The consideration received by the drawer or paid by the holder

²⁷⁶ 1 Pars. Notes & B. 195; *Crofts v. Beale*, 11 C. B. 172. Or it might be, in case of a guaranty, the credit originally given on that account to the principal. *Brewster v. Silence*, 8 N. Y. 207.

²⁷⁷ *Brainard v. Capelle*, 31 Mo. 428. And release of the original debtor and of a former indorser will constitute the indorsee of the new paper a bona fide holder for value. *Stainback v. Manufacturing Co.*, 98 Tenn. 306, 39 S. W. 530.

²⁷⁸ *Ferdon v. Jones*, 2 E. D. Smith (N. Y.) 106.

²⁷⁹ *Guy v. Bibend*, 41 Cal. 322.

²⁸⁰ Byles, Bills, 131.

²⁸¹ 1 Pars. Notes & B. 184.

²⁸² *Lenheim v. Wilmarding*, 55 Pa. 75. As to accommodation paper by married women, see § 289 et seq., supra.

forms a sufficient consideration for an accommodation indorsement.²⁸³ So, too, a prior agreement for his signature will sustain an indorsement signed after the note is discounted.²⁸⁴ And the liability of an accommodation indorser on one note is sufficient consideration for his joint note with the maker, given to take up that note and others on which he was not liable.²⁸⁵ Where the maker of a note obtains a discount of it with another's indorsement already on it, this is *prima facie* an accommodation indorsement.²⁸⁶

Such paper, however, is not within the ordinary scope of a partnership business; and although one partner may, in general, bind his firm by a bill or note in the firm name, he cannot render the firm liable on accommodation paper to the payee;²⁸⁷ nor to a holder with notice of the accommodation character of the paper,²⁸⁸ although liable to a bona fide holder for value.²⁸⁹ In like manner, accommodation paper is not within the ordinary powers of a corporation,²⁹⁰ although the defense may not be available against a

²⁸³ *Yeaton v. Bank of Alexandria*, 5 Cranch, 49; *Violett v. Patton*, Id. 142, as to indorsement on blank paper; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1; *Steers v. Holmes*, 79 Mich. 430, 44 N. W. 922; *Mayer v. Thomas*, 97 Ga. 772, 25 S. E. 761; *Palmer v. Field*, 76 Hun, 229, 27 N. Y. Supp. 736.

²⁸⁴ *Pauly v. Murray*, 110 Cal. 13, 42 Pac. 313.

²⁸⁵ *Spencer v. Ballou*, 18 N. Y. 327.

²⁸⁶ *Stall v. Bank*, 18 Wend. (N. Y.) 478; *Wallace v. Bank*, 1 Ala. 565; *Mauldin v. Bank*, 2 Ala. 502. So, where the note is payable to the maker's own order. *Jennings v. Kosmak*, 20 Misc. Rep. 300, 45 N. Y. Supp. 802. And the presentation of a note for discount by the maker is of itself notice of its accommodation character. *Noble v. Walker*, 32 Ala. 456.

²⁸⁷ *Heffron v. Hanaford*, 40 Mich. 305; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332. And see § 419 et seq., *supra*.

²⁸⁸ *Vredenburg v. Lagan*, 28 La. Ann. 941.

²⁸⁹ *National Exch. Bank v. White*, 30 Fed. 412; *Smith v. Weston*, 88 Hun, 25, 34 N. Y. Supp. 557.

²⁹⁰ *National Park Bank v. Remsen*, 43 Fed. 226; *National Bank of Commerce v. Atkinson*, 55 Fed. 465; *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *National Park Bank v. German-American Mut. W. & S. Co.*, 116 N. Y. 281, 22 N. E. 567; *Central Bank v. Empire Stone-Dressing Co.*, 26 Barb. (N. Y.) 23; *Farmers' & Mechanics' Bank v. Empire Stone-Dressing Co.*, 5 Bosw. (N. Y.) 275; *Fox v. Rural Home Co.*, 90 Hun, 365, 35 N. Y. Supp. 896. And see § 334, *supra*. But an order of which the proceeds are to be applied to the debts of the corporation is not an accommodation. *Beecher v. Dacey*, 45 Mich. 92, 7 N. W. 689.

bona fide holder if the instrument is within the apparent general powers of the corporation.²⁹¹

When an accommodation acceptor receives funds from the drawer to meet the obligation, his accommodation character ceases, and he becomes liable to the party whom he originally accommodated.²⁹² Or his character may be changed by a subsequent parol agreement between the parties affected.²⁹³ Or the note or acceptance may be in part for value and in part for accommodation,²⁹⁴ or apparently for value and really for accommodation.²⁹⁵ On the other hand, if the maker's indebtedness to the payee exceeds the amount of the note, it will not be presumed, even as against the payee, to be accommodation paper, although made at the payee's request, to enable him to raise money.²⁹⁶ But if its object is to raise money for a stock company, and stock is issued to the directors for their notes, they will be treated as given for value to the lender.²⁹⁷ So, a bill taken in exchange for other negotiable paper is for value, and not for accommodation.²⁹⁸

²⁹¹ *Farmers' Nat. Bank of Valparaiso v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191; *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171; *McLellan v. File Works*, 56 Mich. 579, 23 N. W. 321; *Merchants' Nat. Bank of Chicago v. Detroit Knitting & Corset Works*, 68 Mich. 620, 36 N. W. 696; *American Trust & Savings Bank v. Gluck* (Minn.) 70 N. W. 1085; *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488.

The proof that it is such paper throws on the holder the burden of proving that he took it without notice, *Webster v. Machine Co.*, 54 Conn. 394, 8 Atl. 482; but does not itself prove the contrary, *Credit Co. v. Howe Machine Co.*, 54 Conn. 357, 8 Atl. 472. So, too, proof of the fact that it was given for the debt of an individual, and therefore presumptively accommodation. *McLellan v. File Works*, *supra*; *Merchants' Nat. Bank of Chicago v. Detroit Knitting & Corset Works*, *supra*.

²⁹² *Parker v. Lewis*, 39 Tex. 394.

²⁹³ *Norton v. Downer*, 33 Vt. 26.

²⁹⁴ *Darnell v. Williams*, 2 Starkie, 166, with a liability to the payee limited to the value received.

²⁹⁵ *Miller v. Larned*, 103 Ill. 562.

²⁹⁶ *Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194.

²⁹⁷ *Adams v. Kennedy* (Pa. St.) 34 Atl. 659; *Reed v. Bank*, 23 Colo. 380, 48 Pac. 507. So, if the note is given for stock purchased for a bank, but taken in the maker's name to conceal the bank's holding. *Tillinghast v. Carr*, 82 Fed. 298.

²⁹⁸ *In re London B. & M. Bank*, 9 Ch. App. 686 (and may be proved as a debt in bankruptcy); *State Bank of Lock Haven v. Smith*, 85 Hun. 290, 32 N.

Accommodation Parties—Between Original Parties.

§ 473. As regards third parties, the rights and liabilities of an accommodation party are, in general, the same as those of a party receiving valuable consideration for his signature.²⁹⁹ But, between the accommodation party and the person accommodated, there is no such liability, and one who draws, accepts, or indorses commercial paper for the accommodation of another is not liable on it to him, whatever their apparent relation upon the paper may be.³⁰⁰ This is true although the party accommodated may have released another indorser on the strength of the accommodation indorsement obtained, the new indorser having no knowledge of this fact.³⁰¹

So, where A., the original payee of B.'s note, grants an extension to B. only on condition of a note by C., but C.'s note is made to A. as payee for the accommodation of both A. and B., C. will not be liable on the note to either party.³⁰² But this is not so where A. was originally an indorser for B.'s accommodation, and the renewal note by C. is made payable to A. and B. for the accommodation of B. only.³⁰³ And, where the party personally accommodated is a member of a firm which afterwards becomes the bona fide holder of the accommodation paper for value, the knowledge of the accommodation is charged to the firm as well as to the individual partner,

Y. Supp. 999. So, a note to take up another note on which the maker was surety. *Capital City State Bank v. Des Moines Cotton-Mill Co.*, 84 Iowa, 561, 51 N. W. 33. And see § 479, *infra*.

²⁹⁹ It is a "debt" which can be used as a set-off against the insolvent maker, who was accommodated, *Groff v. Bliss*, 19 Misc. Rep. 42 N. Y. Supp. 843; or to set aside as fraudulent as against the holder a voluntary conveyance by the accommodation indorser, *Primrose v. Browning*, 56 Ga. 369; or to claim the benefit of a mortgage given to secure "present and future indebtedness," *National Bank of Chester v. Gunhouse*, 17 S. C. 489.

³⁰⁰ *Story, Bills*, § 187; *Story, Prom. Notes*, § 190; *Thompson v. Clubley*, 1 Mees. & W. 212; *Patten v. Pearson*, 55 Me. 39; *Macy v. Kendall*, 33 Mo. 164; *Peck v. Burwell*, 48 Hun, 471, 1 N. Y. Supp. 33; *Hood v. Robbins*, 98 Ala. 484, 13 South. 574; *Peale v. Addicks*, 174 Pa. St. 543, 34 Atl. 201.

³⁰¹ *Larned v. Ogilby*, 20 Iowa, 410.

³⁰² *Messmore v. Meyer*, 56 N. J. Law, 31, 27 Atl. 938.

³⁰³ *Mosser v. Criswell*, 150 Pa. St. 409, 24 Atl. 618. In this case the note was indorsed by A. in the partnership name of A. & B. and individually, and the proceeds went to the firm.

and the accommodation party is not liable to the firm any further than he would have been to the person accommodated.³⁰⁴

On the other hand, the apparent relation of the parties will not determine their liability inter se, where the accommodated party is not the party primarily liable in form. Thus, a drawer for the accommodation of acceptor and indorser may recover against both;³⁰⁵ or the accommodation maker against the payee;³⁰⁶ or the accommodation acceptor against the drawer;³⁰⁷ or an accommodation indorser against both joint makers on a request made by one of them for his signature;³⁰⁸ or one joint maker may sign for the accommodation of the other;³⁰⁹ or successive indorsers may all sign as co-sureties (inter se) for the maker.³¹⁰

But between two accommodation parties, in the absence of an agreement for joint or inverse liability, their liability to one another will be that which is shown by the paper. Thus, an accommodation indorser may recover against an accommodation acceptor,³¹¹ or maker,³¹² or a second indorser against a first indorser.³¹³ The contrary was held, however, in an action by one of two drawers against the acceptor, where both were for the accommodation of the drawer, and so known to one another.³¹⁴

³⁰⁴ *Sparrow v. Chisman*, 9 Barn. & C. 241; *Quinn v. Fuller*, 7 Cush. (Mass.) 224.

³⁰⁵ *Lewis v. Williams*, 4 Bush (Ky.) 678.

³⁰⁶ *Owens v. Miller*, 29 Md. 144.

³⁰⁷ *Pomeroy v. Tanner*, 70 N. Y. 547.

³⁰⁸ *Hoffman v. Butler*, 105 Ind. 371, 4 N. E. 681.

³⁰⁹ *Chafoin v. Rich*, 92 Cal. 471, 28 Pac. 488.

³¹⁰ *Macdonald v. Whitfield*, 8 App. Cas. 733.

³¹¹ *Gillespie v. Campbell*, 39 Fed. 724, though known as such at time of indorsement.

³¹² *Moynihan v. McKeon*, 16 Misc. Rep. 343, 38 N. Y. Supp. 61, known at the time as such. *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109.

³¹³ *Wescott v. Stevens*, 85 Me. 325, 27 Atl. 146; *McGurk v. Huggett*, 56 Mich. 187, 22 N. W. 308. But see, contra, *Atwater v. Farthing*, 118 N. C. 388, 24 S. E. 736.

³¹⁴ *Turner v. Browder*, 5 Bush (Ky.) 216.

Accommodation Revocable—Discounted after Maturity.

§ 474. Accommodation paper has no validity until it is discounted or comes into the hands of a holder for value.³¹⁵ Until then the accommodation contract is revocable,³¹⁶ even though security has been given to the accommodation party for the use of his name.³¹⁷ Inasmuch as an accommodation signature partakes of the nature of a power of attorney to the party accommodated, it has been questioned whether it is not revoked by the death of the accommodating party before its use. But it has been held that an accommodation acceptance is not revoked by the acceptor's death before it is negotiated;³¹⁸ and that the death of an accommodation maker before the transfer of the note is no defense against a bona fide holder for value.³¹⁹ In general, however, and in the absence of rights accruing to a bona fide holder for value, the death of an accommodation indorser or other party before the negotiation of the paper revokes his signature.³²⁰

Where the accommodation paper is taken up by, and retained in the hands of, the party accommodated after it has matured, it may be recovered in an action of trover by the accommodation party.³²¹ And if it has been paid and reissued after maturity by the payee, for

³¹⁵ *Tufts v. Shepherd*, 49 Me. 312; *Macy v. Kendall*, 33 Mo. 164. And, in the hands of a holder who has paid no value for it, it cannot be enforced. *Millis v. Barber*, 1 Mees. & W. 425. But a plea by an accommodation indorser that the holder gave no consideration for such indorsement is insufficient. *Hunter v. Wilson*, 4 Exch. 489.

³¹⁶ 1 *Daniel*, Neg. Inst. 192; 1 *Edw. Bills & N.* § 452; *Dogan v. Dubois*, 2 Rich. Eq. (S. C.) 85; *Smith v. Wyckoff*, 3 Sandf. Ch. (N. Y.) 77; *Skilding v. Warren*, 15 Johns. (N. Y.) 270; *Berkeley v. Tinsley*, 88 Va. 1001, 14 S. E. 842; *Second Nat. Bank v. Howe*, 40 Minn. 390, 42 N. W. 200. And a taker of the paper after notice of such revocation cannot recover against the accommodation acceptor, *Dogan v. Dubois*, *supra*; or indorser, *May v. Boisseau*, 8 Leigh (Va.) 164; *Skilding v. Warren*, *supra*.

³¹⁷ *May v. Boisseau*, 8 Leigh (Va.) 184.

³¹⁸ *Williams v. Bosson*, 11 Ohio, 66.

³¹⁹ *Clark v. Thayer*, 105 Mass. 216.

³²⁰ *Smith v. Wyckoff*, 3 Sandf. Ch. 94.

³²¹ *Park v. McDaniels*, 37 Vt. 594.

whose accommodation it was made, the accommodation maker has a complete defense in such payment.³²²

The availability of the accommodation character as a defense against purchasers of the paper, when it has not been issued or discounted until after maturity, will be considered hereafter.³²³

Pledge of Accommodation Paper—Diversion.

§ 475. Accommodation paper may, unless its use is restricted, be transferred in payment of an existing debt,³²⁴ or as a pledge or collateral.³²⁵ And one who takes it as such collateral for a precedent debt, and surrenders other security for it, is entitled to recover upon it as a holder for value.³²⁶ And, where a note is pledged with an accommodation indorsement to one who afterwards becomes a purchaser of it, he is entitled to recover against the accommodation indorser, even though he knew of the accommodation at the time he first took the note.³²⁷ Where, however, such paper has been transferred as a pledge or collateral, only the amount which is actually due and is secured by it can be recovered from the accommodation maker or indorser.³²⁸ And this is true also where it has been transferred as collateral for advances made at the time or afterwards.³²⁹

Where accommodation paper has been fraudulently diverted from the purpose for which it was specially made, such diversion constitutes no defense against a bona fide holder for value before matu-

³²² *Blenn v. Lyford*, 70 Me. 149; *Schultz v. Noble*, 77 Cal. 79, 19 Pac. 182.

³²³ See § 677, *infra*.

³²⁴ *Montross v. Clark*, 2 Sandf. (N. Y.) 115.

³²⁵ *Washington Bank v. Krum*, 15 Iowa, 53; *Appleton v. Donaldson*, 3 Pa. St. 386, 31 N. E. 151; *Matthews v. Rutherford*, 7 La. Ann. 225; *Miller v. Pollock*, 99 Pa. St. 202; *National Union Bank v. Todd*, 132 Pa. St. 312, 19 Atl. 218; *Hodges v. Nash*, 141 Ill. 391; *Pitts v. Foglesong*, 37 Ohio St. 676; notwithstanding the insolvency of his indorser, *Heil v. Bank*, 30 Pa. St. 136; and although the pledgee knew that it was accommodation paper, *Maitland v. Bank*, 40 Md. 540.

³²⁶ *Depeau v. Waddington*, 6 Whart. (Pa.) 219.

³²⁷ *Ransom v. Turley*, 50 Ind. 273.

³²⁸ *Atlas Bank v. Doyle*, 9 R. I. 76; *Buchanan v. Bank*, 78 Ill. 500; *Continental Nat. Bank of New York v. Bell*, 125 N. Y. 38, 25 N. E. 1070; *Berkeley v. Tinsley*, 88 Va. 1001, 14 S. E. 842.

³²⁹ *Gordon v. Boppe*, 55 N. Y. 665.

city;³³⁰ although available as such against a purchaser with notice of the diversion,³³¹ or against one who took it for a precedent debt,³³² and under suspicious circumstances.³³³ But, where a diversion is shown, the burden of proving himself a holder for value without notice is put upon the holder.³³⁴ Where one has indorsed commercial paper by way of accommodation for a specific purpose, he may file a bill in equity to prevent its diversion from that purpose, except as against a bona fide holder for value,³³⁵ or he may recover it in an action of trover.³³⁶

Accommodation a Suretyship.

§ 475a. The contract and liability of accommodation parties are, in general, inter se, those of principal and surety.³³⁷ If the accommodation party take the paper up at maturity, the party accommodated will be liable for it as a principal to a surety.³³⁸ And

³³⁰ *Goodwin v. Conklin*, 85 N. Y. 21; *Brooks v. Hey*, 23 Hun (N. Y.) 372; *Bunzel v. Maas* (Ala.) 22 South. 568; *Robertson v. Williams*, 5 Munf. (Va.) 381. And see § 1894, *infra*. And, as to the defense in general, see §§ 1803, 1804, *infra*.

³³¹ *Small v. Smith*, 1 Denio (N. Y.) 583; *People's Nat. Bank of Salem v. Clayton*, 66 Vt. 541, 29 Atl. 1020; *Vietor v. Bauer*, 70 Hun. 246, 24 N. Y. Supp. 428; *Altoona Second Nat. Bank v. Dunn*, 151 Pa. St. 228, 25 Atl. 80.

³³² *Royer v. Bank*, 83 Pa. St. 248; *United States Nat. Bank v. Ewing*, 131 N. Y. 506, 30 N. E. 501; *Ayres v. Doying*, 42 Hun. 630. And see § 465, *supra*. But his contingent liability is not such a present debt as to render his voluntary conveyance presumptively fraudulent as against the holder of the paper. *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7.

³³³ *Thompson v. Poston*, 1 Duv. (Ky.) 389, where the purchaser was a sister of the party accommodated, and took the paper for an old debt after his insolvency, with knowledge of its accommodation character.

³³⁴ *Nickerson v. Ruger*, 76 N. Y. 279; *Western Nat. Bank v. Wood*, 64 Hun. 635, 19 N. Y. Supp. 81.

³³⁵ *Comstock v. Hier*, 73 N. Y. 269.

³³⁶ *Cranch v. White*, 6 Car. & P. 767.

³³⁷ *Byers v. Coal Co.*, 106 Mass. 131; *Child v. Powder Works*, 44 N. H. 354; *Cummings v. Little*, 45 Me. 187; *Barron v. Cady*, 40 Mich. 259; *Gunnis v. Weigley*, 114 Pa. St. 191, 6 Atl. 465. See, too, §§ 901 et seq., *infra*.

³³⁸ *Burton v. Slaughter*, 26 Grat. (Va.) 914. And the drawer of a bill of exchange is liable in the same manner to an accommodation acceptor taking it up. *De Barry v. Withers*, 41 Pa. St. 356; *Martin v. Muncey*, 40 La. Ann. 190, 3 South. 640. And this liability is not changed by the fact that the note was

in some states an accommodation drawer may under such circumstances have such judgment and execution against the payee accommodated as is provided by statute for a surety against his principal, and may show by parol the relation existing between him and the payee.³³⁹ But an accommodation maker is liable as a principal maker, and not as a mere surety, to a bona fide holder;³⁴⁰ and even to the payee, where there is no improper diversion of the paper.³⁴¹ This is true also of an acceptor for the drawer's accommodation.³⁴² And an accommodation indorser is not co-surety with a surety for the principal maker.³⁴³ So, the accommodation maker of a new note is not prima facie in any relation as surety or co-surety to the accommodation indorser of a prior note which was paid off by the proceeds of his note.³⁴⁴

As to third parties, an accommodation maker, indorser, acceptor, or drawer contracts for liability subject to the same conditions as to notice, etc., that governs parties who execute the paper for valuable consideration. Thus, notice of dishonor need not be given to an accommodation maker³⁴⁵ or acceptor,³⁴⁶ and should be given to an accommodation drawer³⁴⁷ or indorser.³⁴⁸ So, no demand is necessary to hold an accommodation maker³⁴⁹ or acceptor.³⁵⁰ An accommodation indorser will not be discharged by recovery of judg-

paid out of moneys received as a gift from the principal debtor. *In re Kern's Estate*, 171 Pa. St. 55, 33 Atl. 129.

³³⁹ *Lacy v. Lofton*, 26 Ind. 324; *Carlton v. White*, 99 Ga. 384, 27 S. E. 704; Code Ga. § 2165.

³⁴⁰ *First Nat. Bank of Chittenango v. Morgan*, 6 Hun (N. Y.) 346; *Stephens v. Bank*, 88 Pa. St. 157; *Yeaton v. Bank of Alexandria*, 5 Cranch, 49.

³⁴¹ *Chafoin v. Rich*, 92 Cal. 471, 28 Pac. 488.

³⁴² He will not be discharged by the holder's discharge of the drawer, *Smith v. Knox*, 3 Esp. 46; or by taking a cognovit from the drawer, with knowledge of the acceptor's accommodation character, *Featun v. Pocock*, 5 Taunt. 193.

³⁴³ *Hanish v. Kennedy*, 106 Mich. 455, 64 N. W. 459.

³⁴⁴ *Mosser v. Criswell*, 150 Pa. St. 409, 24 Atl. 618.

³⁴⁵ *Mayer v. Thomas*, 97 Ga. 772, 25 S. E. 761; *Carlton v. White*, 99 Ga. 384, 27 S. E. 704.

³⁴⁶ See § 1211, *infra*.

³⁴⁷ See §§ 1202, 1354, *infra*.

³⁴⁸ See §§ 1205, 1354, *infra*. As to such holder he is practically a commercial indorser. *State v. Foley* (N. J. Sup.) 39 Atl. 650.

³⁴⁹ *Wallace v. Richards* (Utah) 50 Pac. 804.

³⁵⁰ *Hinkley v. Bank*, 77 Ind. 475.

ment against the maker;³⁵¹ nor by want of diligence by the holder against the maker,³⁵² or in the enforcement of collaterals held by him.³⁵³ But he will be discharged, if his character is known to the holder, by any act of the holder which releases the available assets of the principal debtor,³⁵⁴ or provides for the surrender of the note by him,³⁵⁵ or diverts the collateral held as security for the note.³⁵⁶ The effect of release and extension on accommodation parties as sureties will be considered hereafter.³⁵⁷

Accommodation—Defense, When Admissible.

§ 476. That the paper, as between other parties,—e. g. maker and payee,—was accommodation paper, is no defense on behalf of an indorser.³⁵⁸ Nor, in general, is the accommodation character of a note or indorsement any defense at suit of a holder for value;³⁵⁹ or even, in New York, at suit of one who takes it for an existing debt,³⁶⁰ or as security for an existing debt.³⁶¹

³⁵¹ *Cutler v. Parsons*, 13 App. Div. 376, 43 N. Y. Supp. 187. In this case the indorsement was afterwards renewed with full knowledge of the judgment.

³⁵² *Converse v. Cook*, 31 Hun (N. Y.) 417. So, where the accommodation party is the maker. *State Bank of Lockhaven v. Smith*, 85 Hun, 200, 32 N. Y. Supp. 999; *Hansbrough v. Gray*, 3 Grat. (Va.) 356.

³⁵³ *Allentown Nat. Bank v. Trexler*, 174 Pa. St. 497, 34 Atl. 195.

³⁵⁴ *Dunn v. Parsons*, 40 Hun (N. Y.) 77. So, an accommodation maker, by surrender of collateral. *Guild v. Butler*, 127 Mass. 386.

³⁵⁵ *Flour City Nat. Bank of Rochester v. McKay*, 86 Hun, 15, 33 N. Y. Supp. 365.

³⁵⁶ *Price Co. Bank v. McKenzie*, 91 Wis. 658, 65 N. W. 507.

³⁵⁷ See § 900 et seq., *infra*.

³⁵⁸ *Archer v. Shea*, 14 Hun (N. Y.) 493.

³⁵⁹ *Chit. Bills*, 96; *Mallet v. Thompson*, 5 Esp. 178; *Smith v. Knox*, 3 Esp. 46; *Bank of Ireland v. Beresford*, 6 Dow, 237; *Collins v. Martin*, 1 Bos. & P. 651; *Mechanics' Banking Ass'n v. New York & Saugerties White Lead Co.*, 35 N. Y. 505; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Kenworthy v. Sawyer*, 125 Mass. 28; *Davis v. Randall*, 115 Mass. 547; *Philler v. Patterson*, 168 Pa. St. 463, 32 Atl. 26; *Bernstein v. Crow*, 22 Misc. Rep. 99, 48 N. Y. Supp. 531. Even where suit is brought in the name of the accommodated payee, for want of indorsement by him. *Mathias v. Kirsch*, 87 Me. 523, 33 Atl. 19.

³⁶⁰ *Schupp v. Carpenter*, 51 N. Y. 602, affirming 49 Barb. (N. Y.) 542.

³⁶¹ *De Zeng v. Fyfe*, 1 Bosw. (N. Y.) 335; *Grocers' Bank v. Penfield*, 7 Hun (N. Y.) 279, affirmed 69 N. Y. 502. So, in Pennsylvania, *Smith v. Wachob*, 179 Pa. St. 260, 36 Atl. 221. But see, *contra*, *Cummings v. Boyd*, 83 Pa. St. 372.

And, unlike other cases where there is an actual want of consideration for the note or indorsement, accommodation paper is binding upon the accommodation party at suit of a holder for value, even though its accommodation character was known to him at the time of taking the paper, provided the paper has not been fraudulently used or diverted from its purpose with his knowledge.³⁶² And even a payee, knowing of the accommodation character of the relation existing between prior parties to the paper, can hold them liable notwithstanding that relation.³⁶³ Thus, where a bill is accepted for the accommodation of the drawer, this fact, though known to the payee, will not affect his right to recover against the acceptor.³⁶⁴ But, where the maker who has been accommodated procures the discount of the note by his own firm, recovery can only be had by the surviving partner after the maker's death by proving the

³⁶² Byles, Bills, 131; Chit. Bills, 96; 1 Daniel, Neg. Inst. 193; 1 Pars. Notes & B. 183; Story, Prom. Notes, § 194; Smith v. Knox, 3 Esp. 47; Charles v. Marsden, 1 Taunt. 224; Bank of Ireland v. Beresford, 6 Dow. 237; Fentum v. Pocock, 5 Taunt. 193, 1 Marsh. 14. See, too, Wiffen v. Roberts, 1 Esp. 261; Poplewell v. Wilson, 1 Strange, 264; Parr v. Jewell, 16 C. B. 684; Agra & Masterman's Bank v. Leighton, L. R. 2 Exch. 56; Pettigrew v. Chave, 2 Hilt. (N. Y.) 546; Brown v. Mott, 7 Johns. (N. Y.) 361; Thatcher v. Bank, 19 Mich. 196; Best v. Bank, 76 Ill. 608; Grant v. Ellicott, 7 Wend. (N. Y.) 227; Arnold v. Sprague, 34 Vt. 402; Washington Bank v. Krum, 15 Iowa, 53; Leeke v. Hancock, 76 Cal. 127, 17 Pac. 937; Miller v. Larned, 103 Ill. 562; Hodges v. Nash, 141 Ill. 391, 31 N. E. 151; Tourtelot v. Reed, 62 Minn. 384, 64 N. W. 928; Tourtelot v. Bushnell, 66 Minn. 1, 68 N. W. 104; Beall v. Electric Co., 16 Misc. Rep. 611, 38 N. Y. Supp. 527; Lincoln Nat. Bank of New York v. Butler, 16 Misc. Rep. 566, 38 N. Y. Supp. 776, reversing 14 Misc. Rep. 464, 36 N. Y. Supp. 1112; Iselin v. Bank, 16 Misc. Rep. 437, 40 N. Y. Supp. 388; National Bank v. White, 19 App. Div. 390, 46 N. Y. Supp. 555; Stewart v. Moore, 12 Phila. 225; People's Nat. Bank of Salem v. Clayton, 66 Vt. 541, 29 Atl. 1020; Greenway v. Grain Co., 29 C. C. A. 330, 85 Fed. 536; Evans v. Hardware Co. (Ark.) 45 S. W. 370; Armstrong v. Scott, 36 Fed. 63.

³⁶³ Spurgin v. McPheeters, 42 Ind. 527. But, at suit of a payee with knowledge of the relation of the parties, an accommodation acceptor may set up in his defense a payment by the drawer to the payee, applied by the latter on another indebtedness. Cook v. Lister, 13 C. B. (N. S.) 543. And in a like case an accommodation co-maker may set up against the payee an offset growing out of the same business between the principal debtor and the payee. Beechervaise v. Lewis, L. R. 7 C. P. 372.

³⁶⁴ Israel v. Ayer, 2 S. C. 344.

insufficiency of such maker's interest in the firm to satisfy the note.³⁶⁵

Again, it is no defense that commercial paper was given for accommodation at suit even of one who took it for an existing debt, and with knowledge of its accommodation character.³⁶⁶ And the fact that the holder of such paper took it with knowledge of its character does not shift from the defendant the burden of proving fraud in the paper, where that is set up in defense.³⁶⁷ An accommodation indorser is, in general, entitled to all defenses available to a surety at suit of holders with notice of the character of the paper,³⁶⁸ including subrogation to rights of the principal debtor.³⁶⁹ And this is true in equity, at least, of all accommodation parties among themselves, and against all holders having notice of their character as such.

³⁶⁵ *Patton v. Carr*, 117 N. C. 176, 23 S. E. 182.

³⁶⁶ *Montross v. Clark*, 2 Sandf. (N. Y.) 115.

³⁶⁷ *Lincoln v. Stevens*, 7 Metc. (Mass.) 529.

³⁶⁸ *Gunnis v. Weigley*, 114 Pa. St. 191, 6 Atl. 465. And see § 900 et seq., *infra*.

³⁶⁹ *McDonald Mfg. Co. v. Moran*, 52 Wis. 283, 8 N. W. 864.

III. CONSIDERATIONS OTHER THAN MONEY.

- § 477. Property Purchased.
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Property Purchased.

§ 477. The consideration for a bill or note often consists in property purchased or rights in property acquired. A note given for real estate purchased subject to a mortgage is none the less valid by reason of the mortgage, the presumption being that the equity of redemption is a valuable one.³⁷⁰ In like manner, a quitclaim for land has been held sufficient to support a note.³⁷¹ And even a quitclaim by a former and remote owner, under whose title a bill in

³⁷⁰ Hoyt v. Bradley, 27 Me. 242. So, a transfer coupled with the assumption of a mortgage not yet delivered. Fitzgerald v. Barker, 13 Mo. App. 192. So, a title in part legal and in part equitable is sufficient. Ervin v. Morris, 26 Kan. 664. But a mortgagee's right to redeem from a sheriff's sale does not proceed from his mortgagor, and will not support a note to the mortgagor payable if he redeems, Jessup v. Trout, 77 Ind. 194; especially if there is no redemption, Id.

³⁷¹ Bonney v. Smith, 17 Ill. 531; Monson v. Tripp, 81 Me. 24, 16 Atl. 327; or a deed for the payee's "right, title, and interest," Abbott v. Chase, 75 Me. 83; although the interest may afterwards prove to be of no value, Mullen v. Hawkins, 141 Ind. 363, 40 N. E. 797; but not a deed which is void, Monson v. Tripp, supra. And land transferred as security to one who gives his note for the debt of the person transferring the land is a sufficient consideration. Parsons v. Clark, 132 Mass. 569. So, a note may be made to a wife for a deed from her husband. Rutland v. Brister, 53 Miss. 683.

equity has been filed and is pending, has been held to be a good consideration for a note given by the purchaser of the land to such former owner.³⁷² So, a note given for an improvement, erected by permission on the property of a third person, and transferred to the maker of the note, has been held to be sufficiently supported by the equitable title so transferred.³⁷³ So, a note given for land, the title of which was to pass under the contract on payment of the last installment of purchase money, is upon sufficient consideration, and not dependent upon the performance of the contract.³⁷⁴ But a note given for the difference between exchanged lands and extorted on a false pretense as to the quantity of land, the maker of the note being under the necessity of procuring his deed at once in order to perform another contract on his part, is without valid consideration.³⁷⁵

Again, a note or bill for the sale of spirituous liquor is a sufficient consideration,³⁷⁶ even though it be made to a town agent who is authorized to sell, but not expressly authorized to give credit on such sale.³⁷⁷ And even a note given for the sale of whisky by a distiller, under a broker's license, and subject to a statutory penalty, is valid.³⁷⁸ So, too, a note may be given for a policy of life insurance to be issued for the value of the note, although the actual value of the note may be unknown until it is paid.³⁷⁹

So, a note may be given for the purchase of a patented article;³⁸⁰ or as collateral for goods purchased and delivered;³⁸¹ or for sale of goods at a new contract price after breach of more favorable contract by the payee;³⁸² or for the good will in a carting business;³⁸³

³⁷² *Bachelor v. Lovely*, 69 Me. 33.

³⁷³ *Washband v. Washband*, 24 Conn. 500.

³⁷⁴ *McMath v. Johnson*, 41 Miss. 439.

³⁷⁵ *Holland v. Hoyt*, 14 Mich. 238.

³⁷⁶ *Holmes v. Ebersole*, 12 Ind. 392.

³⁷⁷ *Andover v. Kendrick*, 42 N. H. 324.

³⁷⁸ *Rahter v. First Nat. Bank*, 92 Pa. St. 393.

³⁷⁹ *Franklin Life Ins. Co. v. Cardwell*, 65 Ind. 138.

³⁸⁰ *Kline v. Spahr*, 56 Ind. 296.

³⁸¹ *Fenby v. Pritchard*, 2 Sandf. (N. Y.) 151.

³⁸² *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284.

³⁸³ *Searing v. Tye*, 4 E. D. Smith (N. Y.) 197.

or for membership fees in a society;³⁸⁴ or for an initiation fee in a medical society.³⁸⁵ But not to an officer of a benevolent society for a member's initiation fee;³⁸⁶ nor for like fee to an officer of an unincorporated Masonic lodge;³⁸⁷ nor for the privilege of selling an article which was open to public sale;³⁸⁸ nor for transfer of an interest in the payee, which had no existence.³⁸⁹

Void Transfer of Property.

§ 478. A negotiable instrument has been held to be supported by a valid consideration, though given for the purchase of a grant of a ferry franchise, granted *ultra vires* by a municipal corporation;³⁹⁰ or for the assignment of a lease containing a covenant against assignment, there having been no re-entry for breach of this covenant;³⁹¹ but not for a conveyance by a married woman which is void at law, and furnishes no remedy even on the covenants contained in it;³⁹² nor for the transfer of an untransferable liquor license³⁹³ or of the payee's "legal right to cut timber," etc., the payee having no legal right of the sort.³⁹⁴ But, where a mortgage has been given in fraud of creditors, its assignment to a bona fide assignee, being sufficient to cut off such defense, is sufficient consideration for a note given for it.³⁹⁵ So, a note may be valid, though given for a deed of land which contains, by fraud or mistake, a condition avoiding the deed, if the note be paid at the time mentioned.³⁹⁶

³⁸⁴ *Society of Middlesex Husbandmen & Manufacturers v. Davis*, 3 Metc. (Mass.) 133.

³⁸⁵ *Goree v. Wilson*, 1 Bailey (S. C.) 597.

³⁸⁶ *Nash v. Russell*, 5 Barb. (N. Y.) 556.

³⁸⁷ *Nightingale v. Barney*, 4 G. Greene (Iowa) 106.

³⁸⁸ *Schroeder v. Nielson*, 39 Neb. 335, 57 N. W. 993.

³⁸⁹ *Russell v. Wright*, 98 Ala. 652, 13 South. 594.

³⁹⁰ *Carpentier v. Minturn*, 6 Lans. (N. Y.) 56.

³⁹¹ *Spear v. Fuller*, 8 N. H. 174.

³⁹² *Fowler v. Shearer*, 7 Mass. 14. And mere possession under a void conveyance is not sufficient. *Sorrells v. McHenry*, 38 Ark. 127.

³⁹³ *Strahn v. Hamilton*, 38 Ind. 57.

³⁹⁴ *Long v. Hopkins*, 50 Me. 318; *Swanger v. Mayberry*, 59 Cal. 91.

³⁹⁵ *Payson v. Whitcomb*, 15 Pick. 212.

³⁹⁶ *Hodsdon v. Smith*, 14 N. H. 41. In this case the condition was strictly

Where a note has been given for an improvement erected on public lands and a relinquishment of the payee's claim, the maker taking the government warrant in his own name is estopped from denying a sufficient consideration for the note.³⁹⁷ And in Iowa, in such case, the defense of want of consideration is prohibited by statute.³⁹⁸ And, in general, as we have seen, a note for an improvement erected on the lands of another has a sufficient consideration.³⁹⁹ But the sale of Indian lands to a citizen of the United States, being expressly prohibited by law, cannot support a note given for the purchase money.⁴⁰⁰

Questions have arisen since the emancipation of slaves in the United States as to negotiable instruments given for the hiring or purchase of slaves. Such questions fall more properly under the head of failure of consideration, to be discussed hereafter. In Texas, a note given for slave hire since the emancipation proclamation has been held valid, where the slaves had in fact performed the labor for which the note was given.⁴⁰¹ And such note has been upheld in Alabama as late as May, 1865, slavery having actually ceased at that time in that state.⁴⁰² And in Arkansas emancipation before demand made for payment of the note has been held to be no defense to a note given for the purchase of slaves.⁴⁰³

construed, and a payment after the time mentioned in the deed was held not to be the payment at such time, against which the condition was framed.

³⁹⁷ *Sherrer v. Bullock's Adm'r*, 23 Ark. 729; *Lapham v. Head*, 21 Kan. 332; *Brooks v. Hiatt*, 13 Neb. 503, 14 N. W. 480.

³⁹⁸ *Hill v. Smith*, 1 Morris (Iowa) 70.

³⁹⁹ *Freeman v. Holliday*, Id. 80.

⁴⁰⁰ *Vickroy v. Pratt*, 7 Kan. 238; *Jarvis v. Campbell*, 23 Kan. 370. But the transfer of an entry on public lands has been held sufficient in Minnesota, *Thompson v. Hanson*, 28 Minn. 484, 11 N. W. 86; but not where it had been already abandoned, *McCollum v. Edmunds*, 109 Ala. 322, 19 South. 501.

⁴⁰¹ *Tobler v. Stubblefield*, 32 Tex. 188; *Upshaw v. Booth*, 37 Tex. 125.

⁴⁰² *Leslie v. Langham's Ex'rs*, 40 Ala. 524. But see, contra, in Georgia, after adoption of the amendment to the federal constitution, *Pitts v. Allen*, 72 Ga. 69. See, too, § 534, *infra*.

⁴⁰³ *Rust v. Reives*, 24 Ark. 359.

Exchange of Notes.

§ 479. It happens not infrequently that negotiable instruments are given in exchange for other commercial paper, either by way of accommodation or for the purchase of such paper. In either case the commercial paper given forms a sufficient consideration for that which is received in exchange.⁴⁰⁴ This is true even of a note given by the maker to the payee for the payee's notes of a different amount.⁴⁰⁵ And a note thus obtained in exchange for another may be sold at a discount by the payee without usury.⁴⁰⁶ So, the exchange of checks furnishes a sufficient consideration, each for the other.⁴⁰⁷ And in an exchange of notes neither maker is a mere surety for the other.⁴⁰⁸

So, if a bill or note is given for an open letter of credit, this is a

⁴⁰⁴ Byles, Bills, 127; Chit. Bills, 87; Cowley v. Dunlop, 7 Term R. 565; Buckler v. Buttivant, 3 East, 72; Rose v. Sims, 1 Barn. & Adol. 521; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46; Kern's Estate, 171 Pa. St. 55, 33 Atl. 129; Farber v. Iron Co., 140 Ind. 54, 39 N. E. 249; Mickles v. Colvin, 4 Barb. (N. Y.) 304; Williams v. Banks, 11 Md. 198; Whittier v. Eager, 1 Allen (Mass.) 499; Rolfe v. Caslon, 2 H. Bl. 571; Kent v. Lowen, 1 Campb. 179; Hornblower v. Proud, 2 Barn. & Ald. 327; Spooner v. Gardiner, Ryan & M. 84; Savage v. Ball, 17 N. J. Eq. 142; Newman v. Frost, 52 N. Y. 422; Bassett v. Bassett, 55 Barb. (N. Y.) 505; Cobb v. Titus, 10 N. Y. 198; Backus v. Spaulding, 116 Mass. 418; State Bank of Lock Haven v. Smith, 155 N. Y. 185, 49 N. E. 680; Wooster v. Jenkins, 3 Denio (N. Y.) 187; Byrne v. Schwing, 6 B. Mon. (Ky.) 199; Eaton v. Carey, 10 Pick. (Mass.) 211; or for an acceptance, Seymour v. Lumber Co., 7 C. C. A. 593, 58 Fed. 957. And it makes no difference that the note received in exchange was returned unused, unless the note in question was intended as a mere receipt for the note returned. Trustees of Iowa College v. Hill, 12 Iowa, 462. See, too, § 451, *supra*.

⁴⁰⁵ Higginson v. Gray, 6 Metc. (Mass.) 212. But it will not constitute the buyer a holder for value, where he gives his own note for a smaller sum, payable when the first note is collected. Bird v. Harville, 33 Ga. 459.

⁴⁰⁶ Rice v. Mather, 3 Wend. (N. Y.) 62; Cameron v. Chappell, 24 Wend. (N. Y.) 94. But this is not true of a note given for the accommodation of the payee with security furnished on his part to the maker in an agreement for transfer of books and accounts. Dowe v. Schutt, 2 Denio (N. Y.) 621.

⁴⁰⁷ Rankin v. Knight, 1 Cin. R. 515.

⁴⁰⁸ Stickney v. Mohler, 19 Md. 506. Nor is a bill taken in such exchange accommodation paper, but it may be proved as a debt in bankruptcy. In re London, B. & M. Bank, 9 Ch. App. 686.

sufficient consideration, without any proof of payment made on the letter.⁴⁰⁹ So, a partner may give a valid note to his firm for bills receivable of the firm transferred to him.⁴¹⁰ So, an unaccepted draft of a third person is a sufficient consideration for the discount of a note.⁴¹¹ So, the transfer of a draft and the surrender of another note of the maker furnish a good consideration for a note.⁴¹²

And the giving of a note by the purchaser of a negotiable instrument is a sufficient consideration to make him a bona fide holder for value.⁴¹³ So, the giving of part note and part cash,⁴¹⁴ or of the purchaser's own draft.⁴¹⁵ So, too, the surrender of a note of the payee for another note transferred by him makes the purchaser of such latter note a holder for value.⁴¹⁶

Contracts of Exchange—How Far Independent.

§ 480. In an exchange of commercial paper, each instrument forms an independent contract, and is, as we have seen, a sufficient consideration for the other.⁴¹⁷ And, where a bill of exchange has been sold and actually delivered, an action lies for the price agreed on, irrespective of the question whether the bill is paid or not.⁴¹⁸ So, an acceptance, although rendered worthless by the acceptor's subsequent insolvency, is a valid consideration for a transfer of the drawer's property given for the original acceptance, or to secure it,

⁴⁰⁹ *Duncan v. Gilbert*, 29 N. J. Law, 521.

⁴¹⁰ *Leonard v. Robbins*, 13 Allen (Mass.) 217.

⁴¹¹ *White v. Springfield Bank*, 3 Sandf. (N. Y.) 222.

⁴¹² *First Nat. Bank of Whitehall v. Tisdale*, 84 N. Y. 655; *Nickerson v. Ruger*, Id. 675.

⁴¹³ *Odell v. Greenly*, 4 Duer (N. Y.) 358.

⁴¹⁴ *Adams v. Soule*, 33 Vt. 538; *Luke v. Fisher*, 10 Cush. (Mass.) 271.

⁴¹⁵ *Greenwood v. Lowe*, 7 La. Ann. 197.

⁴¹⁶ *Bacon v. Holloway*, 2 E. D. Smith (N. Y.) 159; *Baldwin v. Van Deusen*, 37 N. Y. 487. See, too, *First Nat. Bank of Whitehall v. Tisdale*, 84 N. Y. 655, where surrender of the maker's own note was held to be sufficient consideration for a second note given to take it up. But this would not be so if the original note was without consideration, *Mason v. Jordan*, 13 R. I. 193; or if the signature of the other maker on the original note was forged, *Stratton v. McMakin*, 84 Ky. 641.

⁴¹⁷ *Dockray v. Dunn*, 37 Me. 442.

⁴¹⁸ *Forward v. Harris*, 30 Barb. (N. Y.) 338; *Newmarket Sav. Bank v. Hanson* (N. H.) 32 Atl. 774.

and held by the acceptor's assignee.⁴¹⁹ Although, however, exchange notes form independent contracts, a note received by the defendant, and not paid, may be set off in an action on the other note between the original parties.⁴²⁰ But, if a note is made as collateral for an acceptance to be afterwards given by the payee, it becomes good only when the bill has been accepted as agreed.⁴²¹ And in Louisiana an acceptance for the benefit of A., given in consideration of an accommodation acceptance by him, is without consideration, unless the latter acceptance be paid by A.⁴²² So, in Illinois, if a note is given for a draft under an express condition for a release in case of nonpayment of the draft, the contracts are rendered dependent upon one another, and no collection of the note can be made if the draft be not paid.⁴²³

Consideration—Other Agreement.

§ 481. Again, a negotiable instrument may be founded upon an agreement of a different character, and such agreement, if lawful, will be a sufficient consideration for it.⁴²⁴ In such case the validity of the negotiable instrument is not dependent upon the performance of the agreement which forms its consideration.⁴²⁵ Thus, the agreement for delivery of a deed is sufficient consideration for a note;⁴²⁶ or even a contract to convey land which the payee supposes erroneously to be his property.⁴²⁷ And, if such agreement to convey land is for a conveyance on full payment of purchase money, it still forms

⁴¹⁹ *Holbrook v. Allen*, 4 Fla. 87.

⁴²⁰ *Backus v. Spaulding*, 116 Mass. 418. And it is properly offered as a set-off, and not by way of failure of consideration. *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46.

⁴²¹ *Carson v. Hill*, 1 McMul. (S. C.) 76.

⁴²² *Shannon v. Langhorn*, 9 La. Ann. 526.

⁴²³ *Hall v. Henderson*, 84 Ill. 611.

⁴²⁴ *Myers v. Phillips*, 7 Gray (Mass.) 508. But not so, a nugatory agreement to perform a legal obligation, e. g. to take up his own note or indorsement. *Manhattan Brass Co. v. Gilman*, 20 Misc. Rep. 690, 46 N. Y. Supp. 685.

⁴²⁵ *Munroe v. Bordier*, 8 C. B. 862; *Watson v. Russell*, 3 Best. & S. 34; *Jackman v. Doland*, 116 Mass. 550; *Waterhouse v. Kendall*, 11 Cush. (Mass.) 128; *Traver v. Stevens*, Id. 167.

⁴²⁶ *Carman v. Pultz*, 21 N. Y. 547.

⁴²⁷ *Trask v. Vinson*, 20 Pick. (Mass.) 105.

a sufficient consideration for the note given, and the note may be sued before delivery of the deed.⁴²⁸ And a note given for such a contract for land will support an action without reference to the title to the land,⁴²⁹ and is valid, even though the land belong at the time of making the contract to some other person, it being afterwards conveyed to the payee.⁴³⁰ So, a parol agreement to convey land will support a note given for it.⁴³¹

And, where a note is given to a banking corporation for a deed to be afterward delivered, it has been held that an assignee of the bank may make a tender of the deed.⁴³² And an agreement by one of two partners purchasing lands in foreclosure of a mortgage has been held sufficient to support a note given for the whole mortgage debt, although it exceeds in amount the value of the land.⁴³³ And a check given for difference in value in an exchange of lands is valid, although supported only by a verbal agreement for the exchange. And in such case the burden of showing a failure of consideration rests on the maker.⁴³⁴ A promise, however, by the owner of a lot, to build an hotel upon it, made to one having no interest in the matter except as an inhabitant of the town where the lot was, is not a sufficient consideration for the extension by him of a note of the promisor.⁴³⁵

Other instances of an executory contract forming an independent consideration for a note, not rendering the note conditional on the performance of the contract, are a policy of insurance;⁴³⁶ an agree-

⁴²⁸ *Daniels v. Stone*, 6 Blackf. (Ind.) 450; *Chapman v. Eddy*, 13 Vt. 205.

⁴²⁹ *Guthrie v. Jones*, 1 Rice (S. C.) 444.

⁴³⁰ *Trask v. Vinson*, 20 Pick. (Mass.) 105.

⁴³¹ *Schierman v. Beckett*, 88 Ind. 52. At most, it is only voidable, and cannot be set up as a defense against a bona fide holder. *Ferriss v. Tavel*, 87 Tenn. 386, 11 S. W. 93. But, to the effect that a verbal contract which is void by the statute of frauds cannot be a valid consideration for a note, see *Cameron v. Tompkins*, 72 Hun, 113, 25 N. Y. Supp. 305.

⁴³² *Bank of Salem v. Caldwell*, 16 Ind. 469.

⁴³³ *Myers v. Phillips*, 7 Gray (Mass.) 508. And the fact that the agreement fails to bind a partner, who did not sign it, will be no defense after its acceptance by the maker of the note.

⁴³⁴ *Raubitschek v. Blank*, 80 N. Y. 478.

⁴³⁵ *Hogan v. Crawford*, 31 Tex. 633.

⁴³⁶ *Robinson v. Insurance Co.*, 51 Ark. 441, 11 S. W. 686, although the policy was by its terms to be void if the premium note was not paid at maturity,

ment to pay money;⁴³⁷ or to assume a debt;⁴³⁸ or sell goods;⁴³⁹ or to perform certain work;⁴⁴⁰ or to execute a bail bond for the maker's son;⁴⁴¹ or to provide for the maintenance of a sister-in-law;⁴⁴² or to purchase the payee's life estate at a public sale to be procured by her.⁴⁴³ So, an agreement to unite with co-legatees in resisting the probate of a will, and also to release a legacy, and to compromise a claim against the testator's estate, is a sufficient consideration for a note, as indeed the release or compromise would be of itself.⁴⁴⁴ So, a note given for a promise of marriage is valid,⁴⁴⁵ if given before and in consideration of marriage.⁴⁴⁶ But a note given after marriage for the use of the wife in consideration of her living with her husband is not valid.⁴⁴⁷ And an agreement for arbitration, made by a married woman, and not binding upon her, furnishes no consideration for a note given by her to abide the issue of the arbitration.⁴⁴⁸ A pledge to abstain from intoxicating liquor has been held to be a sufficient consideration for a note.⁴⁴⁹ So, an agreement to pay a debt of the maker of the note, whether performed or not.⁴⁵⁰

or was to take effect only on payment of the note, *Marskey v. Turner*, 81 Mich. 62, 45 N. W. 644; but not if it was to be without effect unless the premium was paid in cash. *Dunham v. Morse*, 158 Mass. 132, 32 N. E. 1116.

⁴³⁷ *Siegel v. Bank*, 131 Ill. 569, 23 N. E. 417. But not a promise to pay money which the promisor already owed, although he was an insolvent. *Bunker v. Taylor* (S. D.) 74 N. W. 450.

⁴³⁸ *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657.

⁴³⁹ *Hawley v. Bingham*, 6 Or. 76. So, with indorsement that the payee should pay if the goods were not delivered. *Maas v. Chatfield*, 90 N. Y. 303.

⁴⁴⁰ *Walker v. Millard*, 29 N. Y. 375; *Waterhouse v. Kendall*, 11 Cush. (Mass.) 128.

⁴⁴¹ *Davis v. Meisner*, 127 Ind. 343, 26 N. E. 829, though executed after the son's release.

⁴⁴² *Cotton v. Graham*, 84 Ky. 672, 2 S. W. 647.

⁴⁴³ *Smith v. Meek*, 85 Ky. 46, 2 S. W. 650.

⁴⁴⁴ *Austell v. Rice*, 5 Ga. 472.

⁴⁴⁵ *Banfield v. Rumsey*, 2 Hun (N. Y.) 112; or for a breach of promise, *Dean v. Skiff*, 128 Mass. 174.

⁴⁴⁶ *Wright v. Wright*, 54 N. Y. 437, affirming 59 Barb. (N. Y.) 505. So, a daughter's marriage is sufficient consideration for a deed from her father to her. *Verplank v. Sterry*, 12 Johns. (N. Y.) 536.

⁴⁴⁷ *Roberts v. Frisby*, 38 Tex. 219.

⁴⁴⁸ *Rumsey v. Leek*, 5 Wend. (N. Y.) 20.

⁴⁴⁹ *Lindell v. Rokes*, 60 Mo. 249.

⁴⁵⁰ *Turner v. Rogers*, 121 Mass. 12; *Hubon v. Park*, 116 Mass. 541; or to

So, an agreement by an accommodation indorser to take up the notes indorsed by him will support a new note made to him by the person accommodated.⁴⁵¹ So, an agreement to discharge a debtor will be supported by a similar agreement of other creditors.⁴⁵²

But an agreement to support the payee may be insufficient to render an indorsement made by him valid as against his other creditors.⁴⁵³ And a note by a father to his son in satisfaction of a verbal promise to give him some land if he would not go away has been held to be without consideration.⁴⁵⁴

Consideration—Contract—Services.

§ 482. The consideration of a bill or note is often some agreement for service, or for the doing of something for the maker, and such agreement is a sufficient consideration, if lawful. Even a note given to a trustee for the support of the maker's wife, in order to enable the maker to obtain a divorce from the legislature, has been held sufficient.⁴⁵⁵ So, a promise to name a child after the maker.† So, a promise to emancipate a slave, made by the payee of a note, has been held to be a sufficient consideration for it, although he was not the sole owner of the slave.⁴⁵⁶ So, an agreement as to the location

pay another note of the indorser, for his indorsement, *Proctor v. Baldwin*, 82 Ind. 370.

⁴⁵¹ *Cushing v. Gore*, 15 Mass. 69.

⁴⁵² *Paddleford v. Thacher*, 48 Vt. 574.

⁴⁵³ *Cross v. Brown*, 51 N. H. 486. But such a promise, coupled with the naming of a child by the payee after the maker, is sufficient consideration for a note. *Wolford v. Powers*, 85 Ind. 294. So, a note to a mother for the support of her bastard child. *Allyn v. Allyn*, 108 Ind. 327, 9 N. E. 279. So, in general, a note for the maintenance of the maker's minor child. *Clayton v. Whitaker*, 68 Iowa, 412, 27 N. W. 296.

⁴⁵⁴ *Head v. Baldwin*, 83 Ala. 132, 3 South. 293; *Hathaway v. Roll*, 81 Ind. 567.

⁴⁵⁵ *Day v. Cutler*, 22 Conn. 625. So, a note given by a husband to his wife for the wife's return to her husband, and in settlement of a divorce suit brought by her, has been held to be sufficient. *Adams v. Adams*, 24 Hun (N. Y.) 401. But see, as to this, *Van Order v. Van Order*, 8 Hun (N. Y.) 315; *Phillips v. Meyers*, 82 Ill. 67.

† *Eaton v. Libbey*, 165 Mass. 218, 42 N. E. 1127.

⁴⁵⁶ *Thompson v. Thompson*, 4 B. Mon. (Ky.) 502.

of a state reform school;⁴⁵⁷ or by a railroad company for a change of location, such change not being against the public interest.⁴⁵⁸ And, in like manner, a note may be given by a municipal corporation to aid in the construction of a railroad; and, if the corporation has power to make the note, the construction of the road will be a sufficient consideration for it.⁴⁵⁹ And it has even been held that a note given to a corporation by a stockholder to enable the corporation to certify that its stock is paid up is for sufficient consideration, although there was an understanding for the return of such note after the certificate had been made.⁴⁶⁰

But past services which have been rendered gratuitously, as well as future services which are not so stipulated for as to become obligatory, are not a sufficient consideration for a bill or note.⁴⁶¹ And it has been held that an executory contract, to be performed in future, renders the paper given for it conditional, and is therefore insufficient.⁴⁶²

But a note given to an attorney for services as counsel,⁴⁶³ or for legal instruction, is valid.⁴⁶⁴ So, information as to witnesses in a suit, brought by the maker of a note, is a sufficient consideration for the note.⁴⁶⁵ Likewise, information as to an outstanding title to real estate, adverse to the person in possession, will uphold a note

⁴⁵⁷ *Wisner v. McBride*, 49 Iowa, 220.

⁴⁵⁸ *First Nat. Bank of Cedar Rapids v. Hendrie*, 49 Iowa, 402.

⁴⁵⁹ *Wright v. Irwin*, 35 Mich. 347.

⁴⁶⁰ *Cowles v. Gridley*, 24 Barb. (N. Y.) 301. So, too, a note to a bank by its directors to insure its solvency. *Dykman v. Keeney*, 16 App. Div. 131, 45 N. Y. Supp. 137.

⁴⁶¹ *Hulse v. Hulse*, 17 C. B. 711; *Fuller v. Lambert*, 78 Me. 325. So, as a gratuity for services already paid for. *Holland v. Barnes*, 53 Ala. 83. But a note may be given for valuable services already rendered,—e. g. assistance in maker's lawsuit, *Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106, and 4 N. E. 303; or for subsequent valuable services rendered without a binding prior agreement, *Miller v. Mackenzie*, 95 N. Y. 575. As to valuation of family services, see *Price v. Jones*, 105 Ind. 543, 5 N. E. 683.

⁴⁶² *Drury v. Macaulay*, 16 Mees. & W. 146.

⁴⁶³ Even where such services would not sustain an action. *Mowat v. Brown*, 19 Fed. 87.

⁴⁶⁴ *Knowles v. Parker*, 7 Metc. (Mass.) 30. But an agreement to cure a sick man by "conjuring" is not sufficient. *Cooper v. Livingston*, 19 Fla. 684.

⁴⁶⁵ *Chandler v. Mason*, 2 Vt. 193.

given for it by him.⁴⁶⁶ So, where an agent sells goods upon a *del credere* commission, a note given him for his commissions by the buyer of the goods is valid.⁴⁶⁷ So, a note given to a widow for services rendered by her before her husband's death in expectation of payment.⁴⁶⁸ And a note by an employer payable at his death to his employé is sufficient, although given only in consideration of a natural obligation for services rendered.⁴⁶⁹ Even a note given to a bank president in consideration of his resigning his office has been held valid; and that, notwithstanding an unperformed agreement made by him before his election to resign on request.⁴⁷⁰ But, if the service has been already paid for, it will form no consideration for a further promise. Thus, service in obtaining land warrants already paid for will not support a note subsequently extorted by the agent as a condition for giving the maker possession of the warrants.⁴⁷¹

It has been debated whether, as a question of public policy, services rendered in obtaining a pardon for one who has been convicted of crime are sufficient to support a valid note given therefor. But it seems that such services are lawful and sufficient consideration for a note.⁴⁷² Especially where they have been rendered with the object of preventing the execution of a prisoner by an unlawful military court.⁴⁷³ But services as a lobbyist in procuring legislation are against public policy, and are not sufficient consideration for negotiable paper or other contracts.⁴⁷⁴ As to other services of this and more doubtful character, questions more generally arise and

⁴⁶⁶ *Lucas v. Pico*, 55 Cal. 126.

⁴⁶⁷ *Eastman v. Brown*, 32 Ill. 53. See, too, *Barcus v. Elliott*, 95 Ind. 601. So, for the agency of a patent, *Burrill v. Parsons*, 71 Me. 282.

⁴⁶⁸ *Easton v. Easton*, 112 Mass. 438, although there may have been a different agreement with the husband as to compensation.

⁴⁶⁹ *Barthe v. Succession of Lacroix*, 29 La. Ann. 326.

⁴⁷⁰ *Peck v. Requa*, 13 Gray (Mass.) 407.

⁴⁷¹ *White v. Heylman*, 34 Pa. St. 142.

⁴⁷² *Meadow v. Bird*, 22 Ga. 246; *McGill v. Burnett*, 7 J. J. Marsh. (Ky.) 640. But see *Norman v. Cole*, 3 Esp. 253.

⁴⁷³ *Thompson v. Wharton*, 7 Bush. (Ky.) 563. In this case it is said of the court in question: "Its sentence was a nullity, and the infliction of punishment upon the prisoner under such sentence would have been not only unwarranted, but in direct violation of the laws of Kentucky."

⁴⁷⁴ *Marshall v. Railroad Co.*, 16 How. 314, 334; *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315. And see section 499, *infra*.

are more appropriately treated in connection with the subject of illegality of consideration.

Consideration—Release of Liability.

§ 483. Another consideration similar to that of money due or loaned is a liability already incurred. Thus, a valid note may be given for a release from damages claimed against the maker for an assault instigated by him,⁴⁷⁵ or for an assault made by him. And it will not render the note void that the amount of such damage is excessive.⁴⁷⁶ So, a note may be given for an unreasonable delay by the maker in performing a promise of marriage;⁴⁷⁷ or in settlement of an action for breach of warranty.⁴⁷⁸ So, if a note is given contemporaneously with an agreement, and on the condition that it shall be destroyed if the agreement be performed, the satisfaction for the breach of agreement, constituting a bar to a suit on it, is a sufficient consideration to support the note.⁴⁷⁹

A joinder by the wife in her husband's deed, thereby releasing her interest, is sufficient consideration for a note by him to her.⁴⁸⁰ And where notes have been given for land purchased, and the signature of the grantor's wife was wanting in the deed, this defect is a sufficient consideration for an agreement on the grantor's part to cancel one note and pay the others.⁴⁸¹ So, the release of a right to avoid a compromise, which was obtained by false representations, is sufficient to support a note given for the balance due on the debt.⁴⁸²

⁴⁷⁵ *Walbridge v. Arnold*, 21 Conn. 425. But the tort of a third person is not sufficient of itself. *Conney v. Macfarlane*, 97 Pa. St. 361.

⁴⁷⁶ *Whitenack v. Ten Eyck*, 3 N. J. Eq. 249; or even that the payee's right to recover interest be questioned, *Parker v. Enslow*, 102 Ill. 272.

⁴⁷⁷ *Prescott v. Ward*, 10 Allen (Mass.) 203. So, too, though made under threats short of legal duress. *Barrett v. Mahnken* (Wyo.) 48 Pac. 202.

⁴⁷⁸ *Lyons v. Stephens*, 45 Ga. 141. In this case the note was for release of damages for breach of warranty in the sale of a slave, and was distinguished from a note for the price of the slave, which would have been illegal by statute. So a note for breach of a building contract is valid. *Byington v. Simpson*, 134 Mass. 145. And, in general, for the discontinuance of a pending action. *Jones v. Rittenhouse*, 57 Ind. 348.

⁴⁷⁹ *Moody v. Leavitt*, 2 N. H. 171.

⁴⁸⁰ *Graves v. Davenport*, 50 Fed. 881.

⁴⁸¹ *Friermood v. Rouser's Adm'r*, 17 Ind. 461.

⁴⁸² *Crans v. Hunter*, 28 N. Y. 389. So, a mortgagee's forbearing to contest

So, where money has been paid on an illegal contract, the rescission of the contract is sufficient consideration for a note given for the return of the money.⁴⁸³ But a note given for a compromise among the maker's creditors which is not carried out is without consideration.⁴⁸⁴

§ 484. — The withdrawal of a caveat to a will by an heir is, in like manner, sufficient consideration for a promise by a devisee named in the will.⁴⁸⁵ So, the release of an attachment is sufficient consideration for a note;⁴⁸⁶ or the stay of an ejectment suit and writ of restitution.⁴⁸⁷ So, the release of the maker's son from arrest on a *capias*.⁴⁸⁸ So, the release of a judgment, although the sheriff had paid it, and taken an assignment of it to escape liability for his laches on the execution, and the note was given to him.⁴⁸⁹ So, a note given for half of the amount of a judgment recovered against the maker and others, on a receipt for half of the judgment, is for a sufficient consideration.⁴⁹⁰ But where a note by one of seven joint judgment debtors was made in escrow, to be delivered with other securities to the judgment creditor for a release of the judgment, and was delivered to such creditor without the other securities, and without obtaining the release, it is invalid for want of consideration.⁴⁹¹

Again, the discontinuance of supplementary proceedings and payment of the judgment is sufficient consideration.⁴⁹² So, a release

an administrator's sale of the mortgaged premises is a valid consideration. *Bender v. Pryor*, 31 Tex. 341.

⁴⁸³ *Lea v. Cassen*, 61 Ala. 312.

⁴⁸⁴ *Ruggles v. Swanwick*, 6 Minn. 526 (Gil. 365).

⁴⁸⁵ *Seaman v. Seaman*, 12 Wend. (N. Y.) 381. But the withdrawal of a caveat filed to an application for a public road, being a proceeding of a public character, has been held not to be a legal consideration for a note. *Smith v. Applegate*, 23 N. J. Law, 352.

⁴⁸⁶ *Hackett v. Pickering*, 5 N. H. 19. So, a release of a possible defense to an attachment. *First Nat. Bank of New York v. Morris*, 1 Hun (N. Y.) 680.

⁴⁸⁷ *Davis v. Rice*, 88 Ala. 388, 6 South. 751.

⁴⁸⁸ *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714.

⁴⁸⁹ *Brown v. Ladd*, 144 Mass. 310, 10 N. E. 839. So, though paid by the sheriff to relieve himself from laches, and transferred to him. *Sternbergh v. Provoost*, 13 Barb. (N. Y.) 365.

⁴⁹⁰ *McClees v. Burt*, 5 Mete. (Mass.) 198.

⁴⁹¹ *Mickles v. Colvin*, 4 Barb. (N. Y.) 304.

⁴⁹² *Boyd v. Cummings*, 17 N. Y. 101.

from arrest is sufficient consideration for a note given to the plaintiff;⁴⁹³ or given in such case to an arbitrator, subject to his award, the arbitrator afterwards awarding and transferring the note to the plaintiff.⁴⁹⁴ So, too, the discontinuance of a divorce proceeding.⁴⁹⁵

Other sufficient considerations for a note are a release of dower;⁴⁹⁶ or right of homestead;⁴⁹⁷ or of a tax title;⁴⁹⁸ or a future and contingent claim to land.⁴⁹⁹ So, a release of articles of apprenticeship;⁵⁰⁰ or of the insurance clause in a mortgage;⁵⁰¹ or of a right of action for an overdrawing of account.⁵⁰²

Discontinuance of Bastardy Proceedings.

§ 485. The support of a bastard child is a good consideration for a note given by the father to the mother of the child.⁵⁰³ So, the double consideration of the child's support and the prevention of proceedings against the father.⁵⁰⁴ And the compromise of such proceedings is of itself sufficient consideration for a note by the father.⁵⁰⁵ So, too, the damages in such a proceeding and indemnity against further trouble.⁵⁰⁶

⁴⁹³ *Waterman v. Barratt*, 4 Har. (Del.) 311.

⁴⁹⁴ *Shephard v. Watrous*, 3 Caines (N. Y.) 166.

⁴⁹⁵ *Adams v. Adams*, 91 N. Y. 381, affirming 24 Hun (N. Y.) 401.

⁴⁹⁶ Notwithstanding a subsequent divorce for adultery, *Nichols v. Nichols*, 136 Mass. 256; and even though made after divorce granted, in pursuance of a previous agreement, *Chapin v. Chapin*, 135 Mass. 393.

⁴⁹⁷ *McCabe v. Caner*, 68 Mich. 182, 35 N. W. 901; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271.

⁴⁹⁸ *Perkins v. Trink*, 30 Minn. 241, 15 N. W. 115.

⁴⁹⁹ *Brooks v. Wage*, 85 Wis. 12, 54 N. W. 997.

⁵⁰⁰ *Crombie v. McGrath*, 139 Mass. 550, 2 N. E. 100.

⁵⁰¹ *Farmer v. Perry*, 70 Iowa, 358, 30 N. W. 752.

⁵⁰² And such release with a surrender of collateral will constitute a bona fide holder "for value." *Tradesmen's Nat. Bank v. Looney* (Tenn. Sup.) 42 S. W. 149.

⁵⁰³ *Hook v. Pratt*, 14 Hun (N. Y.) 396; *Hook v. Pratt*, 78 N. Y. 371.

⁵⁰⁴ *Hays v. McFarlan*, 32 Ga. 699; *Jackson v. Finney*, 33 Ga. 512; *Burgen v. Straughan*, 7 J. J. Marsh. (Ky.) 583; *Medcalf v. Brown*, 77 Ind. 476; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

⁵⁰⁵ *Haven v. Hobbs*, 1 Vt. 238; *Robinson v. Crenshaw*, 2 Stew. & P. 176; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812. So, too, *Merritt v. Fleming*, 42 Ala. 234, although the child was afterwards stillborn.

⁵⁰⁶ *Taylor v. Dansby*, 42 Mich. 82, 3 N. W. 267.

But, while a note given in settlement of a bastardy proceeding is for sufficient consideration, it is otherwise with a note given to the mother of the child in settlement of the seduction, for which she had no right of action.⁵⁰⁷ The sufficiency of a note given in settlement of a bastardy proceeding is not affected by the fact that the town afterwards required bonds of the father for the support of the child.⁵⁰⁸ Nor is such note affected by the subsequent death of the child.⁵⁰⁹ It has been held also that the discontinuance of bastardy proceedings is sufficient consideration for a note by the putative father of the child to the father of the girl;⁵¹⁰ but not to a public officer without her consent.⁵¹¹

Consideration—Compromise of Doubtful Claim.

§ 486. It is not uncommon that a disputed claim is compromised by a bill or note, and such compromise even of a doubtful claim is a sufficient consideration for the instrument,⁵¹² whether the claim is good or not.⁵¹³ So, the compromise of a doubtful claim against an estate together with forbearance to bring suit is a good consideration for a note by a legatee.⁵¹⁴ The sufficiency of such considera-

⁵⁰⁷ *Heaps v. Dunham*, 95 Ill. 583; *Cline v. Templeton*, 78 Ky. 550.

⁵⁰⁸ *Knight v. Priest*, 2 Vt. 507; *Maxwell v. Campbell*, 8 Ohio St. 265.

⁵⁰⁹ *Maxwell v. Campbell*, *supra*. Nor a note for release of father and support of child, *Eaton v. Burns*, 31 Ind. 390; although it might be otherwise if the note were given for the child's support only, *Harter v. Johnson*, 16 Ind. 271.

⁵¹⁰ *Cutter v. Collins*, 12 Cush. (Mass.) 233.

⁵¹¹ *Wheelwright v. Sylvester*, 4 Allen (Mass.) 59.

⁵¹² *Byles*, Bills, 129; *Cook v. Wright*, 30 L. J. Q. B. 321, 1 Best & S. 559; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Longridge v. Dorville*, 5 Barn. & Ald. 117; *Boone v. Boone*, 58 Miss. 822; *Foster v. Metts*, 55 Miss. 77; *Zane v. Zane*, 6 Munf. (Va.) 406; *Richardson v. Comstock*, 21 Ark. 69; *Stephens v. Spiers*, 25 Mo. 386; *French v. French*, 84 Iowa, 655, 51 N. W. 145; *Housatonic Nat. Bank v. Foster*, 85 Hun, 376, 32 N. Y. Supp. 1031; *Rowe v. Barnes*, 101 Iowa, 302, 70 N. W. 197; *Bent v. Weston*, 167 Mass. 529, 46 N. E. 386; *Rains v. Lee* (Ky.) 36 S. W. 176.

⁵¹³ *Keefe v. Vogle*, 36 Iowa, 87. So, notes given to take up other notes for a 20-year market lease, it being a question whether the corporation could give such lease or not. *Northern Liberty Market Co. v. Kelly*, 113 U. S. 199, 5 Sup. Ct. 422.

⁵¹⁴ *Anstell v. Rice*, 5 Ga. 472.

tion is irrespective of the result to which the claim, if not compromised, would have led.⁵¹⁵ And it has been held in England that moral or honorable obligations are sufficient consideration for such paper.⁵¹⁶ It is not necessary to the validity of a consideration arising from compromise of a claim that it should be in suit, or that a suit should be threatened; but, if the claim is illegal and wholly unfounded, it can be no consideration for a valid note.⁵¹⁷

Release of Claims Barred by Statute.

§ 487. A valid note may, however, be given for a claim which cannot be prosecuted by reason of the statute of limitations or other defense of the sort. Thus, a debt barred by the statute of limitations is a sufficient consideration for a bill or note,⁵¹⁸ although the maker may not at the time of giving the note know that the debt is barred.⁵¹⁹ And in Louisiana a debt so barred is sufficient consid-

⁵¹⁵ *Russell v. Cook*, 3 Hill (N. Y.) 504; *Taylor v. Patrick*, 1 Bibb (Ky.) 168. But the maker of the note may show that he was not liable at all for a disputed injury to land for which the note was given. *Gunning v. Royal*, 59 Miss. 45.

⁵¹⁶ *Chit. Bills*, 87; *Hawkes v. Saunders*, Cowp. 290; *Lee v. Muggeridge*, 5 Taunt. 36; *Gibbs v. Merrill*, 3 Taunt. 311. So, an equitable obligation to pay capitalized interest. *Hatheway v. Meads* (Or.) 19 Cent. Law J. 237.

⁵¹⁷ *Tucker v. Ronk*, 43 Iowa, 80; *Sullivan v. Collins*, 18 Iowa, 228; *Ormsbee v. Howe*, 54 Vt. 182; *Duck v. Antle* (Okl.) 47 Pac. 1056. And, if it is partly invalid, the note will be void pro tanto. *Briscoe v. Kinealy*, 8 Mo. App. 76. So, an account stated, including a fraudulent overcharge. *Dickinson v. Lewis*, 34 Ala. 638. So, where the maker's name has been signed to a note without his authority, this constitutes no consideration for his subsequent promise to pay it. *Owsley v. Phillips*, 78 Ky. 517. So, if a debt has been satisfied, the surrender of a note and cancellation of a mortgage given for it are no consideration for a new note, although the payee claimed that the former one had not been paid. *Smith v. Boruff*, 75 Ind. 412. But it is sufficient if the claim be valid, though represented by a note that is void. *Rome Sav. Bank v. Kramer*, 32 Hun, 270.

⁵¹⁸ *Chit. Bills*, 87; *Wennall v. Adney*, 3 Bos. & P. 249; *Eastwood v. Kenyon*, 11 Adol. & E. 438; *Hyleing v. Hastings*, 1 Ld. Raym. 389; *Dean v. Crane*, 6 Mod. 309; *La Touche v. La Touche*, 3 Hurl. & C. 576; *Way v. Sperry*, 6 Cush. (Mass.) 238; *Giddings v. Giddings*, 51 Vt. 227; *McGrath v. Barnes*, 13 S. C. 328. A payment of such debt cannot be recovered back. *Hubbard v. City of Hickman*, 4 Bush (Ky.) 204.

⁵¹⁹ *Buckner v. Clark*, 6 Bush (Ky.) 168. But fraudulent receipts bringing it within the statute will avoid the note. *Cross v. Herr*, 96 Ind. 93.

eration for the note of the debtor's son.⁵²⁰ So, the liability of a surety on a note which is barred by the statute of limitations is sufficient consideration for a fresh guaranty.⁵²¹ But the guaranty of another person's note already barred by the statute has been held to be insufficient and of no effect in the absence of any existing liability on the part of the guarantor.⁵²² In Louisiana it is said that a debt which is barred by the statute is not a sufficient consideration for a new note;⁵²³ but a plea setting up such defense to a renewal of a note which was barred must show, at least, the date of maturity of the original note.⁵²⁴

In like manner, a verbal promise, which is ineffectual by the statute of frauds, forms a sufficient consideration for a valid note.⁵²⁵ So, a debt discharged by the debtor's insolvency or bankruptcy is sufficient consideration for a new note.⁵²⁶ But a new promise to pay such debt must be an unequivocal one.⁵²⁷ Where, however, a debt has been discharged by a *capias ad satisfaciendum*, although a

⁵²⁰ *Matthews v. Williams*, 25 La. Ann. 585. But see, *contra*, *Clement v. Sigur*, 29 La. Ann. 798, although the note was given by a guardian to his ward, and formally approved by the court.

⁵²¹ *Miles v. Linnell*, 97 Mass. 298.

⁵²² *Clark v. Hampton*, 1 Hun (N. Y.) 612.

⁵²³ *Brierly v. Tanner*, 28 La. Ann. 245.

⁵²⁴ *Turner v. O'Neal*, 24 La. Ann. 543.

⁵²⁵ *Byles, Bills*, 129; 1 *Daniel*, Neg. Inst. 183; *Jones v. Jones*, 6 Mees. & W. 84; *Rogers v. Stevenson*, 16 Minn. 68 (Gil. 56); *Hooker v. Knab*, 26 Wis. 511; *Schnecko v. Meier*, 4 Mo. App. 566. But see *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 608.

⁵²⁶ *Trueman v. Fenton*, Cowp. 544; *Scouton v. Eislord*, 7 Johns. (N. Y.) 36; *McNair v. Gilbert*, 3 Wend. (N. Y.) 344; *Erwin v. Saunders*, 1 Cow. (N. Y.) 24; *Walbridge v. Harroon*, 18 Vt. 448; *Succession of Andrien*, 44 La. Ann. 103, 10 South. 388; *Wislizenus v. O'Fallon*, 91 Mo. 105, 3 S. W. 837. As to the propriety of bringing the action in such case upon the original debt, see *Shippay v. Henderson*, 14 Johns. (N. Y.) 178. And it seems that a debt discharged in bankruptcy will not support a promise to pay if induced by a previous corrupt agreement on the payee's part. *Trumball v. Tilton*, 21 N. H. 129. See, too, *Cockshott v. Bennett*, 2 Term R. 763; *Penn v. Bennet*, 4 Camp. 205; *Maxim v. Morse*, 8 Mass. 127; *Rasmussen v. Bank*, 11 Colo. 301, 18 Pac. 28. And such agreement may be implied. *Grant v. Porter*, 63 N. H. 229.

⁵²⁷ *Merriam v. Bayley*, 1 Cush. (Mass.) 77. See, too, *Depuy v. Swart*, 3 Wend. (N. Y.) 135; *Moore v. Viele*, 4 Wend. (N. Y.) 420. And mere payment of interest on a note that has been discharged by insolvency is not of itself sufficient to revive the obligation. *Cambridge Inst. v. Littlefield*, 6 Cush. (Mass.) 210.

check given for the debtor's release from imprisonment would be valid, a subsequent promise to pay the debt is ineffectual for want of consideration.⁵²⁸

Claims Discharged Voluntarily or by Law.

§ 488. A distinction is to be observed between debts discharged by act of law and those discharged or released by voluntary compromise or act of the parties themselves. In the latter case, after a voluntary compromise and release of a debt, a note given for the part released is without consideration;⁵²⁹ even although the release of the debt was given merely in order to render the creditor competent as a witness.⁵³⁰ But, where it is claimed that a voluntary release was obtained by an insolvent through false pretenses, this claim is sufficient consideration for a note given for the released balance of the debt.⁵³¹

Where loss has been incurred by the payment of a note in Confederate currency, this loss is no sufficient consideration for a new note for the amount lost.⁵³² So, a note given in settlement of a suit against the maker on a previous indorsement is without consideration, if the payee then had in hand sufficient money belonging to

⁵²⁸ *Snevily v. Read*, 9 Watts (Pa.) 396. But see *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714.

⁵²⁹ *Hale v. Rice*, 124 Mass. 292; *Phelps v. Dennett*, 57 Me. 491; *Warren v. Whitney*, 24 Me. 561; *Montgomery v. Lampton*, 3 Metc. (Ky.) 519; *Stafford v. Bacon*, 1 Hill (N. Y.) 535; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Ingersoll v. Martin*, 58 Md. 67. But see, contra, *Willing v. Peters*, 12 Serg. & R. (Pa.) 177, where a debt, voluntarily released to render the debtor competent as a witness, was held sufficient consideration for a subsequent promise to pay. This case has been substantially overruled by *Snevily v. Read*, 9 Watts (Pa.) 396. And a debt barred by a discharge in bankruptcy has been held sufficient to support a note subsequently given. *Hockett v. Jones*, 70 Ind. 229; *Wiggins v. Keizer*, 6 Ind. 252. By the English bankruptcy act of 1861, a promise to pay a debt barred by a discharge in bankruptcy was made void. 24 & 25 Vict. c. 134, § 164. This act was repealed in 1869. 32 & 33 Vict. c. 83, § 20. It is, however, applicable to a bill of exchange made while it was in force. *Rimini v. Van Praagh*, L. R. 8 Q. B. 1.

⁵³⁰ *Valentine v. Foster*, 1 Metc. (Mass.) 520.

⁵³¹ *Crans v. Hunter*, 28 N. Y. 389.

⁵³² *Beazley v. Gignilliat*, 61 Ga. 187.

the maker to pay the amount due.⁵³³ Again, the settlement of a suit on a note, which had been already really settled and released, but was fraudulently represented to be still due, is no consideration for a new note.⁵³⁴ So, a note is invalid which is given under false representations to take up a former note, on which the maker had been discharged by reason of an alteration.⁵³⁵

And, in like manner, a new promise by a guarantor who has been discharged by laches of the holder, or by an indorser discharged by failure to give notice of protest, is without consideration,⁵³⁶ the maker of the new note not knowing of his discharge at the time.⁵³⁷ On the other hand, a note given for rent of part of the premises originally demised is sufficient, although the legal liability for rent had been discharged by the tenant's eviction from another part of the premises.⁵³⁸

Invalid Claims—Coverture—Fraud and Mistake.

§ 489. So, under the disabilities of coverture (still existing in some states), the purchase of goods by a married woman creates no personal liability sufficient to make valid her note therefor, and such purchase by her cannot be declared on as a consideration for a subsequent promise.⁵³⁹ And the fact that she has been deserted by her husband does not alter the liability.⁵⁴⁰ But a married woman's note for goods bought by her during coverture has been held, in

⁵³³ *Stewart v. Ahrenfeldt*, 4 Denio (N. Y.) 189.

⁵³⁴ *Stephens v. Spiers*, 25 Mo. 386.

⁵³⁵ *Fraker v. Cullum*, 21 Kan. 555.

⁵³⁶ *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547. But such discharge, operating as a want of consideration, should be specially averred in the pleading. *Farmers' & Mechanics' Bank of Logan v. Small*, 2 T. B. Mon. (Ky.) 88.

⁵³⁷ *Warder v. Tucker*, 7 Mass. 452.

⁵³⁸ *Anderson v. Insurance Co.*, 21 Ill. 601.

⁵³⁹ *Littlefield v. Shee*, 2 Barn. & Adol. 811. So, her note as surety for her husband, obtained by threat of attacking her title to the land mortgaged as security. *Warey v. Forst*, 102 Ind. 205, 26 N. E. 87.

⁵⁴⁰ *Hayward v. Barker*, 52 Vt. 429. And even a subsequent promise by her after divorce granted, and before her remarriage, neither renders her nor her subsequent husband liable for the debt. *Id.*

New York, to be a sufficient consideration for a promise of payment made after her husband's death.⁵⁴¹

Since the repeal of the usury laws in England, a note given for a debt, which was previously void under such laws, has been held valid.⁵⁴² So, in the United States, a note given for a balance on a usurious note, after payment of part, is for valid consideration.⁵⁴³ So, a note given in settlement of accounts including other usurious notes.⁵⁴⁴

But a promise to pay a forged note is without consideration and of no effect, unless there be some fresh consideration or an estoppel on the maker's part.⁵⁴⁵ Where, however, the defense of forgery is set up to a suit on a note, the compromise of the suit is sufficient consideration for a new note.⁵⁴⁶

So, the surrender of a contract obtained by fraud is sufficient consideration for a note.⁵⁴⁷ And this is true, with greater reason, of a note given in settlement of a compromise which had been induced by fraud, but was already in part executed.⁵⁴⁸ So, a note given to take up a former fraudulent note in the hands of a bona fide holder is for valuable consideration, although obtained through fraudulent representations as to the amount paid by such holder for the first note.⁵⁴⁹ On the other hand, in the absence of fraud, a supposed liability, having no real existence, is no consideration for a note which the maker has been induced to give by false representations,⁵⁵⁰ or

⁵⁴¹ *Goulding v. Davidson*, 26 N. Y. 604. So, in Tennessee, a note by her as widow in renewal of her note made during coverture for a loan obtained by discount. *Spitz v. Bank*, 8 Lea (Tenn.) 641.

⁵⁴² *Flight v. Reed*, 32 L. J. Exch. 265; 1 Hurl. & C. 708. And before such repeal it was held that, where the maker of a usurious note had been arrested in a suit upon it, his release was a good consideration for a note given for the amount by a third person. *Turner v. Hulme*, 4 Esp. 11.

⁵⁴³ *State Bank v. Ayers*, 7 N. J. Law, 130; the original note not being void by the terms of the statute.

⁵⁴⁴ *Morris v. Taylor*, 22 N. J. Eq. 439, affirmed *Id.* 606. See, too, *De Wolf v. Johnson*, 10 Wheat. 367.

⁵⁴⁵ *Workman v. Wright*, 33 Ohio St. 405.

⁵⁴⁶ *Grant v. Chambers*, 30 N. J. Law, 323.

⁵⁴⁷ *Montgomery v. Morris*, 32 Ga. 173.

⁵⁴⁸ *Dodge v. Manchester*, 58 Ind. 429.

⁵⁴⁹ *Murphy v. Lucas*, 58 Ind. 360.

⁵⁵⁰ *Southall v. Rigg*, 11 C. B. 481. But see *Ridlon v. Davis*, 51 Vt. 457.

threats.⁵⁵¹ So, too, a debt which was already paid;⁵⁵² or a note which was still in the hands of a trustee and not yet issued.⁵⁵³

Mutual Accounts—Unfounded Claims.

§ 490. Settlement of mutual accounts also, in the absence of fraud, furnishes sufficient consideration for a bill or note.⁵⁵⁴ So, the settlement of a suit on a note given for a stock subscription;⁵⁵⁵ or a claim for breach of covenant, even without an express formal release.⁵⁵⁶ So, a note is valid if given in settlement of a contract and for the amount due on it, although the contract was subsequently broken and failed in its entirety.⁵⁵⁷

But, where a note is given in settlement of a false and unfounded charge,—e. g. a charge of arson,—it is a mere gift without consideration.⁵⁵⁸ So, a note given by the seller of a horse to the purchaser, who had unnecessarily given up the horse in a replevin suit brought by a third person on the strength of false representations as to its having been stolen, is without consideration.⁵⁵⁹ And although, as we have seen, a note may be given for a breach of warranty, a mere claim, without actual breach and without release, is no consideration for a note.⁵⁶⁰ And, where land has been conveyed without any covenant as to quantity, a subsequent promise by the grantor to pay for a deficiency in the quantity was held to be without consideration.⁵⁶¹ So, even a sealed note, given for a balance due on a former note which was without consideration, is invalid.⁵⁶²

So, if a note is given by a surety in payment of a debt of his

⁵⁵¹ *Bell v. Bean*, 75 Cal. 86, 16 Pac. 521.

⁵⁵² *Thorp v. Deming*, 78 Mich. 124, 43 N. W. 1097; *Brigham v. Holden*, 146 Mass. 259, 15 N. E. 633.

⁵⁵³ *Willoughby v. Holderness*, 62 N. H. 661.

⁵⁵⁴ *Phelps v. Younger*, 4 Ind. 450.

⁵⁵⁵ *Magee v. Badger*, 30 Barb. (N. Y.) 246.

⁵⁵⁶ *Moody v. Leavitt*, 2 N. H. 171; and without a release such note would bar an action on the covenant broken. *Id.*

⁵⁵⁷ *Thorpe v. White*, 13 Johns. (N. Y.) 53.

⁵⁵⁸ *Pearson v. Pearson*, 7 Johns. (N. Y.) 26.

⁵⁵⁹ *Sullivan v. Collins*, 18 Iowa, 228.

⁵⁶⁰ *Conover v. Stillwell*, 34 N. J. Law, 54.

⁵⁶¹ *Smith v. Ware*, 13 Johns. (N. Y.) 257.

⁵⁶² *Geiger v. Cook*, 3 Watts & S. (Pa.) 266.

principal, which was illegal and void by statute, it will be no consideration to support a claim of the surety against the principal.⁵⁶³ So, a note given for an illegal assessment without knowledge of the illegality is void for want of consideration, there being in such case no estoppel against the maker.⁵⁶⁴

A claim by the guardian of a minor, for expenses of her maintenance while single, is no consideration for a promise made by her husband after her marriage.⁵⁶⁵ Neither is a father liable on a promise to pay for the board of his children, who have been taken from him, pending a divorce suit against him, without consent or default on his part.⁵⁶⁶ So, a note given to a mother for an injury to her child, for which she had no right of action, is without consideration.⁵⁶⁷

Forbearance—Extension.

§ 491. As has been already said, the extension of a debt or forbearance on it is sufficient consideration for a note or bill;⁵⁶⁸ or for the guaranty of a note.⁵⁶⁹ So, too, an agreement for delay on an execution already issued.⁵⁷⁰ And it is sufficient that the forbear-

⁵⁶³ Perkins v. Cummings, 2 Gray (Mass.) 258.

⁵⁶⁴ Parsons v. Turnpike Co., 59 Ind. 36. But see Williams v. Pendleton, 76 Ind. 87, where the maker was estopped.

⁵⁶⁵ Eastwood v. Kenyon, 11 Adol. & E. 438.

⁵⁶⁶ Dodge v. Adams, 19 Pick. (Mass.) 429.

⁵⁶⁷ Heast v. Sybert, Cheves (S. C.) 177.

⁵⁶⁸ Foster v. Wise, 27 La. Ann. 538; Meltzer v. Doll, 91 N. Y. 365; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177; Lundberg v. Elevator Co., 42 Minn. 37, 43 N. W. 685; First Nat. Bank of Decatur v. Johnston, 97 Ala. 655, 11 South. 690; Atherton v. Marcy, 59 Iowa, 650, 13 N. W. 759. So, for the transfer of an accommodation note, Callahan v. Bancroft, 28 Hun (N. Y.) 584; or for an accommodation indorsement, National Bank of Gloversville v. Place, 86 N. Y. 444. And, a fortiori, forbearance as to some parties and release of others is good consideration for a new note given as collateral security. Muirhead v. Kirkpatrick, 21 Pa. St. 237. So, an extension to the maker and release of the indorser of a promissory note is a good consideration for a new note, with a new surety. Jackson v. Cooper (Ky.) 39 S. W. 39; Gatzmer v. Pierce, 13 Phila. (Pa.) 88. See, also, §§ 462, 471, supra.

⁵⁶⁹ King v. Upton, 4 Me. 387; Fuller v. Scott, 8 Kan. 25.

⁵⁷⁰ Robinson v. Gould, 11 Cush. (Mass.) 55; or delay on an execution against another person, Giles v. Ackles, 9 Pa. St. 147.

ance be for a reasonable time instead of some more definite period.⁵⁷¹ In such case, what is "reasonable time" is a question for the jury to determine.⁵⁷² So, the surrender of a former note, on which the maker of the new note is surety, together with forbearance given to the principal, is sufficient consideration for a new note.⁵⁷³

So, an extension coupled with agreement not to transfer the note is sufficient to support the obligation of other parties signing as co-makers after the maturity of the note.⁵⁷⁴ So, an extension on the maker's request and agreement for a new surety is sufficient for principal and surety on the new note.⁵⁷⁵

But forbearance to collect a note at its maturity has been held insufficient to support a promise to pay an increased rate of interest,⁵⁷⁶ or to pay compound interest on a note after its maturity.⁵⁷⁷ Where, however, a note was extended and renewed after the war, the extension was held sufficient consideration for a new promise to pay the note with interest accrued on it during the war, for which the maker was not liable.⁵⁷⁸ And an extension given to the maker of a note has been held sufficient to support a promise by an additional note to pay collection fees.⁵⁷⁹

It has been held that a note originally induced by fraud may be ratified by an extension by the indorsee.⁵⁸⁰ But forbearance to sue on a claim which has been discharged by law will not support a

⁵⁷¹ *Lonsdale v. Brown*, 4 Wash. C. C. 148, Fed. Cas. No. 8,494. And the acceptance of a demand note may be shown by parol to be with the intention of forbearance for a reasonable time. *Kelly v. Theiss*, 21 Misc. Rep. 311, 47 N. Y. Supp. 145. Extension until action necessary to save the statute of limitations is sufficiently definite. *Aiken v. Posey*, 13 Tex. Civ. App. 607, 55 S. W. 732.

⁵⁷² *McCelvey v. Noble*, 13 Rich. Law (S. C.) 330.

⁵⁷³ *Wheeler v. Slocumb*, 16 Pick. (Mass.) 52.

⁵⁷⁴ *Frech v. Yawger*, 47 N. J. Law, 157.

⁵⁷⁵ *Collin v. Trustees*, 92 Ind. 337.

⁵⁷⁶ *Shealy v. Toole*, 56 Ga. 210. But see, contra, *Simpson v. Evans*, 44 Minn. 419, 46 N. W. 908.

⁵⁷⁷ *Glasscock v. Glasscock*, 66 Mo. 627. But compound interest already accrued and forbearance on an execution already issued for principal and simple interest are sufficient to support a note for such interest. *Wilcox v. Howland*, 23 Pick. (Mass.) 167.

⁵⁷⁸ *Hutton v. Edgerton*, 6 S. C. 485.

⁵⁷⁹ *Brainard v. Harris*, 14 Ohio, 107.

⁵⁸⁰ *Doherty v. Bell*, 55 Ind. 205.

promise to reinstate the claim.⁵⁸¹ And a note which was originally without valid consideration cannot be made valid by mere renewals,⁵⁸² although the original want of consideration would be no defense to a new note, coupling the extension with a fresh consideration, such as the release of a valid indorsement.⁵⁸³

In the absence of an express agreement for forbearance, the mere taking of negotiable paper payable in future suspends action until its maturity, and amounts, therefore, between the debtor and creditor, to an agreement for forbearance.⁵⁸⁴ The agreement for forbearance may be implied.⁵⁸⁵ But this forbearance can only be implied where the debt for which the paper is given is already due.⁵⁸⁶ A note given by a wife for the husband's debt suspends action on such debt, and such suspension has been held to be sufficient consideration for her note.⁵⁸⁷ And even a check postdated six days has been held to imply an extension of the existing debt for that length of time.⁵⁸⁸

Forbearance at the maker's request amounts to an agreement for forbearance as a consideration for the note.⁵⁸⁹ But forbearance given to A. without valid agreement or request from B. will not support B.'s note or indorsement.⁵⁹⁰ Without such request an

⁵⁸¹ *Von Brandenstein v. Ebensberger*, 71 Tex. 267, 9 S. W. 153.

⁵⁸² *Paxson v. Nields*, 137 Pa. St. 385, 20 Atl. 1016.

⁵⁸³ *Gatzmer v. Pierce*, 13 Phila. (Pa.) 88.

⁵⁸⁴ *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177; *Baker v. Walker*, 14 Mees. & W. 465; *Lundberg v. Elevator Co.*, 42 Minn. 37, 43 N. W. 685; *Webster v. Bainbridge*, 13 Hun (N. Y.) 180; *Holzworth v. Koch*, 26 Ohio St. 33; *York v. Pearson*, 63 Me. 587. But see, contra, *Shaw v. Presbyterian Church*, 39 Pa. St. 226.

⁵⁸⁵ *First Nat. Bank v. Cecil*, 23 Or. 58, 31 Pac. 61, and 32 Pac. 393. But merely agreeing not to dispose of a demand note until the holder wants the money is not sufficient. *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330.

⁵⁸⁶ *Lewis v. Rogers*, 34 N. Y. Super. Ct. 64.

⁵⁸⁷ *Thompson v. Gray*, 63 Me. 228. As to the effect of taking a note as an extension of the debt secured, see *Elsner v. Keller*, 3 Daly (N. Y.) 485; *Hart v. Hudson*, 6 Duer (N. Y.) 304; *Taylor v. Allen*, 36 Barb. (N. Y.) 294; *Fellows v. Prentiss*, 3 Denio (N. Y.) 520; *Pring v. Clarkson*, 1 Barn. & C. 14; *Kendrick v. Lomax*, 2 Crompt. & J. 405; *Andrews v. Marrett*, 58 Me. 539.

⁵⁸⁸ *Okie v. Spencer*, 2 Whart. (Pa.) 253.

⁵⁸⁹ *Crears v. Hunter*, 19 Q. B. Div. 341; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330, affirming 66 Hun, 349, 21 N. Y. Supp. 505.

⁵⁹⁰ *Strong v. Sheffield*, supra. On the other hand, the forbearance of the banking department to close a bank at the request of stockholders is good

agreement is necessary.⁵⁹¹ And this agreement must be particular and certain in order to constitute the maker of it a bona fide holder for value.⁵⁹² But an agreement for indefinite forbearance, coupled with actual forbearance, is sufficient for the support of a new signature after delivery as co-maker.⁵⁹³

Consideration for Extension.

§ 492. An agreement for an extension in its turn requires a consideration in order to be of any force, and will not be binding without it, either as a defense for the party to whom it was granted,⁵⁹⁴ or as a discharge of indorser or surety.⁵⁹⁵ The payment of interest in advance is sufficient consideration for such extension;⁵⁹⁶ or an agreement to pay future interest;⁵⁹⁷ but not a mere payment of matured interest⁵⁹⁸ or principal,⁵⁹⁹ or of usurious interest.⁶⁰⁰

consideration for the stockholder's notes to the bank to make good its impaired capital. *Sickles v. Herold*, 11 Misc. Rep. 583, 32 N. Y. Supp. 1083.

⁵⁹¹ *First Nat. Bank v. Cecil*, 23 Or. 58, 31 Pac. 61, and 32 Pac. 393; *Manter v. Churchill*, 127 Mass. 31; *Smith v. Bibber*, 82 Me. 34, 19 Atl. 89. Forbearance without agreement will not support a new indorsement after delivery. *Lambert v. Clewley*, 80 Me. 480, 15 Atl. 61.

⁵⁹² *Vann v. Marbury*, 100 Ala. 438, 14 South. 273. And mere acceptance of paper payable in future is not sufficient. *Moore v. Ryder*, 65 N. Y. 438. But giving a definite extension, and taking a new note as collateral, constitute the purchaser a holder "for value." *Atlanta Guano Co. v. Hunt* (Tenn. Sup.) 42 S. W. 482.

⁵⁹³ *Howe v. Taggart*, 133 Mass. 284; *Traders' Nat. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094; *Finch v. Skilton*, 79 Hun, 531, 29 N. Y. Supp. 925.

⁵⁹⁴ See section 1822, *infra*. So, too, the payee's promise to renew. *Arend v. Smith*, 151 N. Y. 502, 45 N. E. 872.

⁵⁹⁵ *Costello v. Wilhelm*, 13 Kan. 229; *Roberts v. Richardson*, 39 Iowa, 290; *Dillon v. Russell*, 5 Neb. 484. And see § 964 *et seq.*, *infra*.

⁵⁹⁶ *Grayson's Appeal*, 108 Pa. St. 581; *Maher v. Lanfrom*, 86 Ill. 513; *Lime Rock Bank v. Mallett*, 34 Me. 547; *St. Joseph Fire & Marine Ins. Co. v. Hauck*, 71 Mo. 465; *Stillwell v. Aaron*, 69 Mo. 539; *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17. And see section 965, *infra*.

⁵⁹⁷ *Royal v. Lindsay*, 15 Kan. 591; *Kittle v. Wilson*, 7 Neb. 76.

⁵⁹⁸ *Stuber v. Schack*, 83 Ill. 191; *Kellogg v. Olmsted*, 28 Barb. (N. Y.) 96; *Howard v. Fletcher*, 59 N. H. 151.

⁵⁹⁹ *Wolz v. Parker*, 134 Mo. 458, 35 S. W. 1149.

⁶⁰⁰ *McKamy v. McNabb*, 97 Tenn. 236, 36 S. W. 1091. And payment during the days of grace is not a payment before maturity. *Id.*

Likewise, the payment of another debt not yet matured is sufficient consideration for the extension of a note.⁶⁰¹ And it has even been held that the payment of part of the sum already due on the note was sufficient to support a valid extension of the balance.⁶⁰² Where land has been sold subject to the payment of a note secured by mortgages on the land, the agreement by the purchaser to pay the note is sufficient consideration for an agreement on the part of the holder to extend the time of payment.⁶⁰³ So, the giving of a renewal note with additional security will support an agreement for forbearance.⁶⁰⁴ And so, the extension of a note by the holder is sufficient consideration for its extension by the indorser.⁶⁰⁵ But merely giving a note for an existing debt is not sufficient consideration for an indefinite promise "to allow the loan to remain a little longer."⁶⁰⁶

Indemnity.

§ 493. The indemnity of a surety or of an accommodation party is often the consideration for a note or bill given to him, and is sufficient as such;⁶⁰⁷ although only the amount actually paid by him can be recovered by him on such paper given for his indemnity.⁶⁰⁸ And an agreement to indemnify an accommodation co-maker is a sufficient consideration for his signature.⁶⁰⁹ The real consideration in such case is, however, in general, the credit loaned by him to the party accommodated and the credit given to the party accommodated on his account. Again, the demand of the surety upon a note for

⁶⁰¹ *Rigsbee v. Bowler*, 17 Ind. 167.

⁶⁰² *Turnbull v. Brock*, 31 Ohio St. 649. But see, contra, *Pemberton v. Hoosier*, 1 Kan. 108.

⁶⁰³ *Kester v. Hulman*, 65 Ind. 100.

⁶⁰⁴ *Gates v. Hamilton*, 12 Iowa, 50; *Roberson v. Blevins*, 57 Kan. 50, 45 Pac. 63; *Merchants' Bank of Port Townsend v. Bussell*, 16 Wash. 546, 48 Pac. 242.

⁶⁰⁵ *Third Nat. Bank v. Blake*, 73 N. Y. 260.

⁶⁰⁶ *Atlantic Nat. Bank of New York v. Franklin*, 55 N. Y. 235.

⁶⁰⁷ *Merchants' & Manufacturers' Nat. Bank of Middletown v. Cumings*, 149 N. Y. 360, 44 N. E. 173; *Simmons Hardware Co. v. Thomas* (Ind. Sup.) 46 N. E. 645.

⁶⁰⁸ *Haseltine v. Guild*, 11 N. H. 390.

⁶⁰⁹ *Rutledge's Adm'r v. Townsend*, 38 Ala. 706.

his discharge is sufficient consideration for a note given him by his principal for his security.⁶¹⁰

But it has been held that indemnity against possible loss on the contract of suretyship is not sufficient consideration to render the taker of a note for that purpose a bona fide holder for value.⁶¹¹ So, too, where a note was given by A. to B. to indemnify him against loss on a note on which they were co-sureties, and B. afterwards paid the original debt, and released the original principal therefrom at the request of A. and upon A.'s agreement that the liability of B. should not be affected thereby, the new note for indemnity was held to be without consideration, A.'s liability to B. as co-surety on the original debt remaining unaffected.⁶¹² And if a note be given to the sureties on a bail bond for their indemnity, and they afterwards themselves procure the bond to be forfeited, and pay the amount, they cannot recover in an action for their indemnity on the note, being estopped by their conduct from bringing such action.⁶¹³ On the other hand, a note given to a mutual insurance company under the statute for the purpose of securing policy holders in the company is upon sufficient consideration.⁶¹⁴ But a note for indemnity given to a company by its treasurer to secure it against losses for which he was in no way responsible is without consideration.⁶¹⁵

When a note or bill is given to indemnify an accommodation indorser, it is rather to secure him against the liability incurred than against the ultimate damage that may ensue to him; and a right of action will arise on it in the hands of his indorsee after its maturity whenever the indorser's liability is fixed by dishonor and notice, without waiting for payment by the indorser.⁶¹⁶

⁶¹⁰ *Mercer v. Lancaster*, 5 Pa. St. 160.

⁶¹¹ *Bank of Mobile v. Hall*, 6 Ala. 639; *Andrews v. McCoy*, 8 Ala. 920.

⁶¹² *Hutchinson v. Thacher*, 49 Vt. 486.

⁶¹³ *King v. King*, 69 Ind. 467.

⁶¹⁴ Although in anticipation of a policy to be issued, *Howland v. Myer*, 3 N. Y. 290; and although the company became insolvent before the policy was issued, *Howard v. Palmer*, 64 Me. 86.

⁶¹⁵ *Dexter Sav. Bank v. Copeland*, 77 Me. 263.

⁶¹⁶ *Merchants' & Manufacturers' Nat. Bank of Middletown v. Cummings*, 149 N. Y. 360, 44 N. E. 173, affirming 79 Hun, 397, 29 N. Y. Supp. 782; *Belloni v. Freeborn*, 63 N. Y. 390; *Hapgood v. Wellington*, 136 Mass. 217.

CHAPTER XIV.

CONSIDERATION—ILLEGAL.

I. AGAINST PUBLIC POLICY.

II. AGAINST EXPRESS STATUTE.

I. CONSIDERATIONS AGAINST PUBLIC POLICY.

§ 494. Illegal Considerations—Classification.

1. Against Public Safety.

- 495. Contracts with Alien Enemies.
- 496. Aiding the Confederacy.
- 497. Confederate Currency.
- 498. Sale of Public Office or Contracts.
- 499. Services as Lobbyist.
- 500. Official Action or Negligence.

2. Against Public Justice.

- 501. Compounding Crime.
- 502. Money Embezzled.
- 503. Equitable Relief—Recovery of Payment.
- 504. Suppressing Evidence—Costs—Pardon.
- 505. Private Misdemeanors—Divorce.

3. Against Social Institutions.

- 506. Restraint of Marriage.
- 507. — Of Trade.
- 508. Defrauding Creditors—Bankruptcy.
- 510. Wagers—At Common Law.
- 511. — By Statute.
- 512. — On Racing.
- 513. — Policies—Lotteries.
- 514. — Gambling.
- 515. — Stock Gambling—Futures—"Bohemian Oats."

516. *4. Against Morality and Religion.*

Illegal Considerations—Classification.

§ 494. It is necessary not only that the consideration of commercial paper should be sufficient, as we have seen, but also that it

should be a legal one. If the consideration be illegal, the bill or note is void between the parties.¹ Questions as to the legality of a consideration fall chiefly into the following classes: First, considerations which are void at common law, as being against public policy; second, considerations which are made illegal by statute. Under the first of these classes may be enumerated—First, offenses against the public safety; second, offenses against public justice; third, offenses against trade, marriage, and other institutions protected by public policy; fourth, offenses against public morality, decency, and religion. To render an instrument void as against public policy, the fact that it is so must clearly appear.² If this is doubtful, the instrument cannot be held void on that account.³

First, Offenses against Public Safety—Contracts with Alien Enemies.

§ 495. At common law and by the universal public law, as a necessary protection of the state against its enemies, contracts made with an enemy in time of war are, with some exceptions, illegal and void.⁴ An exception to this rule is a contract by a prisoner of war for ransom, or a contract for ransom of a captured vessel or captured goods.⁵

Commercial paper, in respect to this principle, follows the same rule as other contracts. Thus, a bill drawn by an alien enemy upon a British subject, accepted by the drawee, and indorsed to to another British subject resident in the hostile country, is invalid, although no action be brought on it until after the estab-

¹ Perkins v. Cummings, 2 Gray (Mass.) 258; Holden v. Cosgrove, 12 Gray (Mass.) 216; Hubbell v. Flint, 13 Gray (Mass.) 277; Baker v. Collins, 9 Allen (Mass.) 253; Webster v. Sanborn, 47 Me. 471.

² Byles, Bills, 138; 1 Daniel, Neg. Inst. 195; 1 Pars. Notes & B. 214; Richardson v. Mellish, 2 Bing. 229, 9 Moore, 435.

³ Byles, Bills, 137.

⁴ Byles, Bills, 139; Chlt. Bills, 99; 1 Edw. Bills & N. § 473; Story, Prom. Notes, § 189; 1 Pars. Notes & B. 216; Scholefield v. Eichelberger, 7 Pet. 586; Ketchum v. Scribner, 1 Root (Conn.) 98. And see, supra, § 248 et seq.

⁵ Contracts to ransom British ships or goods are void in England by statute (45 Geo. III. c. 72). Webb v. Brooke, 3 Taunt. 6. But a bill or note for the ransom of a ship is now valid in the hands of a bona fide holder for value. 5 & 6 Wm. IV. c. 41, § 1.

ishment of peace.⁶ But a bill drawn by a British prisoner for necessities in favor of an alien enemy can be sued upon after the war is ended.⁷ A bill of exchange drawn by a citizen upon an alien enemy, not being open to the same objection as a bill or other contract effecting remittances to an enemy, has been held not to be illegal;⁸ especially where it is drawn for supplies furnished the enemy's vessel under authority of an act of congress.⁹ It was formerly held that a note given for the purchase of a British sailing license during the war with Great Britain was valid.¹⁰ Such sale has, however, been held by the United States supreme court to be unlawful.¹¹

Aiding the Confederacy.

§ 496. Most questions that have arisen on this subject in the American courts have grown out of transactions occurring during the recent war in the United States. Thus, it has been held that a note given for money loaned for the purpose of raising volunteers to resist the United States army in Tennessee could be sued upon even by an indorsee for value who knew of the illegal purpose.¹² But, in general, such instrument is illegal and void. So, too, a note or bill given to procure a substitute in the Confederate army is illegal.¹³ So, too, a note made for a loan for that purpose, even though the money obtained on it be otherwise applied.¹⁴ But a note given

⁶ Willison v. Patteson, 7 Taunt. 440.

⁷ Antoine v. Morshead, 6 Taunt. 237, 1 Marsh. 55S.

⁸ United States v. Barker, 1 Paine, 156, Fed. Cas. No. 14,517.

⁹ Suckley v. Furse, 15 Johns. (N. Y.) 33S.

¹⁰ Coolidge v. Inglee, 13 Mass. 26.

¹¹ Patton v. Nicholson, 3 Wheat. 204.

¹² Puryear v. McGavock, 9 Heisk. 461; Jones v. Bank, Id. 455; Bank of Tennessee v. Cummings, Id. 470. And a note given for the purpose of aiding the Confederacy is valid in the hands of a bona fide holder. Glenn v. Bank, 70 N. C. 191.

¹³ Chancely v. Bailey, 37 Ga. 532; Critcher v. Holloway, 64 N. C. 526; Stewart v. Bosley, 19 La. Ann. 439; Wright v. Stacey, Id. 449; Heidenreich v. Leonard, 21 La. Ann. 628; Pickens v. Eskridge, 42 Miss. 114.

¹⁴ Kingsbury v. Fleming, 66 N. C. 524; Kingsbury v. Gooch, 64 N. C. 52S. So, too, a note for money borrowed to pay off such a note. Kingsbury v. Suit, 66 N. C. 601.

to a surety for money actually paid by him as surety on such a note has been held to be valid.¹⁵

In like manner, a note given for the purchase of horses for the Confederate service is illegal and void.¹⁶ But the fact that such note was given by a Confederate officer for the purchase of a horse, apparently for army use, has been held not of itself sufficient to render the note invalid.¹⁷ And, where a note was given in Virginia for cattle purchased, evidence that the purchaser of the cattle and maker of the note was an agent of the Confederate government, and that the purchase was made for the purpose of aiding the Rebellion, has been held to be inadmissible.¹⁸ So, it has been held that the guarantor of a note under seal could not set up in his defense that the note was given for the purchase of a horse for the Confederate service, and that this purpose was known to the payee of the note.¹⁹ A note given for arms or other material of war for the Confederate army is illegal and void.²⁰ And a note given partly for such supplies, with knowledge on the seller's part of the illegal purpose, is wholly void.²¹

But it has been held that a note given for a loan of money which was intended, as the payee knew, for the equipment of Confederate troops, the borrower not being restricted in any way as to the use to be made of the money, is a valid note.²² So, too, a bond given for money borrowed to pay a debt which had been already incurred

¹⁵ *Powell v. Smith*, 66 N. C. 401.

¹⁶ *McMurtry v. Ramsey*, 25 Ark. 350; *Booker v. Robbins*, 26 Ark. 660; *Martin v. McMillan*, 63 N. C. 486. Not so, however, a new note, given after the war was over, on a new valuation at that time of a horse sold and used before for such service. *Murphy v. Weems*, 69 Ga. 687.

¹⁷ *Thedford v. McClintock*, 47 Ala. 647.

¹⁸ *Ruckman v. Lightner's Ex'rs*, 24 Grat. 19.

¹⁹ *Wallace v. Lark*, 12 S. C. 576.

²⁰ *Tatum v. Kelley*, 25 Ark. 209.

²¹ *Hanauer v. Doane*, 12 Wall. 342.

²² *Walker v. Jeffries*, 45 Miss. 160; *Gilliam v. Brown*, 43 Miss. 641. So, a note for money borrowed, with the knowledge of the lender, to make saltpeter for the Confederacy, *Bank of Tennessee v. Cummings*, 9 Heisk. (Tenn.) 465; or even to equip soldiers, *Puryear v. McGavock*, *Id.* 461; or for an advance obtained from an administrator, and applied, with his knowledge, to the purchase of a substitute for the Confederate army, *Williams v. Alexander*, 79 N. C. 411.

for such illegal purpose;²³ while, in Texas, a note given for the price of a house to be used in the Confederate service has been held to be illegal and void, even in the hands of a bona fide holder.²⁴ This case seems, however, not to be supported by common-law authority; but in Arkansas, also, such defense is admissible against an assignee.²⁵ The admission of this defense against a bona fide holder for value in such cases is by force of local statute.

Where bonds, however, have been issued for the purchase of a forge to make iron for the use of the Confederate government, the payee knowing of the illegal purpose, the bonds are illegal and void in the hands of the payee.²⁶

But where a note was given for money lent to an iron company, part of the business of which consisted in the making of iron for the Confederate government, in connection with other and lawful business, the mere knowledge on the payee's part that the company was manufacturing iron for such illegal purpose will not render the note void.²⁷ So, if a note is given for rent of land, rented to raise food for laborers employed in manufacturing iron for the Confederate government, the illegality is too remote to invalidate the note.²⁸

On the other hand, war bonds issued by the Confederate government carry sufficient notice on their face of their illegal character, and cannot furnish a legal consideration for a note given for their purchase,²⁹ even though bought in the ordinary course of business.³⁰ And, if Confederate currency be deposited for conversion into Confederate bonds, the certificate of deposit for such currency is founded on an illegal consideration, and a demurrer based on that ground will defeat a recovery on it.³¹

²³ *Poindexter v. Davis*, 67 N. C. 112.

²⁴ *Roquemore v. Alloway*, 33 Tex. 461.

²⁵ *Ruddell v. Landers*, 25 Ark. 238.

²⁶ *Logan v. Plummer*, 70 N. C. 388; *Oxford Iron Co. v. Spradley*, 46 Ala. 98.

²⁷ *Oxford Iron Co. v. Spradley*, 51 Ala. 171. See, too, *Cooper v. Thompson*, 20 La. Ann. 182.

²⁸ *McKesson v. Jones*, 66 N. C. 258.

²⁹ *Tucker v. Horner*, 28 Ark. 335; *Grant v. Ryan*, 37 Tex. 37; *Gill v. Creed*, 3 Cold. (Tenn.) 295; *Thornburg v. Harris*, Id. 157.

³⁰ *Hanauer v. Woodruff*, 15 Wall. 439; *Converse v. Evins*, 5 S. C. 52.

³¹ *Heard v. Swift*, 32 Tex. 515.

Confederate Currency.

§ 497. Since the war, many cases have held even that a note or bill given for a loan made in Confederate currency is without legal consideration and void.³² And in Louisiana, by force of a constitutional provision, such notes are void, even in the hands of a bona fide holder for value, and cannot be enforced by the courts of that state.³³ So, a note for such money lost at cards has been held to be unlawful.³⁴

In like manner, a note for hire of a slave, payable in Confederate money in January, 1865,³⁵ or for a purchase of land payable in Confederate currency,³⁶ has been held illegal and void. And, where a note was made for payment of so many "dollars" for the purchase of a mill, it has been held void on parol evidence showing Confederate currency to have been intended.³⁷ And where part of the consideration of a note is legal, and the rest was held illegal, being for a loan of Confederate currency, the whole note was void.³⁸ And it has been held in Louisiana that where a check was drawn for a bill for the payee's accommodation, and afterwards paid by the bank out of the drawer's deposit of Confederate currency, the drawer could not

³² Ford v. Ragland, 25 Ark. 612; George v. Terry, 26 Ark. 160; King v. Carnall, Id. 36; Willis v. Johnson, 38 Tex. 303; Goodman v. McGehee, 31 Tex. 252; Hale v. Huston, 44 Ala. 134; Tarleton v. Bank, 49 Ala. 229; Askew v. Torbert, Id. 101; Whitfield v. Fulford's Adm'r, Id. 304; Durbin v. McMichael, 22 La. Ann. 132; Bank of New Orleans v. Frantom, Id. 462; Winter v. Jones, Id. 485; Seuzeneau v. Saloy, 21 La. Ann. 305; Pickens v. Preston, 20 La. Ann. 138; Huck v. Haller, 19 La. Ann. 257; Reeve v. Doughty, Id. 164; Blossat v. Sullivan, 21 La. Ann. 565; Robertson v. Shores, 7 Cold. (Tenn.) 164; Smith v. Smith, 30 Tex. 754; McCartney v. Greenway, Id. 754; Cundiff v. Herron, 33 Tex. 622; Peltz v. Long, 40 Mo. 532; Potts v. Gray, 3 Cold. (Tenn.) 468; Scudder v. Thomas, 35 Ga. 364. So, too, a sealed bond. Calfee v. Burgess, 3 W. Va. 274.

³³ Baldwin v. Sewell, 23 La. Ann. 444; Const. La. 1868, art. 127; Ivey v. Lalland, 42 Miss. 444.

³⁴ Voinche v. Villemarette, 23 La. Ann. 227.

³⁵ Reavis v. Blackshear, 30 Tex. 753.

³⁶ Brown v. Wylie, 2 W. Va. 502.

³⁷ Donley v. Tindall, 32 Tex. 43.

³⁸ Bozeman v. Allen, 48 Ala. 512.

bring an action to recover the amount from the payee.³⁹ So, if a note be given to one partner for a loan of Confederate currency by his firm, and be afterwards transferred to the firm, it is illegal in their hands.⁴⁰

A note given for a loan of Confederate currency has been held not to be provable in bankruptcy.⁴¹ And the illegality of such note has been held not to be removed by a direction for its payment contained in the maker's will, the will having been made in 1862, and payment in Confederate currency being therefore implied.⁴² So, a note given partly for a loan of Confederate currency, and partly for the purchase of goods, at a price fixed in such currency, has been held to be illegal.⁴³ This is true also of the renewal of a note originally given for such loan.⁴⁴

Other cases have, however, held that the loan of Confederate currency during the war, and within the lines of the Confederacy, was a legal consideration for a note or bill,⁴⁵ unless made for the purpose of aiding the Rebellion.⁴⁶ And this seems to be the sounder view, although the authorities supporting it are greatly in the minority. So, a note given partly in settlement of a liquidated account, and partly for a loan of Confederate currency, has been held to be valid.⁴⁷ So, too, a note given in 1863 in the Confederacy for a loan of Confederate currency payable in "current bankable funds," United States currency being held to have been intended by this expression.⁴⁸ And, where a note has been given for Confederate cur-

³⁹ *Irvine v. Short*, 23 La. Ann. 721.

⁴⁰ *Norton v. Pickens*, 21 La. Ann. 575; such firm not being bona fide holders without notice.

⁴¹ *Baily v. Milner*, 35 Ga. 330.

⁴² *Dittmar v. Myers*, 39 Tex. 295.

⁴³ *Peltz v. Long*, 40 Mo. 532.

⁴⁴ *Lawson v. Miller*, 44 Ala. 616; *Scudder v. Thomas*, 35 Ga. 364; but, contra, *Torbett v. Worthy*, 1 Heisk. (Tenn.) 107.

⁴⁵ *Simpson v. Lauderdale Co.*, 56 Ala. 64; *Wyatt v. Evins*, 52 Ala. 285; *Rivers v. Moss*, 6 Bush (Ky.) 600; *Rodes v. Patillo*, 5 Bush (Ky.) 271; *McMath v. Johnson*, 41 Miss. 439; *Gist v. Gans*, 30 Ark. 285, overruling *Latham v. Clark*, 25 Ark. 574; *Whitfield v. Riddle*, 52 Ala. 467; *McManus v. Scott*, 48 Tex. 601.

⁴⁶ *Kingsbury v. Lyon*, 64 N. C. 128.

⁴⁷ *Bozeman v. Rushing*, 51 Ala. 529.

⁴⁸ *Taylor v. Turley*, 33 Md. 500.

rency, it has been held to be *prima facie* valid, in the absence of proof that it was payable in such currency.⁴⁹ So, a note given after the end of the war in renewal of an earlier note which was given for such currency has been held valid.⁵⁰ So, a note given for the purchase of land, and paid in such currency, is a legal consideration for a new note given to reimburse the person making such payment, the land being held in this case to be the real consideration.⁵¹

Sale of Public Office or Contract.

§ 498. Notes and bills, like other contracts for the procurement or purchase of a public office, are held at common law to be contrary to public policy, and therefore void.⁵² Where, however, such sale is authorized by statute, as has been the case in Vermont as to certain offices, the note given at such sale for the price of the office is upon sufficient consideration and valid.⁵³ The office of an administrator is, as regards this principle of law, a public office; and a note given to procure the appointment of any one as administrator is void.⁵⁴ So, to procure votes for a public measure.⁵⁵

So, a note or other contract for procuring the election or appointment of any one to any public office is illegal;⁵⁶ or a note by the

⁴⁹ *Diltz v. Sadler*, 37 Tex. 137.

⁵⁰ *McLaughlin's Ex'r v. Beard*, 5 W. Va. 538; *Beard v. Lilesay*, 4 W. Va. 637.

⁵¹ *Scott v. Davidson*, 33 Tex. 807; *Jordan v. Cobb*, 47 Ala. 132.

⁵² *Byles, Bills*, 144; *Chit. Bills*, 101, 113; 1 *Daniel, Neg. Inst.* 195; 1 *Pars. Notes & B.* 214; *Story, Prom. Notes*, § 189; *Blachford v. Preston*, 8 Term R. 93; *Parsons v. Thompson*, 1 H. Bl. 322; *Layng v. Paine, Willes*, 571; *Stackpole v. Earle*, 2 Wils. 133; *Palmer v. Bate*, 2 Brod. & B. 673; *Harrington v. Klopogge*, Id. 678; *Richardson v. Mellish*, 2 Bing. 229, 9 Moore, 435; *Ferris v. Adams*, 23 Vt. 136; *Johnson Co. Com'rs v. Milliken*, 7 Blackf. (Ind.) 301.

⁵³ *Thetford v. Hubbard*, 22 Vt. 440. The statute in this case authorized the inhabitants of the town "to agree with a suitable person, in such manner as they shall judge most advantageous, to fill the office." See *Rev. St. Vt. c. 13*, § 63.

⁵⁴ *Porter v. Jones*, 52 Mo. 399.

⁵⁵ *Burden Bank v. Phelps*, 5 Kan. App. 658, 48 Pac. 938.

⁵⁶ 1 *Daniel, Neg. Inst.* 195; 1 *Pars. Notes & B.* 214; *Nichols v. Mudgett*, 32 Vt. 546; *Martin v. Wade*, 37 Cal. 168; *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931.

candidate for the payee's interest in his favor at an election.⁵⁷ So, too, a contract for supplying liquor and refreshment for the purpose of influencing votes at an election is void.⁵⁸ And all contracts which amount to bribery at election are illegal at common law, as well as in England and in most of the United States by statute.⁵⁹ Again, a note given to induce a public officer to resign his office and to exert his influence in favor of the maker's appointment to it is void;⁶⁰ or to induce a candidate at an election to withdraw in favor of another.⁶¹ And, in like manner, an assignment of the official fees of a public officer,⁶² or an agreement between two candidates to divide the fees of an office upon the withdrawal of one of the candidates,⁶³ is illegal. An office in a private corporation stands, however, on a different footing from a public office; and it has been held that the resignation of such office is good consideration for a note.⁶⁴

Public policy in like manner extends its protection to public contracts. Thus, it is not lawful to obtain the withdrawal of a bid for a contract to carry the mail, and a note given for that purpose is void.⁶⁵ The same rule applies to other government contracts.⁶⁶ So, a note given to a city officer for illegal services on his part in procuring a city contract is void.⁶⁷ And it has been held in England that an agreement by a town clerk to recommend a certain attorney to persons requiring an attorney to conduct prosecutions

⁵⁷ *Swayze v. Hull*, 8 N. J. Law, 54.

⁵⁸ 1 Daniel, Neg. Inst. 196; 1 Edw. Bills & N. § 475.

⁵⁹ *Chit. Bills*, 113; *Sulston v. Norton*, 3 Burrows, 1235; *Rex v. Pitt*, 1 W. Bl. 380; *Allen v. Hearn*, 1 Term R. 56; *Webb v. Smith*, 4 Bing. N. C. 373.

⁶⁰ *Meacham v. Dow*, 32 Vt. 721.

⁶¹ *Ham v. Smith*, 87 Pa. 63.

⁶² *Bowery Bank of New York v. Gerety*, 153 N. Y. 411, 47 N. E. 793, affirming 91 Hun, 539, 36 N. Y. Supp. 254. But the illegality of such transfer as collateral will not render the note secured by it invalid. *Id.*

⁶³ *Gray v. Hook*, 4 N. Y. 449; or to aid in the election of a candidate on a like agreement, *Martin v. Wade*, 37 Cal. 168.

⁶⁴ *Peck v. Requa*, 13 Gray (Mass.) 407.

⁶⁵ *Kennedy v. Murdick*, 5 Har. 458; *Gulick v. Ward*, 10 N. J. Law, 87.

⁶⁶ *Sharp v. Wright*, 35 Barb. (N. Y.) 236; and money paid on such contract may be recovered.

⁶⁷ *Bell v. Quin*, 2 Sandf. (N. Y.) 146; or, in general, any agreement for procurement of a public contract. *Tool Co. v. Norris*, 2 Wall. 45; or to prevent obstruction, *French v. Paving Co.*, 100 Mich. 443, 59 N. W. 166.

in his office is illegal, and can form no valid consideration for a bill or note given on the strength of it.⁶⁸

Services as Lobbyist—Location of Public Building.

§ 499. Services as a lobbyist in procuring legislation in congress or elsewhere are also against public policy, and are not a legal consideration for commercial paper or other contracts.⁶⁹ So, a note given to influence the location of a county seat has been held to be against public policy and void,⁷⁰ although such note is valid in the hands of a bona fide holder for value before maturity.⁷¹

Official Action or Negligence.

§ 500. Contracts relating to official conduct are likewise void as against public policy.⁷² An agreement to induce a public officer to neglect his duty is void.⁷³ So, a note given to a public officer to influence him in the discharge of his duty,⁷⁴ or to a sheriff or other executive officer for ease and favor.⁷⁵ Thus, an agreement on a sheriff's part to delay a sale,⁷⁶ or to release a prisoner held on a mittimus,⁷⁷ is illegal. So, a sheriff, being incapacitated by statute,

⁶⁸ Hughes v. Statham, 4 Barn. & C. 187, 6 Dowl. & R. 219. So, too, agreements for poundage for recommending customers in a private business. Wyburd v. Stanton, 4 Esp. 179.

⁶⁹ Trist v. Child, 21 Wall. 441; Clippinger v. Hepbaugh, 5 Watts & S. (Pa.) 315; Harris v. Roof's Ex'rs, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Marshall v. Railroad Co., 16 How. 314.

⁷⁰ Herman v. Edson, 9 Neb. 152, 2 N. W. 368. So, a note to the owner of a building adjacent to the maker, to induce him to offer the government a free location for a post office. Elkhart Co. Lodge v. Crary, 98 Ind. 238.

⁷¹ Thorne v. Yontz, 4 Cal. 321.

⁷² Chit. Bills, 113; Todderidge v. Mackalley, W. Jones, 341; Layng v. Paine, Willes, 575, note; Co. Litt. 206b; Watson v. Fletcher, 8 Barn. & C. 25; Alston v. Atlay, 6 Nev. & M. 686.

⁷³ Byles, Bills, 139; Chit. Bills, 101; Denny v. Lincoln, 5 Mass. 385. So, to a constable for forbearing to levy under an execution in his hands. Ashby v. Dillon, 19 Mo. 619.

⁷⁴ Cook v. Shipman, 51 Ill. 316.

⁷⁵ Byles, Bills, 144; Chit. Bills, 113; Rogers v. Reeves, 1 Term R. 418; Samuel v. Evans, 2 Term R. 569.

⁷⁶ Goodale v. Holdridge, 2 Johns. (N. Y.) 193.

⁷⁷ Pills v. Comstock, 12 Metc. 468; Wheeler v. Bailey, 13 Johns. (N. Y.) 366.

cannot buy a note on an execution sale, and a transfer to him is therefore illegal.⁷⁸ So, a note given to a public officer to induce him to pay moneys on a public contract before they are due, in violation of a corporation ordinance, is illegal and void.⁷⁹

It has been held also that a note given to a magistrate for a fine imposed by him on the maker with costs, on a criminal charge, is void.⁸⁰ But in some states such payment may be made by a note or bill. Thus, in Vermont, the sheriff, being also the jailer, may take a note for a fine and costs from the person in custody, and thereby becomes liable to the county, as though he had received payment in cash.⁸¹ And, in Maine, the county treasurer is authorized by statute to receive a note for fines; and the fact that the person thereby obtains his discharge does not render it a case of duress.⁸² So, to a county officer in payment for a liquor license,⁸³ or in discharge of a judgment upon a forfeited recognizance.⁸⁴ So, in New Hampshire, a taxpayer arrested on a tax warrant may obtain his discharge by a note given to the tax collector, the tax being paid by the collector.⁸⁵

A contract with a sheriff or other public officer for an act in violation of his duty, and to indemnify him from the consequences of such act, is illegal;⁸⁶ although it seems that a contract to indemnify such officer in the execution of a lawful or an apparently lawful act is

⁷⁸ *Sproule v. Merrill*, 29 Me. 260.

⁷⁹ *Devlin v. Brady*, 36 N. Y. 531.

⁸⁰ *Kingsbury v. Ellis*, 4 Cush. (Mass.) 578; *Wheelwright v. Sylvester*, 4 Allen (Mass.) 59; *Manitowoc Co. v. Sullivan*, 51 Wis. 115, 8 N. W. 12. So, if to obtain discharge from custody. *Rollins v. Lashus*, 74 Me. 218. So, in payment of state tolls, *Hunter v. Field*, 20 Ohio, 340; or to a city treasurer for city taxes, *Crowell v. Osborne*, 43 N. J. Law, 335; *State v. Illyes*, 87 Ind. 405; *Inhabitants of Embden v. Bunker*, 86 Me. 313, 29 Atl. 1085.

⁸¹ *St. Albans Bank v. Dillon*, 30 Vt. 122.

⁸² *Bates v. Butler*, 46 Me. 387; *Kendrick v. Crowell*, 38 Me. 42; *Joy v. Phillips*, 29 Me. 255; Rev. St. Me. 1840, c. 175. So, *Strafford Co. v. Jackson*, 14 N. H. 16; *Blain v. Hitch*, 70 Ga. 275. But such note is not transferable by indorsement. *Id.* So, a note taken by a sheriff instead of bail, *Strong v. Tompkins*, 8 Johns. (N. Y.) 76.

⁸³ *Appling Co. v. McWilliams*, 69 Ga. 840; *Doran v. Phillips*, 47 Mich. 228, 10 N. W. 350; *Turnbull v. Alpena Tp.*, 74 Mich. 621, 42 N. W. 114.

⁸⁴ *Livingston v. Hastie*, 2 Caines (N. Y.) 246.

⁸⁵ *Kelley v. Noyes*, 43 N. H. 209.

⁸⁶ *Chit. Bills*, 102; 10 *Coke*, 102; *Cro. Eliz.* 199; *Yelv.* 197.

valid.⁸⁷ Where, however, the performance of a duty is made obligatory on such officer by statute, an indemnity bond demanded by him as a condition for performing the duty is contrary to public policy and void.⁸⁸ So, a promise to pay such an officer extra compensation for extra diligence in performing his duty cannot be enforced.⁸⁹ So, a note given to a town in order to secure judicial approval of the proceedings for opening a public road is illegal.⁹⁰

Second, Offenses Against Public Justice — Compounding Crime.

§ 501. Among the most flagrant offenses against public policy are those which interfere with the public administration of justice. All contracts, including commercial paper, given for the purpose of compounding a felony or misdemeanor, are in a high degree opposed to public policy, and are illegal and void.⁹¹ So, even,

⁸⁷ Chit. Bills, 102; Cro. Jac. 652; 1 Lord Raym. 279.

⁸⁸ Mitchell v. Vance, 5 T. B. Mon. (Ky.) 528.

⁸⁹ Hatch v. Mann, 15 Wend. (N. Y.) 44.

⁹⁰ Dudley v. Butler, 10 N. H. 281.

⁹¹ Byles, Bills, 138; Chit. Bills, 100; 1 Daniel, Neg. Inst. 197; 1 Edw. Bills & N. § 475; 1 Pars. Notes & B. 213; Story, Prom. Notes, § 189; Elworthy v. Bird, 2 Sim. & S. 372; Edgcombe v. Rodd, 5 East. 294; Fallowes v. Taylor, 7 Term R. 475; Brett v. Tomlinson, 16 East, 293; Harding v. Cooper, 1 Starkie, 467; Kirk v. Strickwood, 4 Barn. & Adol. 421; Clubb v. Hutson, 18 C. B. (N. S.) 414; Wallace v. Hardacre, 1 Camp. 45; Johnson v. Ogilby, 3 P. Wms. 279; Collins v. Blantern, 2 Wils. 349; Vincent v. Groom, 1 Yerg. (Tenn.) 430; Roll v. Raguett, 4 Ohio, 400; Hinesburgh v. Sumner, 9 Vt. 23; Com. v. Pease, 16 Mass. 91; Clark v. Ricker, 14 N. H. 44; Hinds v. Chamberlain, 6 N. H. 225; Porter v. Havens, 37 Barb. (N. Y.) 343; Farrar v. Davis, 53 Vt. 597; Kimbrough v. Lane, 11 Bush (Ky.) 556; Steuben Co. Bank v. Matthewson, 5 Hill (N. Y.) 249; Sumner v. Summers, 54 Mo. 340; Murphy v. Bottomer, 40 Mo. 67; Swan v. Chandler, 8 B. Mon. (Ky.) 97; Breathwit v. Rogers, 32 Ark. 758; Chandler v. Johnson, 39 Ga. 85; Clark v. Pomeroy, 4 Allen, 534; Collier v. Waugh, 64 Ind. 456; Doyle v. Carroll, 28 U. C. C. P. 218; Wynne v. Whisenant, 37 Ala. 46; Rogers v. Blythe, 51 Ark. 519, 11 S. W. 822; Stout v. Turner, 102 Ind. 418, 26 N. E. 85; Moeckly v. Gorton, 78 Iowa. 202, 42 N. W. 648; Groesbeck v. Marshall, 44 S. C. 538, 22 S. E. 743; Sylvester-Bleckley Co. v. Goodwin (S. C.) 29 S. E. 3; Cain v. Express Co., 1 Baxt. 315. And this is true whether proceedings are pending or not. Gardner v. Maxey, 9 B. Mon. (Ky.) 90. Of the same character is a note for establishing a false defense to a criminal prosecution. Bates v. Cain's Estate (Vt.)

an agreement "to use all legal and proper endeavor" to have a criminal prosecution dismissed is illegal.⁹² The crime and the agreement not to prosecute must, however, both be made clearly to appear.⁹³ A note given to stop an intended prosecution for felony, not to appear as a witness before the grand jury, and to dismiss an action for assault and battery, is illegal.⁹⁴ So, a note to indemnify against the forfeiture of a recognizance to appear as witness in a criminal prosecution against the son of the maker of the note is illegal and void.⁹⁵ The compounding of a misdemeanor, such as

40 Atl. 36. So, a note in consideration of withdrawing a parliamentary petition against a member for bribery, *Coppock v. Bower*, 4 Mees. & W. 361; or for a prisoner's discharge from arrest on a criminal recognizance, *Com. v. Johnson*, 3 Cush. 454; but not to suppress a proceeding only criminal in form and involving no criminal offense, *Soule v. Bonny*, 37 Me. 128. And, to make the suppression illegal, the crime must be a possible one; e. g. not embezzlement by a partner. *Turle v. Sargent*, 63 Minn. 211, 65 N. W. 349.

⁹² *Averbeck v. Hall*, 14 Bush (Ky.) 505, only part of the consideration being thus illegal. So, the payee's agreement to use his influence to secure the dismissal of proceedings or acquittal of the defendant. *Ricketts v. Harvey*, 78 Ind. 152. In such a case, however, the right of action on the valid claim forming part of the consideration is not lost in the invalid note taken, but it may be sued upon, as though no note had been given. *Pecker v. Kennison*, 46 N. H. 488. But a note for a valid debt procured by the abuse of criminal process is void. *Shenk v. Phelps*, 6 Ill. App. 612.

⁹³ *Swope v. Insurance Co.*, 93 Pa. St. 251, *Sterrett, J.*, saying (page 254): "Though the proof of guilt need not be of that conclusive character that would be necessary to convict, there should be at least such preponderance of evidence as will justify the jury in finding that a felony was committed." So, to avoid the note where no criminal prosecution was pending, *Columbia Lodge, No. 117, v. Manning* (N. J. Ch.) 38 Atl. 444. That the debt was contracted under circumstances that might render the debtor liable to criminal proceedings, and that the creditor was induced by the note to abstain from such prosecution, is not enough. *Flower v. Sadler*, 9 Q. B. Div. 83, affirming 8 Q. B. Div. 572. Neither is a threat of prosecution sufficient. *Id.*, 10 Q. B. Div. 572; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718; *Wolf v. Troxell's Estate*, 94 Mich. 573, 54 N. W. 383; unless such threat amounts to duress, *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 59 N. W. 564; *Id.*, 91 Wis. 166, 64 N. W. 843.

⁹⁴ *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90; *Henderson v. Palmer*, 71 Ill. 579. So, an agreement not to appear as witness for the prosecution. *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931.

⁹⁵ *Plumer v. Smith*, 5 N. H. 553.

the interruption of a ball by violence or disorderly conduct, is an illegal consideration, although joined with a release of the damages growing out of the same misdemeanor.⁹⁶

A note given to obtain a discharge from arrest for stealing is illegal;⁹⁷ or for a discharge from arrest for false pretenses, although without any express agreement to drop the prosecution, and although the note was given for the money obtained under such false pretenses.⁹⁸ So, an agreement not to prosecute the maker's son for forgery is not a legal consideration for a note.⁹⁹ Neither is the release of a defendant in a criminal proceeding from the custody of his bail, the bail bond having been forfeited, and the bail having been notified to surrender the prisoner, a legal consideration for a note given by the prisoner or by a third person.¹⁰⁰ Where the consideration is only in part a discontinuance or compounding of a criminal prosecution, it avoids the whole note or bill;¹⁰¹ although such a note would, of course, be good in the hands of a bona fide holder for value before maturity.¹⁰² Where one has been indicted for unlawful liquor selling, and threatened with arrest, a note given for a fine and costs to escape arrest has been held to be a compounding of the offense, and, as such, illegal.¹⁰³

⁹⁶ *Jones v. Rice*, 18 Pick. 440. But see *Drage v. Ibberson*, 2 Esp. 643.

⁹⁷ *Bell v. Wood*, 1 Bay (S. C.) 249; or on an agreement not to search a suspected house for stolen goods, *Merrill v. Carr*, 60 N. H. 114.

⁹⁸ *Conderman v. Hicks*, 3 Lans. (N. Y.) 108; *McMahon v. Smith*, 47 Conn. 223; *Bowen v. Buck*, 28 Vt. 308; *Shaw v. Spooner*, 9 N. H. 197; *Ozanne v. Haber*, 30 La. Ann. 1384.

⁹⁹ *National Bank of Oxford v. Kirk*, 90 Pa. St. 49.

¹⁰⁰ *Com. v. Johnson*, 3 Cush. (Mass.) 454, although it was the duty of the bail to surrender the prisoner in this case.

¹⁰¹ *Wisner v. Bardwell*, 38 Mich. 278; *Snyder v. Willey*, 33 Mich. 483; *Frick v. Moore*, 82 Ga. 159, 8 S. E. 80; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287; *Wegner v. Biering*, 65 Tex. 506; *Fernekes v. Bergenthal*, 69 Wis. 464, 34 N. W. 238. Although it has been held that if the note be given wholly for the amount of a dispute settled, with an agreement added that the maker should not be prosecuted for an assault, the latter agreement will not vitiate the note. *Wilkins v. Riley*, 47 Miss. 306. See, too, *Bank of Newberry v. Stegall*, 41 Miss. 142.

¹⁰² *Clark v. Ricker*, 14 N. H. 44. But the defense is admissible against a holder with notice. *Gorham v. Keyes*, 137 Mass. 583.

¹⁰³ *Town of Illnesburgh v. Sumner*, 9 Vt. 23.

Money Embezzled.

§ 502. And, as we have seen, the suppression of a criminal charge, being made part of the consideration of a note, renders it illegal, although the amount of money for which the note was given be actually due to the payee.¹⁰⁴ Thus, if a note be given for the debt of a defaulter, with a promise of clemency on the part of the payee, it is illegal.¹⁰⁵

But, where a note is given to a city officer for the amount of bonds unlawfully converted by a friend of the maker of the note, it is presumptively for a good consideration, although criminal prosecution may have been threatened by another officer of the city without the payee's knowledge.¹⁰⁶ And, in the absence of all agreement compounding a crime, a note for the money embezzled or stolen is for good and valid consideration.¹⁰⁷

And such consideration has been held to be sufficient for a note given by a defaulting officer and his sureties, notwithstanding an agreement not to prosecute the defaulter.¹⁰⁸ And a note of this sort is valid, although the maker of it has been already arrested on a criminal charge, and is released on giving the note, if there be no agreement to drop the prosecution.¹⁰⁹ And it has been held that a threatened prosecution for fraud in the sale of goods is sufficient

¹⁰⁴ *Taylor v. Jaques*, 106 Mass. 291; *Sumner v. Summers*, 54 Mo. 340; *Godwin v. Crowell*, 56 Ga. 566; Code Ga. §§ 3054, 3055; *Crowder v. Reed*, 80 Ind. 1. So, for the value of property stolen and suppression of a pending prosecution. *Gorham v. Keyes*, 137 Mass. 583.

¹⁰⁵ *Buck v. Bank*, 27 Mich. 293.

¹⁰⁶ The note in this case being given without authority of the defaulter. *City of Cohoes v. Cropsey*, 55 N. Y. 685.

¹⁰⁷ *Von Windisch v. Klaus*, 46 Conn. 433; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177. And in Pennsylvania the statute authorizes a settlement by note of criminal prosecutions of a quasi private nature. *Geier v. Shade*, 109 Pa. St. 180; *Rothermal v. Hughes*, 134 Pa. St. 510, 19 Atl. 677. So, to make good an agent's deficit, and secure his further employment. *Provident Sav. Life Assur. Soc. v. Edmonds*, 95 Tenn. 53, 31 S. W. 168.

¹⁰⁸ *Bibb v. Hitchcock*, 49 Ala. 468.

¹⁰⁹ *Flower v. Sadler*, 9 Q. B. Div. 83; *Ward v. Lloyd*, 7 Scott, N. R. 499; *Armstrong v. Express Co.*, 4 Baxt. (Tenn.) 376; or threatened with a criminal prosecution, *Beath v. Chapoton* (Mich.) 73 N. W. 806.

consideration for the indorsement by a third person as surety.¹¹⁰ On the other hand, a note given in settlement of a charge of criminal conversation with the payee's alleged wife, under threat of violence, is void for duress.¹¹¹

But where a note is given for money actually paid by a third person to the maker of the note, to be paid by him to the payee on account of an illegal contract between such third person and the payee of the note, the payment of the money to the maker forms a new consideration, and renders the note a legal one.¹¹²

Equitable Relief—Recovery of Payment.

§ 503. While a note or bill given for the purpose of compounding a felony is illegal, and cannot be enforced in a court of law, it is also true that a court of equity will not entertain a bill in favor of another party to the illegal transaction to cancel such paper.¹¹³ And, where such a note has been paid, the amount paid cannot be recovered from the payee, both parties being in *pari delicto*.¹¹⁴ And, even where the maker has been obliged to pay such illegal note to a bona fide holder for value, he cannot afterwards recover the amount paid from the payee of the note.¹¹⁵ And, although the compounding of a felony renders a bill or note void, it is lawful to substitute a good bill for one that is forged, if there be no stipulation to compound the forgery.¹¹⁶

Suppressing Evidence — Costs of Prosecution — Obtaining Pardon.

§ 504. Agreements to suppress evidence are of the same nature as contracts for compounding crime, and are against public policy

¹¹⁰ *Jaffray v. Brown*, 74 N. Y. 393.

¹¹¹ *McGowen v. Bush*, 17 Tex. 195.

¹¹² *Barker v. Parker*, 23 Ark. 390.

¹¹³ *Atwood v. Fisk*, 101 Mass. 363.

¹¹⁴ *Haynes v. Rudd*, 83 N. Y. 251, reversing 17 Hun (N. Y.) 477. And in general money paid to compound a felony is not recoverable. *Daimouth v. Bennett*, 15 Barb. (N. Y.) 541.

¹¹⁵ *Haynes v. Rudd*, *supra*.

¹¹⁶ *Byles*, Bills, 139; 1 Pars. Notes & B. 215; 1 Daniel, Neg. Inst. 198; *Wallace v. Hardacre*, 1 Camp. 45.

and void.¹¹⁷ Thus, an agreement not to appear as witness of fraud in obtaining letters patent is not a legal consideration for a note.¹¹⁸ And it is said that a contract to furnish evidence is void as against public policy,¹¹⁹ although this may be doubted if the contract is merely to procure attendance of witnesses or other means of testimony without fraud or falsehood.

While a bill or note cannot be given to suppress a prosecution, it may be given after the maker's conviction for the costs and expenses of prosecution;¹²⁰ especially where they have been determined by the court.¹²¹

As we have seen already, the soliciting of a pardon is not generally held to be a sufficient consideration for a note or bill.¹²² Although, in Georgia, a note given for an argument by the payee before the court of pardons, in order to obtain the pardon of the maker's son, has been held to be founded on a valid consideration.¹²³

Private Misdemeanors—Divorce.

§ 505. Although a note may not be given to suppress a criminal prosecution, yet, as has been already remarked, forbearance to prosecute a civil claim, however doubtful, is a sufficient and valid consideration.¹²⁴ Thus, a note may be given in settlement of any private misdemeanor.¹²⁵ But, if the claim is illegal or wholly unfounded,

¹¹⁷ Byles, Bills, 139; 1 Pars. Notes & B. 215; Chit. Bills, 100; 1 Daniel, Neg. Inst. 195; *Nerot v. Wallace*, 3 Term R. 17; *Fallowes v. Taylor*, 7 Term R. 475; *Edgecombe v. Rodd*, 5 East, 294; *Swan v. Chandler*, 8 B. Mon. (Ky.) 97; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90. So, a note given to a man to induce him to testify against a co-conspirator. *Hagan v. Wellington* (Kan. App.) 52 Pac. 909.

¹¹⁸ *Hoyt v. Macon*, 2 Colo. 502.

¹¹⁹ 1 Edw. Bills & N. § 475.

¹²⁰ Byles, Bills, 139; 1 Daniel, Neg. Inst. 198; 1 Pars. Notes & B. 215; *Kirk v. Strickwood*, 4 Barn. & Adol. 421; *Baker v. Townshend*, 1 Moore, 120.

¹²¹ *Beeley v. Wingfield*, 11 East, 46; *Keir v. Leeman*, 9 Q. B. 394.

¹²² Chit. Bills, 100.

¹²³ *Meadow v. Bird*, 22 Ga. 246.

¹²⁴ *Keefe v. Vogle*, 36 Iowa, 87; *Wyatt v. Evins*, 52 Ala. 285; *Bozeman v. Rushing*, 51 Ala. 529; *Muirhead v. Kirkpatrick*, 21 Pa. St. 237, the consideration in this case being forbearance to prosecute a claim and release of indorser and co-maker on a former note given for it.

¹²⁵ Byles, Bills, 139; 1 Daniel, Neg. Inst. 198; 1 Pars. Notes & B. 215;

it is no sufficient consideration for the note or bill.¹²⁶ Neither is a note legal which is given to a father in settlement of a felonious assault on his daughter, for which he had no right of action.¹²⁷ And a note given to one who is not an attorney at law, for aid in defending a suit, has been held to be void for maintenance.¹²⁸ So, a note cannot be given for the withdrawal of a caveat against the opening of a public road.¹²⁹

The relation of marriage being especially under the protection of the public policy of the law, divorces are not favored by the law, nor any agreements made for the purpose of facilitating them. But a note given by the husband pending a divorce suit, to provide alimony for the wife, is upon sufficient consideration and valid;¹³⁰ but not if given for the purpose of facilitating divorce.¹³¹ On the other hand, a note given in consideration of the withdrawal of a defense in a divorce suit is illegal.¹³² So, a note for an agreement not to defend such suit.¹³³ And where a divorce suit has been dismissed on the reconciliation of the parties to it, and a note has been

Drage v. Ibberson, 2 Esp. 643; *Coppock v. Bower*, 4 Mees. & W. 361; *Clark v. Ricker*, 14 N. H. 44; *Kneeshaw v. Collier*, 30 U. C. C. P. 265. So, a bond given in satisfaction of damages for assault and battery and to prevent a prosecution, *Price v. Summers*, 5 N. J. Law, 578; or a note in settlement of a charge on suspicion against the maker's slave for setting fire to the payee's property, there being no agreement to compound the felony, if any, *Morgan v. Knox*, 15 La. Ann. 176.

¹²⁶ *Tucker v. Ronk*, 43 Iowa, 80.

¹²⁷ *Loomis v. Cline*, 4 Barb. (N. Y.) 453.

¹²⁸ *Burt v. Place*, 6 Cow. (N. Y.) 431. So, the transfer of a note to an attorney to sue and divide proceeds is void for champerty. *Roberts v. Yancey*, 94 Ky. 243, 21 S. W. 1047.

¹²⁹ *Smith v. Applegate*, 23 N. J. Law, 352. So, an agreement not to prosecute a caveat filed for alleged fraud against an application for a land patent. *Hoyt v. Macon*, 2 Colo. 502.

¹³⁰ *Burnett v. Paine*, 62 Me. 122. So, a note by husband to wife for her return to him, and in settlement of a divorce suit, has been held valid. *Adams v. Adams*, 24 Hun (N. Y.) 401, affirmed 91 N. Y. 381. But see, contra. *Van Order v. Van Order*, 8 Hun (N. Y.) 315; *Phillips v. Meyers*, 82 Ill. 67; *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271.

¹³¹ *Adams v. Adams*, 25 Minn. 72.

¹³² *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Sayles v. Sayles*, 21 N. H. 312.

¹³³ *Everhart v. Puckett*, 73 Ind. 409; *Muckenburg v. Holler*, 29 Ind. 139; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229.

given by the husband to the attorney of the wife for services rendered in the matter to both, it is illegal as to the husband's share of the services, inasmuch as the attorney cannot lawfully render services in the matter to both contending parties.¹³⁴

Third, Offenses Injurious to Institutions Protected by Public Policy—Restraint of Marriage.

§ 506. The institution of marriage being under the protection of the law, contracts in general restraint of marriage are at common law illegal and void.¹³⁵ So, too, even contracts in restraint of marriage for a limited period; e. g. for six years.¹³⁶ So, a sealed bill for the payment of money provided that the drawer is not lawfully married in six months is illegal;¹³⁷ or on condition that the drawer, a widow, shall not marry again.¹³⁸ So, contracts for the procurement of marriage are illegal; and a note or bill given for such agreement is void.¹³⁹

Contracts in Restraint of Trade.

§ 507. The institutions of trade are also under the protection of the law, and a contract in general restraint of trade is unlawful.¹⁴⁰ An agreement not to engage in trade or in a particular business in any part of England is a general restraint and illegal.¹⁴¹ So, coal combinations are in restraint of trade, and a check given for a balance due on such a combination agreement is illegal.¹⁴² So, a bill

¹³⁴ MacDonald v. Wagner, 5 Mo. App. 56.

¹³⁵ Byles, Bills, 138; Chit. Bills, 101; 1 Edw. Bills & N. § 478; 1 Pars. Notes & B. 214; Story, Prom. Notes, § 189; Lowe v. Peers, 4 Burrows, 2225; Hartley v. Rice, 10 East, 22; Gibson v. Dickie, 3 Maule & S. 463.

¹³⁶ Hartley v. Rice, 10 East, 22.

¹³⁷ Sterling v. Sinnickson, 5 N. J. Law, 756.

¹³⁸ Baker v. White, 2 Vernon, 215.

¹³⁹ Byles, Bills, 138; 1 Daniel, Neg. Inst. 195; Chit. Bills, 101; Co. Litt. 206b; 1 Pars. Notes & B. 214; Hall v. Potter, 3 Lev. 411; Roberts v. Roberts, 3 P. Wms. 66.

¹⁴⁰ Chit. Bills, 99; 1 Daniel, Neg. Inst. 195; 1 Edw. Bills & N. § 478; Story, Prom. Notes, § 189.

¹⁴¹ Byles, Bills, 138; Chit. Bills, 99.

¹⁴² Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

or note given to further the objects of an association having for its object the regulation of freight and passage rates on the Erie Canal is illegal.¹⁴³ So, contracts to prevent competition at an auction or other public sale are illegal and void.¹⁴⁴ So, a contract not to bid at an auction, in consideration of the one who bids and buys in the property dividing it with the others,¹⁴⁵ or selling it again and satisfying a debt out of the surplus,¹⁴⁶ is illegal. And this has been held to be the case even where one purchased land subsequent to a judgment, which was at the time a lien upon it unknown to him, and afterwards paid off the execution issued under the judgment, and gave his note for an additional sum to prevent the judgment creditor from bidding on the property at the sheriff's sale,¹⁴⁷ although the judgment creditor claimed to have another claim, not in judgment, against the prior owner of the land, represented by the amount of the note.

On the other hand, while a contract in general restraint of trade is illegal, it is lawful to make one in partial and limited restraint of trade.¹⁴⁸ Such restriction may be as to the limit of space within which the business in question may not be carried on;¹⁴⁹ or for the exclusive use of a trade secret;¹⁵⁰ or not to carry on a trade with

¹⁴³ *Stanton v. Allen*, 5 Denio (N. Y.) 434.

¹⁴⁴ *Brisbane v. Adams*, 3 N. Y. 129; *Noyes v. Day*, 14 Vt. 384; *Atlas Nat. Bank v. Holm*, 19 C. C. A. 94, 71 Fed. 489; *Goldman v. Oppenheim*, 118 Ind. 95, 20 N. E. 635.

¹⁴⁵ *Doolin v. Ward*, 6 Johns. (N. Y.) 194.

¹⁴⁶ *Thompson v. Davies*, 13 Johns. (N. Y.) 112.

¹⁴⁷ *Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Thompson v. Davies*, 13 Johns. (N. Y.) 112. But several persons may agree to purchase property together at an auction sale appointing one to bid for all with restrictions as to price. *Small v. Jones*, 6 Watts & S. (Pa.) 122.

¹⁴⁸ 1 Daniel, Neg. Inst. 198; *Bunn v. Guy*, 4 East, 190; *Perkins v. Lyman*, 9 Mass. 522; *Jenkins v. Temples*, 39 Ga. 655. But a general promise not to carry on a certain trade for 30 years is illegal, and a note given in consideration of it cannot be enforced. *Saratoga Co. Bank v. King*, 44 N. Y. 87.

¹⁴⁹ *Chit. Bills*, 99; 1 *Edw. Bills & N.* § 478; *Hulocke v. Blacklowe*, 2 Saund. 156, note 1; *Mitchell v. Reynolds*, 1 P. Wms. 190; *Davis v. Mason*, 5 Term R. 118; *Bunn v. Guy*, 4 East, 190; *Horner v. Graves*, 7 Bing. 735; *Ward v. Byrne*, 5 Mees. & W. 548; *Homer v. Ashford*, 3 Bing. 323; *Nobles v. Bates*, 7 Cow. (N. Y.) 307.

¹⁵⁰ *Bryson v. Whitehead*, 1 Sim. & S. 74.

certain customers;¹⁵¹ or not to trade against the laws of a certain company, such as the Russian Company or East India Company.¹⁵²

Contracts in Fraud of Creditors.

§ 508. The protection of legitimate trade naturally implies a prohibition of fraud in all its forms; and it may be laid down as a general principle that contracts in fraud of the rights and interests of third persons, as well as contracts in fraud of a party to them, are void, except where by the rules of commercial paper the defense is excluded.¹⁵³ It follows that a note or bill made in fraud of other creditors is void between the parties.¹⁵⁴ But the maker of a note or check cannot obtain relief for fraud to which he is a party as against the defrauded creditors.¹⁵⁵ But, if the creditor receives notes given for goods fraudulently sold by the maker, they cannot attack the sale without first giving up the notes.¹⁵⁶

This is especially the case in proceedings under the bankruptcy law. Thus, a note given to a creditor for more than his share of the assets in fraud of the bankrupt law is illegal.¹⁵⁷ So, a note

¹⁵¹ Byles, Bills, 138; *Mitchell v. Reynolds*, 1 P. Wms. 190; *Davis v. Mason*, 5 Term R. 118; *Tallis v. Tallis*, 1 El. & Bl. 391; *Mallan v. May*, 11 Mees. & W. 653; *Green v. Price*, 13 Mees. & W. 695; *Price v. Green*, 16 Mees. & W. 346; though for an unlimited time, *Pemberton v. Vaughan*, 10 Q. B. 87; *Salnter v. Ferguson*, 7 C. B. 716.

¹⁵² *Gross v. La Page*, Holt, 105; *Lightfoot v. Tenant*, 1 Bos. & P. 552.

¹⁵³ Chit. Bills, 102; 1 Daniel, Neg. Inst. 193, 197; 1 Edw. Bills & N. § 483; *Story, Prom. Notes*, § 89; *Gordon v. Clapp*, 113 Mass. 335.

¹⁵⁴ *Fay v. Fay*, 121 Mass. 561; *Fenton v. Ham*, 35 Mo. 409; *Hamilton v. Scull's Adm'r*, 25 Mo. 165; *Powell v. Inman*, 52 N. C. 28; *Scott v. Magloughlin*, 133 Ill. 35, 24 N. E. 1030. So, if the payee surrenders the note to defraud his creditors, he cannot afterwards recover on it. *Church v. Muir*, 33 N. J. Law, 318.

¹⁵⁵ E. g. where a third party gives his note or check to a bank to create fictitious assets for the inspection of the bank examiner, *Allen v. Bank*, 127 Pa. St. 51, 17 Atl. 886; or to a defaulting public officer to conceal his deficit, *Longmire v. Fain*, 89 Tenn. 393, 18 S. W. 70. But such fraud could be set up against the solvent bank payee. *First Nat. Bank v. Felt*, 100 Iowa, 680, 69 N. W. 1057. So, where the maker's fraudulent purpose was known to his accommodation indorser, he can set it up against him. *Erie Boot & Shoe Co. v. Eichenlaub*, 127 Pa. St. 164, 17 Atl. 889.

¹⁵⁶ *Bowden v. Spellman*, 59 Ark. 251, 27 S. W. 602.

¹⁵⁷ Chit. Bills, 92, 102; 1 Edw. Bills & N. § 482; 1 Pars. Notes & B. 216;

given to a creditor to induce him to join in a composition deed in bankruptcy is illegal,¹⁵⁸ even though given only for the balance of the debt due the creditor. And such a note is illegal, although given after the maker's discharge.¹⁵⁹ So, a note given by a bankrupt in consideration of the payee's consenting to the composition is illegal, the note including both the balance of the creditor's claim and the assumption of another debt for which the bankrupt was not liable.¹⁶⁰ And a note given by a third person to the creditor to induce him to enter into such composition is void.¹⁶¹ And a note

Grimes v. Hillenbrand, 4 Hun (N. Y.) 354; *Cockshott v. Bennett*, 2 Term R. 763; *Leicester v. Rose*, 4 East, 372; *Spurrett v. Spiller*, 1 Atk. 105; *Jackson v. Lomas*, 4 Term R. 166; *Cooling v. Noyes*, 6 Term R. 263; *Bryant v. Christie*, 1 Starkie, 329; *Jackson v. Davison*, 4 Barn. & Ald. 695; *Lewis v. Jones*, 4 Barn. & C. 511; *Ex parte Sadler*, 15 Ves. 55; *Knight v. Hunt*, 5 Bing. 432; *Britten v. Hughes*, Id. 460; *Took v. Tuck*, 4 Bing. 224.

¹⁵⁸ *Bryant v. Christie*, 1 Starkie, 329; *Humphreys v. Welling*, 1 Hurl. & C. 7; *Breck v. Cole*, 4 Sandf. (N. Y.) 79. Of such a transaction, *Duer, J.*, says in this case (page 88): "When an additional security, privately given to a particular creditor, is taken from the debtor himself, it is not merely upon the ground that it is a fraud upon the creditors from whom it is concealed that it is held to be void. The creditor who exacts such a security as the condition of his own assent to a composition deed takes an unfair advantage of the distressed condition of the debtor. He is guilty of oppression and coercion. The unfortunate debtor is not a free agent, but is subjected to a moral duress as odious to the law as the grossest fraud." So, *Cockshott v. Bennett*, 2 Term R. 763; *Jackson v. Lomas*, 4 Term R. 166; *Case v. Gerrish*, 15 Pick. (Mass.) 49; *Harvey v. Hunt*, 119 Mass. 279; *Huckins v. Hunt*, 138 Mass. 366; *Winn v. Thomas*, 55 N. H. 294; *Weaver v. Waterman*, 18 La. Ann. 241. But such notes will be valid so far as they conform to the composition, if in part only. *Hanover Nat. Bank v. Blake*, 142 N. Y. 404, 37 N. E. 519. And, even though "void" by statute between original parties, they are valid in the hands of a bona fide holder. *Rhodes v. Beall*, 73 Ga. 641.

¹⁵⁹ *Howe v. Litchfield*, 3 Allen (Mass.) 443; *Rice v. Maxwell*, 13 Smedes & M. (Miss.) 289. At least such a note has been held to be without consideration. *Ex parte Hall*, 1 Deac. 171; *Chit. Bills*, 103. And a better or additional security stands on the same footing as a payment in excess of the creditor's proper share. *Leicester v. Rose*, 4 East, 372, overruling *Feise v. Randall*, 6 Term R. 146. And a note or other security given as such inducement after the composition, but agreed on beforehand, is likewise void, *Fay v. Fay*, 121 Mass. 561; *Tinker v. Hurst*, 70 Mich. 159, 38 N. W. 16; or, on like agreement, after discharge, *Howe v. Litchfield*, 3 Allen (Mass.) 443.

¹⁶⁰ *Doughty v. Savage*, 28 Conn. 146.

¹⁶¹ *In re Clement's Appeal*, 52 Conn. 461.

given to such third person by a bankrupt for his indemnity is likewise void.¹⁶² Where, however, a note, given to induce a creditor to join in a composition deed in fraud of other creditors, has been paid to a bona fide holder for value, the amount may be recovered by the maker from the payee.¹⁶³

So, an agreement by the payee of a note to file a petition in bankruptcy or insolvency against the maker is an illegal consideration for a note, although the payee be a bona fide creditor for the full amount.¹⁶⁴ And this is true, although such note be given with the knowledge of other creditors.¹⁶⁵ So, a bill or note given by a bankrupt to his creditor to induce him to sign a bankrupt certificate of discharge is void;¹⁶⁶ or to induce him not to oppose a bankrupt's discharge;¹⁶⁷ or to withdraw his opposition to such discharge.¹⁶⁸ So, a bond given for such consideration by a third person other than the bankrupt is void.¹⁶⁹ But the opposition of a creditor to the

¹⁶² 1 Daniel, Neg. Inst. 194.

¹⁶³ Gilmour v. Thompson, 49 How. Prac. (N. Y.) 200.

¹⁶⁴ Payne v. Eden, 3 Caines (N. Y.) 213.

¹⁶⁵ 1 Edw. Bills & N. § 381.

¹⁶⁶ Byles, Bills, 141; Chit. Bills, 113; St. 12 & 13 Vict. c. 106. § 202; Smith v. Bromley, 2 Doug. 696, note; Cockshott v. Bennett, 2 Term R. 763; Nerot v. Wallace, 3 Term R. 17; Sumner v. Brady, 1 H. Bl. 647; Birch v. Jervis, 3 Car. & P. 379; Murray v. Reeves, 8 Barn. & C. 421, 2 Man. & R. 423; Rogers v. Kingston, 10 Moore, 97, 2 Bing. 441; Haywood v. Chambers, 5 Barn. & Ald. 753, 1 Dowl. & R. 411; Horn v. Ion, 4 Barn. & Adol. 78, 1 Nev. & M. 627; Robson v. Calze, 1 Doug. 228; Holland v. Palmer, 1 Bos. & P. 95; Davis v. Holding, 1 Mees. & W. 159.

¹⁶⁷ Byles, Bills, 144; Chit. Bills, 102; Murray v. Reeves, 8 Barn. & C. 421; Rogers v. Kingston, 2 Bing. 441, 10 Moore, 97; Jackson v. Davison, 4 Barn. & Ald. 691; Davis v. Holding, 1 Mees. & W. 159; Wiggin v. Bush, 12 Johns. (N. Y.) 306; Fulton v. Day, 63 Wis. 112, 23 N. W. 99.

¹⁶⁸ Baker v. Matlack, 1 Ashm. (Pa.) 68; Simmons v. West, 2 Miles (Pa.) 196; Sharp v. Teese, 9 N. J. Law, 352; Austin v. Markham, 44 Ga. 161; Rice v. Maxwell, 21 Miss. 289.

¹⁶⁹ Bruce v. Lee, 4 Johns. (N. Y.) 410. But a note for the debt due, given by a third person to the creditor to induce him to withdraw his opposition to the debtor's discharge under the United States bankrupt act of 1841, has been held to be valid. Fox v. Paine, 10 Ala. 523. See, however, contra. Bell v. Leggett, 7 N. Y. 176, although given in this case without the bankrupt's knowledge.

bankrupt's discharge may be lawfully removed by the purchase of his debt without the bankrupt's knowledge by a third party.¹⁷⁰

§ 509. — An agreement to dismiss a bankruptcy proceeding is also illegal and void as a consideration for a note or bill.¹⁷¹ So, under the United States bankruptcy act of 1867, a note given for a debt discharged in bankruptcy, together with an agreement for the dismissal of a proceeding to set aside a bankruptcy discharge, is illegal and void.¹⁷² But, where an agreement has been made for the discontinuance of bankruptcy proceedings against a corporation and for the sale of certain stock, this has been held to constitute a valid consideration for a note given by the purchaser of the stock.¹⁷³

In like manner, a note or other security given by a bankrupt to a creditor who has proved his debt, to enable him to receive more than other creditors, is void;¹⁷⁴ e. g. a note for twice the amount of the actual debt given for the purpose of defrauding other creditors.¹⁷⁵ So, an agreement made in fraud of a surety or other collateral party is void;¹⁷⁶ or a note given to protect the property of the maker from his creditors.¹⁷⁷ So, a note given to a debtor by one who has received the purchase money of the debtor's property, which was sold for the purpose of defrauding his creditors, is illegal; although other good consideration be joined with the illegal consideration.¹⁷⁸ We have already seen that a note or other security given for a debt discharged in bankruptcy or insolvency is without sufficient consideration and void.¹⁷⁹ And a promise to pay such

¹⁷⁰ *Bell v. Leggett*, 2 Sandf. (N. Y.) 450.

¹⁷¹ *Paton v. Stewart*, 78 Ill. 481.

¹⁷² *Fell v. Cook*, 44 Iowa, 485, although a promise of payment had been made subsequent to the discharge. See Rev. St. U. S. §§ 5120, 5131.

¹⁷³ *Benner v. Van Norden*, 27 La. Ann. 473.

¹⁷⁴ *Byles, Bills*, 144; *Rose v. Main*, 1 Bing. N. C. 357, 1 Scott, 127; *Davis v. Holding*, 1 Mees. & W. 159.

¹⁷⁵ *Sternburg v. Bowman*, 103 Mass. 325.

¹⁷⁶ *Pidcock v. Hinton*, 3 Barn. & C. 605; *Jackson v. Duchaire*, 3 Term R. 551; *Lewis v. Jones*, 4 Barn. & C. 506; *Stone v. Compton*, 5 Bing. N. C. 142; *Cowper v. Smith*, 4 Mees. & W. 74.

¹⁷⁷ *Nellis v. Clark*, 20 Wend. (N. Y.) 24, 4 Hill (N. Y.) 424; *McCausland v. Ralston*, 12 Nev. 195.

¹⁷⁸ *Niver v. Best*, 10 Barb. (N. Y.) 369.

¹⁷⁹ *Evans v. Williams*, 1 Crompt. & M. 30; *Ashley v. Killick*, 5 Mees. & W.

debt in full, after the property covered by the general assignment is exhausted, is void.¹⁸⁰

Wagers—At Common Law.

§ 510. At common law, wagers on indifferent subjects are not in themselves illegal as against public policy, and a consideration of that sort is therefore at common-law sufficient.¹⁸¹ If, however, the wager is in itself repugnant to principles of public policy, a note given for it is void.¹⁸² Thus, a wager which leads to a breach of the peace is illegal;¹⁸³ or one which violates or tends to violate public decency or order;¹⁸⁴ or one that is calculated to produce an injurious effect upon the feelings or interests of a third person;¹⁸⁵ or to expose another to ridicule or libel.¹⁸⁶ Thus, a wager that an unmarried woman would have a child is illegal.¹⁸⁷

So, it has been held that wagers relating to public events of the state, as a wager upon the event of a national war, are illegal.¹⁸⁸ In like manner, a wager upon the result of a public election is illegal at common law.¹⁸⁹ This is true, although the wager may have been

509; *Kernot v. Pittis*, 2 El. & Bl. 421; *Humphreys v. Welling*, 32 L. J. Ex. 33, 1 Hurl. & C. 7. For other cases, see "Sufficiency of Consideration," supra.

¹⁸⁰ *Ramsdell v. Edgarton*, 8 Metc. (Mass.) 227.

¹⁸¹ Chit. Bills, 103; 1 Daniel, Neg. Inst. 196; 1 Edw. Bills & N. § 477; *Good v. Elliott*, 3 Term R. 693, referring with approval to the remarks of Lord Mansfield to that effect in *Da Costa v. Jones*, Cowp. 734.

¹⁸² Chit. Bills, 101; 1 Pars. Notes & B. 215; Story, Prom. Notes, § 189; *Gilbert v. Sykes*, 16 East, 150. But not so a note for money loaned to the maker, to enable him to pay a wager to a third party. *Armstrong v. Bank*, 133 U. S. 433, 10 Sup. Ct. 450.

¹⁸³ Chit. Bills, 103.

¹⁸⁴ Chit. Bills, 103; 1 Pars. Notes & B. 215; 1 Edw. Bills & N. § 477.

¹⁸⁵ Byles, Bills, 137; Chit. Bills, 102; 1 Daniel, Neg. Inst. 196; *Da Costa v. Jones*, Cowp. 729; *Harvy v. Gibbons*, 2 Lev. 161; *Eastabrook v. Scott*, 3 Ves. 456; *Gilbert v. Sykes*, 16 East, 150; *Eltham v. Kingsman*, 1 Barn. & Ald. 683.

¹⁸⁶ Chit. Bills, 103.

¹⁸⁷ *Ditchburn v. Goldsmith*, 4 Camp. 152.

¹⁸⁸ Chit. Bills, 101; 1 Daniel, Neg. Inst. 196; 1 Edw. Bills & N. § 477; *Lacausade v. White*, 7 Term R. 535; *Allen v. Hearn*, 1 Term R. 57.

¹⁸⁹ Chit. Bills, 101; 1 Edw. Bills & N. §§ 477, 511; *Beeley v. Wingfield*, 11 East, 46; *Pilkington v. Green*, 2 Bos. & P. 151; *Denny v. Elkins*, 4 Cranch, C. C. 161, Fed. Cas. No. 3,790; *Lockhart v. Hullinger*, 2 Ill. App. 465; *Gordon v. Ca-*

made after the election, but prior to the result being made known.¹⁹⁰ So, where a horse was sold, and a note taken for it payable when Martin Van Buren should be elected president, it was held to be void as a wager of this character.¹⁹¹ And such illegality is a good defense against one who takes a note or bill by indorsement after its maturity.¹⁹² But, where money has been deposited as a stake on an election wager of this kind, a creditor of the loser has no power to rescind the contract except in case of insolvency of the debtor.¹⁹³ In like manner, a wager on the result of a public criminal prosecution is illegal at common law.¹⁹⁴ So, too, a wager upon an abstract question of law in which the parties have no interest.¹⁹⁵ On the same ground of public policy, wagers concerning the produce of a branch of the public revenue have been held to be illegal.¹⁹⁶

Wagers, likewise, as to the sex of a third person, are illegal, as tending to indecency and immorality.¹⁹⁷ For the same reason, a wager on a prize fight is illegal;¹⁹⁸ or on a dog or cock fight;¹⁹⁹ or on the mode or result of playing an illegal game.²⁰⁰

sey, 23 Ill. 70; *Guyman v. Burlingame*, 36 Ill. 201; *Gregory v. King*, 58 Ill. 169. But see, contra, *Williams v. Smith*, 4 Ill. 524; and, so far as regards a bona fide holder for value before maturity, *Adams v. Wooldridge*, Id. 255. But no recovery can be had in trover against a stakeholder for a note payable on an election wager, and surrendered by the stakeholder to the maker, who had lost the wager, *Rust v. Gott*, 9 Cow. (N. Y.) 169; nor by the drawer of a check for a wager against the bank for payment of it, *McCord v. California Nat. Bank of San Diego*, 96 Cal. 197, 31 Pac. 51.

¹⁹⁰ *Brush v. Keeler*, 5 Wend. (N. Y.) 250.

¹⁹¹ *Danforth v. Evans*, 16 Vt. 538. But giving a note for a liquor business, with proviso that it should be void if its value was affected by legislation at the next session, is not a wager. *Phillips v. Gifford* (Iowa) 73 N. W. 1033.

¹⁹² *Lansing v. Lansing*, 8 Johns. (N. Y.) 354.

¹⁹³ *Clark v. Gibson*, 12 N. H. 386.

¹⁹⁴ *Byles, Bills*, 138; 1 *Daniel, Neg. Inst.* 196; *Evans v. Jones*, 5 Mees. & W. 77.

¹⁹⁵ *Chit. Bills*, 101; *Henkin v. Guerss*, 12 East, 247.

¹⁹⁶ *Chit. Bills*, 101; *Atherfold v. Beard*, 2 Term R. 610; *Shirley v. Sankey*, 2 Bcs. & P. 130.

¹⁹⁷ *Da Costa v. Jones*, Cowp. 729.

¹⁹⁸ *Chit. Bills*, 101; 1 *Daniel, Neg. Inst.* 196; 1 *Edw. Bills & N.* § 477; *Hunt v. Bell*, 7 Moore, 212.

¹⁹⁹ *Chit. Bills*, 101; *Egerton v. Furzman*, Ryan & M. 213; *Squires v. Whisken*, 3 Camp. 140.

²⁰⁰ *Chit. Bills*, 101; *Brown v. Leeson*, 2 H. Bl. 43.

Wagers—By Statute.

§ 511. In many of the United States the matter of wagers is regulated by statutes prohibiting wagers and games of chance.²⁰¹ Some states make exceptions in favor of the legality of racing and bets on racing. Where wagers are prohibited under a penalty, as in Vermont, no recovery can be had on a bill or note given for such consideration.²⁰²

In England, by the statute of Charles II., all securities for money lost at play exceeding £100 were made void;²⁰³ and, by the statute of Anne, all written contracts given for gaming or betting or for money loaned for such purposes are made void.²⁰⁴ A later act of George II. avoids contracts for gaming, but does not expressly include bills and notes, and therefore such instruments founded on a stock jobbing transaction have been held to be valid in the hands of a bona fide holder for value before maturity.²⁰⁵ By the still later act of Wm. IV., a note given for a loss in gambling was not made void, although the consideration was declared to be illegal.²⁰⁶ The more recent act of 8 & 9 Vict. makes all gaming contracts, whether written or oral, void.²⁰⁷ And it has been held under these two last-mentioned statutes that a bill given in renewal of a note for a

²⁰¹ 1 Daniel, Neg. Inst. 196. VERMONT (V. S. § 5133 et seq.); NEW YORK (1 Rev. St. [3d Ed.] pp. 839, 841); NEW JERSEY (2 Gen. St. p. 1606, § 3). In TENNESSEE it is a misdemeanor to knowingly negotiate a note given for a gaming loss (Shannon's Code, §§ 3165, 6822). In WISCONSIN such notes are void (Sanb. & B. Ann. St. § 453S).

²⁰² Collamer v. Day, 2 Vt. 144.

²⁰³ St. 16 Car. II. c. 7; Byles, Bills, 222; Chit. Bills, 109; Bentineck v. Connop, 5 Q. B. 693; Edwards v. Dick, 4 Barn. & Ald. 212.

²⁰⁴ St. 9 Anne, c. 14; Byles, Bills, 140; Chit. Bills, 109; Robinson v. Bland, 2 Burrows, 1077; Young v. Moore, 2 Wils. 67; McKinnell v. Robinson, 3 Mees. & W. 434, 441.

²⁰⁵ Chit. Bills, 111; 7 Geo. II. c. 8; Day v. Stuart, 6 Bing. 109; Greenland v. Dyer, 2 Man. & R. 422; Cuthbert v. Haley, 8 Term R. 390; George v. Stanley, 4 Taunt. 683; Davison v. Franklin, 1 Barn. & Adol. 142; Boulton v. Coghlan, 1 Bing. N. C. 640.

²⁰⁶ 5 & 6 Wm. IV. c. 41, § 1.

²⁰⁷ Byles, Bills, 141; St. 8 & 9 Vict. c. 109; Fitch v. Jones, 24 Law J. Q. B. 293, 5 El. & Bl. 238; Parsons v. Alexander, 24 Law J. Q. B. 277, 5 El. & Bl. 263; Coombes v. Dibble, L. R. 1 Exch. 248.

gaming debt and for forbearance on the debt is illegal as between the payee and acceptor.²⁰⁸

Wagers on Racing.

§ 512. Under the older English laws, a bet under £10 on a horse race was legal;²⁰⁹ although by the gaming statute of Anne a note or bill given to secure it would have been void.²¹⁰ In like manner, a note or bill given for a wager on a foot race or cricket match is void under the statute of Anne.²¹¹ Horse races, which were legalized by the statutes of George II., were within the former acts against gaming.²¹² A race for a plate under £50 still remained illegal,²¹³ but a deposit of £25 on each side on such race was held to be good.²¹⁴

In Texas a note deposited for a wager on a race is valid.²¹⁵ But a note made in Maryland for "bookmaking" on a horse race in Virginia is illegal, although valid by Virginia law.† And, where wagers are prohibited, a note given for money won at a race is void.²¹⁶ So, a note for the entrance fee of a horse at such race.²¹⁷ So, in Rhode Island, a note given by the stakeholder to the winner of such a wager, except in the hands of a bona fide holder for value.²¹⁸ And where the stakeholder has paid over the stake to the

²⁰⁸ Hay v. Ayling, 16 Q. B. 423.

²⁰⁹ Byles, Bills, 141; McAllester v. Haden, 2 Camp. 438.

²¹⁰ Byles, Bills, 141.

²¹¹ Chit. Bills, 101; Jeffreys v. Walter, 1 Wils. 220; Lynall v. Longbothom, 2 Wils. 36.

²¹² 13 Geo. II. c. 19; 18 Geo. II. c. 34; Goodburn v. Marley, 2 Strange. 1159; Clayton v. Jennings, 2 W. Bl. 706; Blaxton v. Pye, 2 Wils. 309; Shillito v. Theed, 7 Bing. 405.

²¹³ Byles, Bills, 141; Chit. Bills, 113; Whaley v. Pajot, 2 Bos. & P. 51; Robson v. Hall, Peake, 127; Johnson v. Bann, 4 Term R. 1; Ximenes v. Jacques, 6 Term R. 499.

²¹⁴ Bidmead v. Gale, 4 Burrows, 2432.

²¹⁵ Crump v. Secrest, 9 Tex. 260.

† Spies v. Rosenstock (Md.) 39 Atl. 268. The statutes of 16 Car. II. c. 7, and 9 Anne, c. 14, are both in force in Maryland. Id.

²¹⁶ Crawford v. Storms, 41 Miss. 540.

²¹⁷ Comly v. Hillegass, 94 Pa. St. 132.

²¹⁸ Atwood v. Weeden, 12 R. I. 293.

winner, the wager being prohibited by statute, the infancy of the stakeholder is no defense to a suit brought against him by the loser for the money.²¹⁹

And the transfer by a stakeholder to the winner, against the loser's protest, of a check given him to hold as a stake upon a race, is void in Connecticut by force of the statute, even in the hands of a holder for value without notice.²²⁰ So, in general, where a wager is prohibited by statute, stakes deposited on such wager may be recovered from the stakeholder by the loser.²²¹

Wager Policies—Lotteries.

§ 513. Wager policies of insurance on ships or lives, in which the parties insuring have no interest, are against public policy and illegal.²²² The English statutes against gaming apply to games both of skill and of chance.²²³ Thus an I O U, given for money lost at billiards, is within the statutes and void at suit of the payee.²²⁴

So, in states where lotteries are prohibited by statute, a note given for a lottery ticket is illegal and void.²²⁵ And a statute prohibiting lotteries under a penalty renders the sale of tickets illegal and void.²²⁶ Even when lotteries were permitted in England by

²¹⁹ *Lewis v. Littlefield*, 15 Me. 233.

²²⁰ *Conklin v. Roberts*, 36 Conn. 461.

²²¹ *Holt v. Hodge*, 6 N. H. 104. So, a stake deposited on a wager that A. B. could not break jail, *Perkins v. Eaton*, 3 N. H. 152; or on an election, *McAllister v. Hoffman*, 16 Serg. & R. (Pa.) 147.

²²² *Byles*, Bills, 144; *Chit. Bills*, 113; *Kent v. Bird*, Cowp. 583; *Nantes v. Thompson*, 2 East, 385; *Halford v. Kymer*, 10 Barn. & C. 724; *Roebuck v. Hamerton*, Cowp. 737; *Good v. Elliott*, 3 Term R. 693; *Morgan v. Pebrer*, 4 Scott, 230.

²²³ *Sigel v. Jebb*, 3 Starkie, 1.

²²⁴ *Parsons v. Alexander*, 5 El. & Bl. 263.

²²⁵ *Thompson v. Milligan*, 2 Cranch, C. C. 207, Fed. Cas. No. 13,969; *Hawkins v. Cox*, 2 Cranch, C. C. 173, Fed. Cas. No. 6,243; *Hunt v. Knickerbacker*, 5 Johns. (N. Y.) 327. But not a note for money received by the maker from the payee's agent for such illegal sales made by the agent. *Lemon v. Grosskopf*, 22 Wis. 447.

²²⁶ *Roby v. West*, 4 N. H. 285. So, too, a prohibition under a penalty of sales of liquor without license. *Lewis v. Welch*, 14 N. H. 294.

law, gaming by means of lotteries was illegal.²²⁷ But in an early case in Connecticut a note given to insure a prize in a lottery was held to be valid,²²⁸ lotteries not being then prohibited in the state of Connecticut. On the other hand, a contract for the purchase of goods or trinkets, to be sold on the lottery plan, is void where lotteries are prohibited.²²⁹

Gambling.

§ 514. Where gaming is prohibited, a note given for winnings at cards or other games is illegal and void.²³⁰ So, a note given to a fellow loser for a share of the gambling loss is illegal.²³¹ But, where one of two losers by gaming pays the debts jointly incurred, this has been held to be a legal consideration for a note afterwards given to him by the other loser for his share.²³² And it has been held in a recent case in North Carolina that, where a judgment had been won at cards, a note afterwards given for it was not therefore illegal.²³³ But, where a bill is drawn in France to take up English bills given for money lost in gaming in England, the taint of illegality still remains, and avoids the instrument in the hands of the original payee, although not prohibited by French law.²³⁴

In general, a bill or note given for a wager is invalid, not only in the hands of the original parties, but of all subsequent holders

²²⁷ Chit. Bills, 113, 116; *Deey v. Shee*, 2 Term R. 617; *Seddons v. Stratford, Peake*, 215; *Wyatt v. Bulmer*, 2 Esp. 533.

²²⁸ *Bacon v. Goodfell*, 2 Root, 283.

²²⁹ *Hull v. Ruggles*, 56 N. Y. 424. So, a note for work and materials in preparing a lottery. *Higgins v. Miner*, 13 Ind. 346.

²³⁰ *Knight v. Gregg*, 26 Tex. 506; *Evans v. Cook*, 11 Nev. 69; *Shain v. Goodwin*, 46 Fed. 564, under CALIFORNIA Pen. Code, § 330. So, a nonnegotiable certificate for money lost at faro, *Savings Bank of Kansas v. National Bank of Commerce*, 38 Fed. 800, under MISSOURI Rev. St. §§ 5720, 5721; and even its transfer in another state, *Id.* So, for liquor, cigars, and billiard table paid by the loser. *Murphy v. Rogers*, 151 Mass. 118, 24 N. E. 35, under MASSACHUSETTS Pub. St. c. 99, § 5. But a note for the repurchase of a horse which had been lost on a bet is valid. *Windham v. Childress*, 7 Ala. 357.

²³¹ *Whitesides v. McGrath*, 15 La. Ann. 401.

²³² *Bogges v. Lilly*, 18 Tex. 200.

²³³ *Teague v. Perry*, 64 N. C. 39.

²³⁴ *Wynne v. Callander*, 1 Russ. 293.

taking it after maturity or with notice.²³⁵ Thus, where A. gave a check for a gambling debt which was afterwards indorsed and eventually paid by B. with knowledge of its illegal character, no recovery could be had against A.²³⁶ And, if the statute makes it absolutely void, it will be so even in the hands of a bona fide holder.²³⁷ Although, however, a bill or note for a gaming debt may be illegal or even void in the hands of a bona fide holder for value against the original loser, it may still be valid against indorsers.²³⁸ But where the consideration is a doubtful one, and the note on its transfer represents two debts, one of which is illegal, it will be itself valid. Thus, where A. owed a gambling debt to B., and B. owed a legal debt to C., and A. gave his note to C. in discharge of the illegal debt to B., the note, being accepted by C. in discharge of the legal debt from B., is valid in C.'s hands.²³⁹

In like manner and for like reasons a note or bill given for money lent to game with is void by force of the statute even in the hands of a holder for value.²⁴⁰ And money which has been lent for such illegal purpose cannot be recovered again by the lender.²⁴¹

So, a renewal note, given for such loan to the payee of the original note, is likewise void between the parties.²⁴² So, too, a note for money loaned to be staked on a horse race.²⁴³ So, too, a bill

²³⁵ *Brown v. Turner*, 7 Term R. 630, 2 Esp. 631; *Aubert v. Maze*, 2 Bos. & P. 374; *Steers v. Lashley*, 6 Term R. 61; *Amory v. Meryweather*, 2 Barn. & C. 573; *Id.*, 4 Dowl. & R. 86; *Spray v. Burk*, 123 Ind. 565, 24 N. E. 588.

²³⁶ *Scollans v. Flynn*, 120 Mass. 271, bona fide holders being protected by the statute (Gen. St. c. 85, § 4).

²³⁷ IOWA (Code, §§ 4028, 4029). *Traders' Bank of Chicago v. Alsop*, 64 Iowa, 97, 19 N. W. 863. And this statute covers a note given even in small part for tickets for a raffle. *Koster v. Seney*, 99 Iowa, 584, 68 N. W. 824.

²³⁸ *Byles, Bills*, 141; *Chit. Bills*, 117; *Edwards v. Dick*, 4 Barn. & Ald. 212; *Bowyer v. Bampton*, 2 Strange, 1155; *O'Keefe v. Dunn*, 6 Taunt. 315.

²³⁹ *Bowen v. Doggett*, 2 Nott & McC. 127.

²⁴⁰ *Chit. Bills*, 110; *Byles, Bills*, 141; 1 Daniel, *Neg. Inst.* 204; 1 *Pars. Notes & B.* 214; *Bowyer v. Bampton*, *supra*; *Mordecai v. Dawkins*, 9 Rich. Law (S. C.) 262. But see, *contra*, even in the payee's hands, *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. 22.

²⁴¹ *Cannan v. Bryce*, 3 Barn. & Ald. 179; *McKinnell v. Robinson*, 3 Mees. & W. 434.

²⁴² *Cutler v. Welsh*, 43 N. H. 497.

²⁴³ *Ruckman v. Bryan*, 3 Denio (N. Y.) 340. But not for the purchase of a horse to run in a race. *Cummings v. Henry*, 10 Ind. 109. And, as to money

of exchange, given partly for money lost at play and partly for money loaned for gaming purposes, is void as to both, but as to the latter there might formerly be a recovery under the common counts in England.²⁴⁴

Stock Gambling—Futures—"Bohemian Oats."

§ 515. Stock jobbing and stock gambling are essentially of the same general character as other gambling, and are now specifically prohibited by statute in some states.²⁴⁵ It was formerly held that money paid out in settling differences on a stock jobbing transaction could be recovered.²⁴⁶ And it has been held that contracts for the purchase or sale of stocks are lawful, although the seller is not at the time possessed of such stock.²⁴⁷ By the statute of George II., payment for differences in stock jobbing was prohibited, and such payments and loans made for that purpose might be recovered back.²⁴⁸ But this act has since been repealed.²⁴⁹ As bills and other securities given for such differences have not been declared void by statute, it seems that an indorsee may recover thereon against the acceptor²⁵⁰ or drawer.²⁵¹ But the indorsee of such a note after maturity cannot recover against the drawer upon it, or upon a bond subsequently given by him in settlement of it.²⁵²

In Massachusetts, a note given to a broker in settlement of losses on a stock transaction has been held valid, although the transac-

loaned for an illegal purpose, and securities given therefor, see *Jones v. Planters' Bank*, 9 Heisk. (Tenn.) 455; *White v. Yarbrough*, 16 Ala. 109.

²⁴⁴ *Robinson v. Bland*, 2 Burrows, 1077.

²⁴⁵ ILLINOIS (Cr. Code, §§ 132, 178); TENNESSEE (Mill. & V. Code, §§ 2438-2444); INDIANA (Rev. St. § 4950).

²⁴⁶ *Byles, Bills*, 142; *Falkney v. Reynous*, 4 Burrows, 2069; *Petrie v. Hannay*, 3 Term R. 418.

²⁴⁷ *Mortimer v. McCallan*, 7 Mees. & W. 20, affirmed 9 Mees. & W. 636.

²⁴⁸ 7 Geo. II. c. 8; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *McKinnell v. Robinson*, 3 Mees. & W. 434.

²⁴⁹ 23 & 24 Vict. c. 28.

²⁵⁰ *Broughton v. Waterworks Co.*, 3 Barn. & Ald. 10.

²⁵¹ *Day v. Stuart*, 6 Bing. 109, 3 Moore & P. 334.

²⁵² *Amory v. Meryweather*, 2 Barn. & C. 573, 4 Dowl. & R. 86; nor against the acceptor, *Brown v. Turner*, 7 Term R. 630, 2 Esp. 631.

tion itself was void by statute.²⁵³ On the other hand, notes given for losses in stock gambling,²⁵⁴ or for margins in stock operations,²⁵⁵ or by the broker to his customer for profits,²⁵⁶ have been held to be founded upon illegal consideration, and not recoverable. And, in Wisconsin, notes given for a broker's services in a gambling transaction in grain, which was illegal by statute, have been held to be void, both as to maker and indorser, and at suit of a subsequent indorsee.²⁵⁷

Contracts for "futures" or "options," whether in stocks or produce, are wagers at common law, where no actual sale and delivery are contemplated, and are within the general terms of the statute provisions against wagers. A note or bill is therefore invalid as to parties with notice, if given for margins on such contract,²⁵⁸ or to reimburse advances made.²⁵⁹ Securities pledged for such margins may be recovered from the pledgee.²⁶⁰ So, the note of a third party transferred to the broker for that purpose.²⁶¹ It must, however, be shown affirmatively that no actual delivery was intended.²⁶²

²⁵³ Wyman v. Fiske, 3 Allen, 238.

²⁵⁴ Fareira v. Gabell, 89 Pa. St. 89; Brua's Appeal, 55 Pa. St. 294. But see Smith v. Bouvier, 70 Pa. St. 325, where a distinction is based on the delivery of the stocks afterwards.

²⁵⁵ Swartz's Appeal, 3 Brewst. (Pa.) 131; Raven v. Rubino, 20 N. Y. Wkly. Dig. 124. So, in Alabama for cotton margins, Hawley v. Bibb, 69 Ala. 52; and in Illinois even in the hands of a bona fide holder, Tenney v. Foote, 4 Ill. App. 594. But see Hentz v. Jewell, 20 Fed. 592; Sawyer v. Macaulay, 18 S. C. 543; Shaw v. Clark, 49 Mich. 384, 3 N. W. 786; Third Nat. Bank v. Harrison, 3 McCrary, 316, 10 Fed. 243; Third Nat. Bank v. Tinsley, 11 Mo. App. 498.

²⁵⁶ Morris v. Norton, 21 C. C. A. 553, 75 Fed. 912; Mechanics' Sav. Bank & Trust Co. v. Duncan (Tenn.) 36 S. W. 887.

²⁵⁷ Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, and 9 N. W. 595.

²⁵⁸ Root v. Merriam, 27 Fed. 909; Cunningham v. Bank, 71 Ga. 400 (Ga. Code 1882, § 2753); Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839 (Ill. Cr. Code, § 178); Davis v. Davis, 119 Ind. 511, 21 N. E. 1112; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Snoddy v. Bank, 88 Tenn. 573, 13 S. W. 127 (Tenn. Mill. & V. Code, § 2438); Mechanics' Sav. Bank & Trust Co. v. Duncan (Tenn. Ch. App.) 36 S. W. 887; Seeligson v. Lewis, 65 Tex. 215.

²⁵⁹ Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776. But in Alabama such a note has been upheld. Thompson v. Maddux (Ala.) 23 South. 157.

²⁶⁰ Lee v. Boyd, 86 Ala. 283, 5 South. 489.

²⁶¹ Pearce v. Foote, 113 Ill. 228.

²⁶² Hentz v. Jewell, 20 Fed. 592.

And after a note has been given by A. ostensibly for the valid debt of B., and actually paid as such by A., who takes a new note from B. for his reimbursement, B. cannot dispute the validity of the new note on the ground that the original debt was for losses in "futures."²⁶³

"Bohemian Oats" notes partake of the wager character of notes for the purchase of "futures," although they generally come more clearly under the head of fraud, in which maker and payee both participate. These notes are ostensibly taken by the operator from a farmer for the sale to him of 10 bushels of oats, at \$10 per bushel, on the operator's agreement to sell twice the quantity for the maker at the same price before the maturity of his note. They have been appropriately called "wagers on finding a fool." Such notes are, of course, void in the hands of the payee or of a holder with notice,²⁶⁴ and are recoverable from him by bill in equity.²⁶⁵

Fourth, Offenses Against Morality and Religion.

§ 516. Contracts in violation of the principles of the Christian religion are illegal and void at common law;²⁶⁶ as also contracts which are contrary to sound Christian morals,²⁶⁷ or which are prejudicial to the community at large.²⁶⁸ Thus, as we have seen, a contract for libeling another, or for the sale of libelous or immoral books, is illegal and void.²⁶⁹ So, too, a contract or note having for its consideration future illicit cohabitation;²⁷⁰ although it is other-

²⁶³ *Bangs v. Hornick*, 30 Fed. 97.

²⁶⁴ *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281; *Merrill v. Packer*, 80 Iowa, 542, 45 N. W. 1076; *Payne v. Raubinek*, 82 Iowa, 587, 48 N. W. 995; *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218; *Davis v. Seeley*, 71 Mich. 209, 38 N. W. 901; *Ward v. Doane*, 77 Mich. 328, 43 N. W. 980; *Jacobs v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768.

²⁶⁵ *Shipley v. Reasoner*, 80 Iowa, 548, 45 N. W. 1077.

²⁶⁶ 1 Pars. Notes & B. 214.

²⁶⁷ 1 Pars. Notes & B. 214; *Story, Prom. Notes*, § 189.

²⁶⁸ *Chit. Bills*, 99, 102; *Jackson v. Duchaire*, 3 Term R. 551.

²⁶⁹ *Chit. Bills*, 102; 1 *Daniel, Neg. Inst.* 197; *Stockdale v. Onwhyn*, 5 Barn. & C. 173; *Fores v. Johnes*, 4 Esp. 97.

²⁷⁰ *Byles, Bills*, 137; *Chit. Bills*, 101; 1 *Daniel, Neg. Inst.* 195; 1 Pars. Notes & B. 214; *Story, Prom. Notes*, § 189. And proof that the payee is the

wise if the illicit act be already a past transaction.²⁷¹ At least an executed deed or contract will not be rendered void by such consideration, though it might not be sufficient to support a promise.²⁷² In like manner, a note given for rent of lodgings taken for purposes of prostitution is void.²⁷³ And, where a house is purchased for such unlawful purpose, there is a resulting trust in favor of the purchaser's creditors, the title being taken in the name of the woman with whom the intercourse was carried on.²⁷⁴ So, too, a note given by the father of an illegitimate child to prevent bastardy proceedings is illegal;²⁷⁵ but not so a contract for the child's support in consideration of such proceedings being dropped.²⁷⁶ And a note given for such purpose and consideration is valid, although the child die within a few hours.²⁷⁷ And, in case of seduction, a note given for such consideration to the girl's father or mother is good.²⁷⁸ So, too, a note given to the selectman of a town in compromise of a bastardy proceeding;²⁷⁹ but not a note for a gross sum given to indemnify the parish.²⁸⁰

mistress of the maker puts on her the burden of proving a valuable consideration, in Louisiana. Succession of Coste, 43 La. Ann. 1144, 9 South. 62.

²⁷¹ Ex parte Mumford, 15 Ves. 289; Gibson v. Dickie, 3 Maule & S. 463; Walker v. Perkins, 3 Burrows, 1568; Marchioness of Annandale v. Harris, 2 P. Wms. 432; Turner v. Vaughan, 2 Wils. 339; Hill v. Spencer, 2 Amb. 641; Ex parte Cottrell, Cowp. 742; Shenk v. Mingle, 13 Serg. & R. (Pa.) 29; Smith v. Richards, 29 Conn. 232; Brown v. Kinsey, 81 N. C. 245.

²⁷² Byles, Bills, 137; Chit. Bills, 101; 1 Daniel, Neg. Inst. 195; 1 Edw. Bills & N. § 474; 1 Pars. Notes & B. 214; Binnington v. Wallis, 4 Barn. & Ald. 651; Gibson v. Dickie, supra; Nye v. Moseley, 6 Barn. & C. 133, 9 Dowl. & R. 165; Beaumont v. Reeve, 15 Law J. Q. B. 141, 8 Q. B. 483.

²⁷³ Jennings v. Throgmorton, Ryan & M. 251; Girardy v. Richardson, 1 Esp. 13; or for furniture for such house, Reed v. Brewer (Tex. Civ. App.) 36 S. W. 99.

²⁷⁴ Wait v. Day, 4 Denio (N. Y.) 439; Trovinger v. McBurney, 5 Cow. (N. Y.) 253.

²⁷⁵ Hays v. McFarlan, 32 Ga. 699.

²⁷⁶ Jackson v. Finney, 33 Ga. 512.

²⁷⁷ Maxwell v. Campbell, 8 Ohio St. 265.

²⁷⁸ Cutter v. Collins, 12 Cush. (Mass.) 233; Harter v. Johnson, 16 Ind. 271; Merritt v. Flemming, 42 Ala. 234.

²⁷⁹ Hoit v. Cooper, 41 N. H. 111.

²⁸⁰ Byles, Bills, 139; Chit. Bills, 101; 6 Geo. II. c. 31; Cole v. Gower, 6 East, 110; Watkins v. Hewlett, 1 Brod. & B. 1, 3 Moore, 211; Clark v. Johnson, 3 Bing. 424, 11 Moore, 319.

II. CONSIDERATIONS ILLEGAL BY STATUTE.

- § 517. Statutory Prohibition—Penalty.
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Statutory Prohibition—Penalty.

§ 517. All contracts which violate the provisions of the statute law either expressly or by implication are void.²⁸¹ And this is true although the prohibition of the statute be not expressed, but must be implied from its nature and objects.²⁸² Where a statute expressly declares the contract which forms the consideration of the note or bill to be void, the note or bill is illegal and void even in the hands of a bona fide holder for value.²⁸³ So, where the legislature

²⁸¹ *Holman v. Johnson*, Cowp. 341; *Nerot v. Wallace*, 3 Term R. 17; *Waymell v. Reed*, 5 Term R. 599. So, a bill of credit issued by a state in violation of the United States constitution. *Craig v. State of Missouri*, 4 Pet. 410.

²⁸² *Story*, Prom. Notes, § 189.

²⁸³ 1 *Daniel*, Neg. Inst. 199; 1 *Pars. Notes & B.* 218; *Hatch v. Burroughs*, 1 *Woods*, 439, *Fed Cas. No.* 6,203; *Vallett v. Parker*, 6 *Wend. (N. Y.)* 615. So, where this is expressly provided, in the case of sales by merchants not paying their license tax. *Deans v. Robertson*, 64 *Miss.* 195, 1 *South.* 159. And see §§ 525, 559, *infra*.

has prohibited a transaction, a bill or note given for it is void.²⁸⁴ And penal statutes annexing a penalty to the performance of an act are, in effect, a prohibition of the act.²⁸⁵ And a note or bill given for a consideration prohibited under a penalty is in like manner void.²⁸⁶ Where, however, a bond has been given for the payment of notes which, though issued in violation of the statute of another state, constitute a legal liability in the state where the action is brought, it is valid in such latter state.²⁸⁷ And, by English statute, bills and notes, though given for a consideration declared void by statute, are now made valid in the hands of a bona fide holder for value without notice.²⁸⁸

If the holder of a bill or note was compelled to make title through those who were parties to the illegal consideration, and the transfer was void as between them, the holder could not recover against any of the antecedent parties in England prior to the statute just referred to.²⁸⁹ Thus, if a bill was tainted with usury, and the holder was obliged to make title through the guilty party, he could not recover against the drawer or acceptor.²⁹⁰

²⁸⁴ Chit. Bills, 114; *Bensley v. Bignold*, 5 Barn. & Ald. 335; *Hodgson v. Temple*, 5 Taunt. 181; *Langton v. Hughes*, 1 Maule & S. 593; *President, etc., of Bank of Louisville v. Young*, 37 Mo. 398. Thus, the payee cannot recover on a note for the service of a stallion, where the statute requiring registry was disregarded, *Nelson v. Beck*, 89 Me. 264, 36 Atl. 374; or for goods sold by a peddler without requisite statutory license, *Rash v. Farley*, 91 Ky. 344, 15 S. W. 862; *Rash v. Halloway*, 82 Ky. 674; or for a patent right, without record of letters, etc., as required by statute, *Brechbill v. Randall*, 102 Ind. 528, 1 N. E. 362.

²⁸⁵ 1 Pars. Notes & B. 213. But if this is clearly not the intention of the statute, as in a statute prohibiting sales of town lots until a map is recorded, under a penalty, a note for lots sold in disregard of the statute is not void. *Pangborn v. Westlake*, 36 Iowa, 546.

²⁸⁶ *Griffith v. Wells*, 3 Denio (N. Y.) 226.

²⁸⁷ *York Co. v. Small*, 1 Watts & S. (Pa.) 315.

²⁸⁸ *Byles*, Bills, 141; 5 & 6 Wm. IV. c. 41; 8 & 9 Vict. c. 109; *Hay v. Ayling*, 16 Q. B. 423; *Fitch v. Jones*, 5 El. & Bl. 238; *Goldsmid v. Hampton*, 5 C. B. (N. S.) 94; *Parsons v. Alexander*, 5 El. & Bl. 263. See, too, for a similar statute in Massachusetts, *Kendall v. Robertson*, 12 Cush. 156; Rev. St. Mass. 35, § 2.

²⁸⁹ *Story*, Prom. Notes, § 193; *Henderson v. Benson*, 8 Price, 281.

²⁹⁰ *Lowes v. Mazzaredo*, 1 Starkie, 385. But now, by 58 Geo. III. c. 93, no bill or note, though given for usurious consideration, is void in the hands of a holder for value without notice.

Where the consideration of a note is the transfer of a contract which is prohibited by statute, it is void in the same manner that it would be if the making of the contract were the consideration.²⁹¹

Banking Acts.

§ 518. If a note is given for a debt contracted illegally by a bank in violation of the banking acts, it is illegal and void between the immediate parties.²⁹² Thus, corporation "post notes" prohibited by statute are an illegal consideration.²⁹³ So, by statute in New York, notes or certificates of deposit made by a banking association payable to order a certain time after date,²⁹⁴ or negotiable drafts intended for circulating medium.²⁹⁵ But the restrictions of New York banking laws have been held not to apply to sealed bonds issued by a banking company, although registered as promissory notes.²⁹⁶ But where a note has been given on an agreement for delivery of foreign bank bills under five dollars, which are prohibited by New York statute, and the agreement has not been performed, but the consideration paid in other lawful money, the note is valid notwithstanding the unlawful agreement.²⁹⁷ And, where a note has been discounted in New Jersey, in bills under five dollars, with the intention of using them with the indorser's knowledge in New York, where such bills were prohibited by statute, the note was still held in New York to be a legal one; the New York statute being a positive prohibition, and not expressive of any *malum in se*, and hav-

²⁹¹ *Cummings v. Saux*, 30 La. Ann. 207.

²⁹² *Brown v. Tarkington*, 3 Wall. 377; *Swift v. Beers*, 3 Denio (N. Y.) 70. So, a note payable in a prohibited currency. *Springfield Bank v. Merrick*, 14 Mass. 322. So, too, a note by an insurance company for a loan not authorized by statute. *New York Firemen's Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678; *Utica Ins. Co. v. Caldwell*, 3 Wend. (N. Y.) 296. So, a trust deed given to secure the payment of notes illegally issued by a banking company. *Leavitt v. Palmer*, 3 N. Y. 19. But one who contracts with a bank for payment of his checks in currency (in violation of the charter of the bank) cannot refuse the currency, and recover against the bank on his agreement. *Bank of State of Missouri v. Merchants' Bank of Baltimore*, 10 Mo. 123.

²⁹³ *Reynolds v. Nichols*, 12 Iowa, 399.

²⁹⁴ 1 Edw. Bills & N. § 485; *Bank of Chillicothe v. Dodge*, 8 Barb. 233.

²⁹⁵ 1 Edw. Bills & N. § 485.

²⁹⁶ *Leavitt v. Curtis*, 15 N. Y. 9.

²⁹⁷ *Noble v. Cornell*, 1 Hilt. 98.

ing no extritorial force.²⁹⁸ If a note be given in renewal of another note, part of the consideration of which was small bills prohibited by statute, the renewal note is void *pro tanto*.²⁹⁹ But if the maker of a note has received for it a loan of state notes, which were issued in violation of law, but were made use of by him as money, it has been held that he cannot avail himself of the illegality of the notes as a defense.³⁰⁰

Parties to a bank loan cannot in general set up the statutory prohibition against the bank;³⁰¹ and the bank cannot use its own violation of law to escape the liability incurred.³⁰² But the courts will not aid it to recover on a bill made under a statutory prohibition on penalty of forfeiture of charter.³⁰³ Where a statute prohibits banking corporations from making loans to the stockholders in excess of one-half the amount of their stock, a note made by a stockholder in excess of such amount for a debt already owing to the bank is not within the statute, and is not illegal.³⁰⁴ So, if a note is given in payment for stock in violation of a banking act, it has been held to be good between the maker of the note and the bank.³⁰⁵ But, where notes given for premiums of insurance largely in excess of

²⁹⁸ Merchants' Bank v. Spalding, 9 N. Y. 53.

²⁹⁹ Doty v. Bank, 16 Ohio St. 133.

³⁰⁰ Gowen v. Shute, 4 Baxt. (Tenn.) 57.

³⁰¹ E. g. that the loan exceeded the tenth part of its capital, the maximum allowed by the National Bank Act (Rev. St. U. S. § 5200). Gold-Min. Co. v. National Bank, 96 U. S. 640; Allen v. Bank, 127 Pa. St. 51, 17 Atl. 886. So, that the stock of the bank was pledged as collateral to it (in violation of Rev. St. U. S. § 5201), National Bank of Xenia v. Stewart, 107 U. S. 676, 2 Sup. Ct. 778; or that it had taken real-estate security (in violation of Rev. St. U. S. § 5137), National Bank v. Whitney, 103 U. S. 99; National Bank v. Matthews, 98 U. S. 621; or had purchased and not discounted the note (in violation of Rev. St. U. S. § 5136), Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

³⁰² Thompson v. Bank, 146 U. S. 240, 13 Sup. Ct. 66, check certified in excess of balance in bank, violating Rev. St. U. S. § 5208. In such case the statutory penalty is the only remedy. Thompson v. Bank, 113 N. Y. 325, 21 N. E. 57.

³⁰³ Kilbreth v. Bates, 38 Ohio St. 187, exceeding maximum rates fixed for loans by its charter.

³⁰⁴ Pemigewasset Bank v. Rogers, 18 N. H. 255.

³⁰⁵ Farmers' & Mechanics' Bank v. Jenks, 7 Mete. (Mass.) 592. And see § 455, *supra*.

the cash premiums for similar insurance are prohibited by statute, such notes are void.³⁰⁶ So, if a note is given to a foreign insurance company for premiums in business done by it in violation of the law of the state where the note was made, such note will be illegal.³⁰⁷ But such a note has been held in Indiana not to be void, where the right of the company to do business depended on a certificate which had not been filed; but the remedy on the note was suspended until the requirements of the law had been complied with.³⁰⁸

Revenue and License Laws.

§ 519. A frequent instance of the violation of statutes is in the case of contracts repugnant to, or in invasion of, the customs and excise laws. Agreements of this character are void.³⁰⁹ Thus, a contract for purchasing and selling goods, to be smuggled into the country and the profits to be divided, is illegal and void.³¹⁰ But where money has been paid by a surety for duties on goods illegally imported by his principal, and for the expenses of a defense of prosecution, it can be recovered by the surety against his principal.³¹¹ And it has even been held in England that the release by an excise officer of a person arrested for violation of the excise laws is a good consideration for a note given for the penalties incurred, although the officer had no authority to release the offender in such way.³¹²

³⁰⁶ *Otis v. Harrison*, 36 Barb. (N. Y.) 210.

³⁰⁷ *Roche v. Ladd*, 1 Allen (Mass.) 436; *Drinkhouse v. Surette*, Id. 443, note.

³⁰⁸ *American Ins. Co. v. Wellman*, 69 Ind. 413; *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221.

³⁰⁹ *Bytes, Bills*, 138; *Chit. Bills*, 100; 1 *Pars. Notes & B.* 213; *Biggs v. Lawrence*, 3 Term R. 454; *Banks v. Colwell*, cited in 3 Term R. 81; *Vandyek v. Hewitt*, 1 East, 97; *Lightfoot v. Tenant*, 1 Bos. & P. 551; *Johnston v. Sutton*, 1 Doug. 254; *Hodgson v. Temple*, 5 Taunt. 181; *Meux v. Humphries*, 3 Car. & P. 79; *Taylor v. Gas Co.*, 10 Exch. 293.

³¹⁰ *Holman v. Johnson*, Cowp. 341. So, too, a note given for goods exported for the payee under an illegal contract. *Alexander's Ex'rs v. Lewis*, 47 Tex. 481.

³¹¹ *Armstrong v. Toler*, 11 Wheat. 258.

³¹² *Sugars v. Brinkworth*, 4 Camp. 46; *Pilkington v. Green*, 2 Bos. & P. 151; *Beeley v. Wingfield*, 11 East, 46. But see *Good v. Allen*, 15 Ill. App. 663. So,

Again, notes or bills given in violation of license laws are unlawful. Thus, the acceptance of a bill of exchange to secure the payment of money taken at, or expended for, an unlicensed theater, is void in the hands of a payee who knew the theater to be unlicensed.³¹³

Sunday Laws—Various Statutes.

§ 520. So, contracts in violation of Sunday laws are illegal and void.³¹⁴ In Massachusetts such contracts were formerly held valid, although the offense was made punishable by the statute.³¹⁵ If a Sunday contract is made in violation of the statute, it seems that a due bill given in consideration of that contract on a week day is also void between the parties.³¹⁶

In England, where gambling is prohibited by statute, and negotiable instruments given for gambling losses are void, the maker who is obliged to pay such bill or note to a subsequent holder for value may, by statute, recover the amount paid from the original payee.³¹⁷ Where a statute prohibits clergymen from trading, a banking company in which a clergyman is a stockholder cannot recover as indorsee of a bill of exchange transferred to it.³¹⁸ But it has been held that a note given for an attorney's bill is valid, although the bill was not delivered pursuant to the requirements of the statute.³¹⁹

Newsom v. Thighen, 30 Miss. 414, as to note to county treasurer for liquor license.

³¹³ *De Begnis v. Armistead*, 10 Bing. 107, 3 Moore & S. 511; *Mitchell v. Cockburne*, 2 H. Bl. 379; *Langton v. Hughes*, 1 Maule & S. 596. So, a note for the medical services of an unlicensed physician has been held void. *May v. Williams*, 27 Ala. 267. But not so a note for an auction bid to an unlicensed auctioneer. *Gunnaldson v. Nyhus*, 27 Minn. 440, 8 N. W. 147. And see § 517, *supra*.

³¹⁴ *Chit. Bills*, 115; 1 *Pars. Notes & B.* 213; *Drury v. Defontaine*, 1 Taunt. 131; *Josephs v. Pebrer*, 3 Barn. & C. 639, 5 Dowl. & R. 542; *Scarfe v. Morgan*, 4 Mees. & W. 270; *Simpson v. Nicholls*, 3 Mees. & W. 240. And see § 225, *supra*. But an indorser cannot set up against his indorsee that the note was made on Sunday. *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909.

³¹⁵ *Geer v. Putnam*, 10 Mass. 312.

³¹⁶ *Kountz v. Price*, 40 Miss. 341.

³¹⁷ *Oulds v. Harrison*, 10 Exch. 572.

³¹⁸ 57 Geo. III. c. 99; *Hall v. Franklin*, 3 Mees. & W. 259.

³¹⁹ *Jeffreys v. Evans*, 14 Mees. & W. 210.

So, a note which is given for an indenture of apprenticeship for less than seven years, antedated and voidable by statute, is valid.³²⁰ But a note given for an apprentice's fees is void if the indenture itself be void by statute for want of the expression of premium in it.³²¹ So, a note given for the assignment of an apprentice's time is illegal and void.³²² So, a note given in payment for fertilizers not branded and tagged as required by statute;³²³ or a note to a foreign insurance company for a policy issued without proper license.† But where an act prohibits apothecaries from recovering for medicines, unless they are certified apothecaries, a note given for drugs purchased will sustain a recovery without evidence that the payee has such certificate.³²⁴ So, a note is valid which is given for diseased sheep, the statute prohibiting trade in such sheep, under a penalty, and reserving actions and defenses to persons suffering damage.³²⁵

Usury Laws—English and American Statutes.

§ 521. The most frequent defense for statutory illegality occurs under statutes prohibiting usury. The usury laws are now abolished in England except as to securities upon real property.³²⁶ Formerly it was enacted in England that contracts in which more than 5 per cent. was agreed upon for forbearance of money for one year should be utterly void under a penalty of three times the value of the money loaned.³²⁷ By the banking act of 3 & 4 Wm. IV., bills and notes payable within three months were exempted from the

³²⁰ *Grant v. Welchman*, 16 East, 207.

³²¹ 8 Anne, c. 9; *Jackson v. Warwick*, 7 Term R. 121; *Mann v. Leut*, 10 Barn. & C. 877.

³²² *Walker v. Johnson*, 2 Cranch, C. C. 203, Fed. Cas. No. 17,073.

³²³ *Lorentz v. Conner*, 69 Ga. 761. Even in the hands of a bona fide holder for value. *Johnston v. McConnell*, 65 Ga. 129; *Hanover Nat. Bank v. Johnston*, 90 Ala. 549, 8 South. 42.

† *Cassaday v. Insurance Co.*, 72 Ind. 95.

³²⁴ 55 Geo. III. c. 194, § 21; *Blogg v. Pinkers*, Ryan & M. 125.

³²⁵ *Vining v. Bricker*, 14 Ohio St. 331.

³²⁶ Byles, Bills, 140; Chit. Bills, 104.

³²⁷ Chit. Bills, 105; 12 Anne, c. 16. And a bill of exchange illegal under this statute is not a good consideration for a subsequent bill given after its repeal. *Flight v. Reed*, 1 Hurl. & C. 703; *Barons Pollock and Wilde dissenting*.

usury laws.³²⁸ And by the later act of 2 & 3 Vict. such exemption was extended to bills and notes payable within 12 months.³²⁹ By the act of 5 & 6 Wm. IV., bills and notes for usurious consideration are no longer void, but are to be deemed given for an illegal consideration, which would make them void between original parties or those having notice.³³⁰ Prior to this act a broker's receiving exorbitant brokerage on the discount of a bill did not affect its validity in the hands of a bona fide holder for value.³³¹

In many of the United States there are no statutes against usury. Others simply fix a maximum rate of interest to be recovered, while New York and some other states retain a strict usury law.³³²

³²⁸ Chit. Bills, 106; 3 & 4 Wm. IV. c. 98, § 7.

³²⁹ Chit. Bills, 106; 2 & 3 Vict. c. 37.

³³⁰ Chit. Bills, 106; 5 & 6 Wm. IV. c. 41; *Edmunds v. Groves*, 2 Mees. & W. 642. 5 Dowl. 775.

³³¹ Chit. Bills, 117; *Dagnall v. Wigley*, 11 East, 43; *Jones v. Davison*, Holt, N. P. 256.

³³² The usury statutes of the different states are made the subject of frequent alterations, and the author attempts nothing more than to give a statement in brief of the law as it appeared in the last revision or compilation of laws in each state. In ALABAMA, contracts for usurious interest exceeding 8 per cent. are enforceable only for the principal sum due. Code, § 1754. In ARKANSAS, 10 per cent. of interest may be agreed upon. In the absence of agreement, the rate is 6 per cent. Sand. & H. Dig. §§ 5076, 5077. In CALIFORNIA, any rate may be agreed upon, and, if not fixed by agreement, the rate is 7 per cent. Civ. Code, § 1917. So, in COLORADO, 8 per cent. Mills' Ann. St. §§ 2251-2253. In CONNECTICUT, the legal rate is 6 per cent., except where a higher rate is agreed on in case of maker resident, or mortgage given, in another state; but there can be no recovery in any case or set-off of excessive interest paid. Gen. St. §§ 2941-2943. In DELAWARE, taking more than 6 per cent. subjects the taker to a forfeiture equal in amount to the whole loan. Rev. Code, c. 63, § 1. In FLORIDA, the legal rate is 8 per cent., but any rate may be agreed upon. Rev. St. § 2320. In GEORGIA, the maximum rate is 8 per cent. Civ. Code, § 2876. In ILLINOIS, only the principal is recoverable on contracts for more than 7 per cent., the legal rate in the absence of agreement being 5 per cent. Rev. St. c. 74, §§ 1-6. In INDIANA, an agreement may be made for 8 per cent.; otherwise, the rate is 6 per cent. Rev. St. § 5198. In IOWA, the law is the same, but taking more than 8 per cent. is prohibited under a penalty. And a bona fide assignee of a usurious contract may recover from his assignor all moneys paid by him over and above the amount of the original loan, with lawful interest. Code, §§ 3038-3042. In KANSAS, the legal rate is 6 per cent., but parties may agree upon 10 per cent., with penalties, if exceeded. Usury paid is cred-

Usury—What Local Law Governs.

§ 522. In questions of usury relating to commercial paper not made payable in any particular place, the law of the place of con-

ited upon the principal. 2 Gen. St. c. 116. In KENTUCKY, the legal rate is 6 per cent. Contracts for a higher rate are void as to the excess. Ky. St. §§ 2218, 2219. But a note at 8 per cent., valid before the passage of this act, may be reduced to 7 per cent. after its passage. *Mix v. Safety-Vault Co.* (Ky.) 44 S. W. 393. In LOUISIANA, the legal rate is 5 per cent., but 8 per cent. may be agreed upon. Agreements for more are prohibited under a penalty of forfeiture of the whole amount loaned. If more than 8 per cent. be paid, it may be recovered. Banks are expressly made subject to this act. Rev. Laws, §§ 1883-1887. In MAINE, the legal rate is 6 per cent., but any rate may be agreed on and recovered. Rev. St. p. 397, § 1. In MASSACHUSETTS, corporation bonds are limited to 7 per cent. For other contracts any rate may be agreed on in writing, subject to be discharged by a payment of 18 per cent. and collection fee. Pub. St. c. 77, § 3; P. L. 1892, c. 428. In MARYLAND, the legal rate is 6 per cent. The exaction of all interest in excess of that rate is forbidden under penalty of forfeiture of such excess and legal interest, but the original loan with interest is still recoverable, and a bona fide holder is not affected by usury in the inception of a contract. Pub. Gen. Laws, art. 49, §§ 1-4. In MICHIGAN, the legal rate of interest is 6 per cent., but a higher rate may be agreed upon, not exceeding 8 per cent. In case of usury, only the excess over principal and legal interest is forfeited. How. Ann. St. §§ 1594, 1595. In MINNESOTA, the legal rate is 7 per cent., but parties may agree to pay 10 per cent. Nothing above that rate can be enforced. Gen. St. § 2212. In MISSISSIPPI, the legal rate is 6 per cent., but 10 per cent. may be reserved by agreement. If more is reserved, all interest is forfeited. Ann. Code, § 2348. In MISSOURI, the legal rate is 6 per cent., but by agreement parties may take 10 per cent. If more is reserved, judgment is rendered for 10 per cent., the interest recovered being applied to the benefit of the public schools. Rev. St. §§ 5972-5977. In NEBRASKA, the legal rate is 7 per cent., but 10 per cent. may be agreed on. In case of usury no interest can be recovered. Comp. St. §§ 3495, 3499. In NEVADA, the legal rate is 7 per cent., but any rate may be agreed on in writing. Gen. St. §§ 4903, 4904; P. L. 1887, c. 77. In NEW HAMPSHIRE, the legal rate is 6 per cent., and no more can be recovered. In case of usury the principal and legal interest can be recovered, but the person taking the usury is liable to a penalty of forfeiture of treble the amount of the usury to any one prosecuting for it. Pub. St. c. 203, §§ 1-4. In NEW JERSEY, the legal rate is 6 per cent. (since 1878,—Laws 1878, p. 30), and taking more than that rate is prohibited as usury. But the principal loaned may be recovered on all usurious contracts without costs or interest (Revision, p. 519), except contracts in Monmouth county, for more

tract governs the paper.³³³ And the law of the place where a corporation contract was made will govern the contract in this respect,

than 7 per cent., which are void since 1875. 3 Gen. St. pp. 3703, 3704. In NEW YORK, the legal rate of interest is 6 per cent., and contracts for a greater rate are void. 2 Rev. St. (9th Ed.) p. 1855, § 5. By the original Revised Statutes of 1830, bona fide indorsees for value were protected, but this provision was repealed in 1837. Tyler, Usury, 67. In NORTH CAROLINA, the legal rate is 6 per cent., but 8 per cent. may be agreed upon by writing signed by the party. If a higher rate is reserved, no interest can be recovered. If usurious interest is paid, double the amount may be recovered back. Code, §§ 3835, 3836. In OHIO, the legal rate is 6 per cent., but 8 per cent. may be reserved by agreement. All interest in excess of this rate is usurious, and, if paid, is to be credited on the principal. Bona fide holders for value are not affected by usury in the original contract. 2 Bates' Ann. St. §§ 3179-3183. In OREGON, the legal rate is 8 per cent., but contracts may be made for 10. Any contract for a higher rate is usurious, and entails the forfeiture of the whole debt to the school fund. Bona fide holders may recover the amount paid by them. Hill's Ann. Laws, § 3587. In PENNSYLVANIA, the rate is 6 per cent. No higher rate can be collected; and, if such rate is voluntarily paid, it can be recovered again. Bona fide holders of negotiable paper are not affected by usury in the original contract. Purd. Dig. p. 1062, §§ 1, 2. In RHODE ISLAND, 6 per cent. is the legal rate, but any rate may be agreed on. Gen. Laws, c. 166, § 11. In SOUTH CAROLINA, the legal rate is 7 per cent., but 8 may be taken by agreement in writing, under penalty of double forfeiture for excess. Rev. St. § 1390. In TENNESSEE, the legal rate is 6 per cent. If more is contracted for, it is usurious, and the excess above 6 per cent. is forfeited under a penalty. Code, §§ 3493, 3499, 3502. In TEXAS, the legal rate is 8 per cent., but 12 may be reserved by contract. If more is reserved, no interest can be recovered. Rev. Civ. St. arts. 2976-2979. In VERMONT, the legal rate of interest is 6 per cent., and all excess paid may be recovered with interest. V. S. §§ 2301, 2304. In VIRGINIA, the legal rate is 6 per cent., and the excess is illegal. Code, §§ 2817, 2818. In WEST VIRGINIA, the legal rate is 6 per cent., and no more can be reserved, all contracts being void as to the excess. Code, c. 96, §§ 4, 5. In WISCONSIN, the legal rate is 7 per cent., but 10 per cent. may be stipulated for in writing. In contracts for a greater rate, only principal without interest is recoverable, and all excess paid may be recovered again. Sanb. & B. Ann. St. § 4538. Finally, it is provided by act of congress that national banks shall be restricted to the rate of discount fixed by law of the state or territory where they are located, and, where none is fixed, shall receive 7 per cent., which may be taken in advance. Knowingly taking a greater rate entails a forfeiture of the entire interest, and a penalty of double the amount of interest. Rev. St. U. S. §§ 5197, 5198.

³³³ Cutler v. Wright, 22 N. Y. 472; Merchants' Bank v. Griswold, 72 N. Y.

although the company was incorporated in a state in which such contract would be usurious.³³⁴

On the other hand, if a bill or note is made in one state payable in another, the law of the latter state will govern as to the rate of interest.³³⁵ And such a note may be enforced in the state where it was made, although made to bear a higher rate of interest than is lawful there.³³⁶ And it has been held that where a note is made in one state, but dated in another, where the makers had a place of business, it is presumably payable in the latter state, and governed by its laws as to usury.³³⁷

There being no usury at common law, no presumption can be made as to foreign usury laws, but such laws must be proved.³³⁸ And, even if a note bears a higher rate of interest than is legal in the place where the suit is brought, it will not be presumed to be usurious, unless shown to be so where it was made.³³⁹ So, it seems, if a contract is void in one state for usury, it may be a valid basis for a new contract made in another state.³⁴⁰ In England it has been held that taking excessive interest is *prima facie* evidence of an original illegal contract.³⁴¹

But where an instrument is capable of two constructions, by one of which it would be valid, it is a well-known principle of law that that one will be adopted in the absence of proof to the contrary.

472; *Stickney v. Jordan*, 58 Me. 106. But a bill made in France as a substitute for an English bill, which was illegal on account of a gaming consideration, is void in England. *Wynne v. Callander*, 1 Russ. 293. And see, as to conflict of usury laws, § 43 et seq., *supra*.

³³⁴ *Bard v. Poole*, 12 N. Y. 495.

³³⁵ *Little v. Riley*, 43 N. H. 109; *Dickinson v. Edwards*, 13 Hun (N. Y.) 405, 77 N. Y. 573. Although the land mortgaged as collateral lies in the state where the contract was made. *Ware v. Investment Co. (Va.)* 29 S. E. 744; *Pioneer Savings & Loan Co. v. Cannon*, 96 Tenn. 599, 36 S. W. 386. And see § 46, *supra*.

³³⁶ *Lines v. Mack*, 19 Ind. 223.

³³⁷ *Tillotson v. Tillotson*, 34 Conn. 335.

³³⁸ *Smith v. Bank*, 29 Ind. 158.

³³⁹ *Davis v. Garr*, 6 N. Y. 124.

³⁴⁰ *Jacks v. Nichols*, 5 Barb. (N. Y.) 38. This case was reversed in 5 N. Y. 178, on the ground that the renewal itself showed there was no intention to change the place of contract.

³⁴¹ *Chit. Bills*, 107; *Solarte v. Melville*, 1 Man. & R. 204, 7 Barn. & C. 430; *Fussil v. Brookes*, 2 Car. & P. 318.

Although a contract be affected with usury, it may be subsequently ratified for a legal consideration, and made valid,³⁴² or it may be merged in a judgment rendered on the note.³⁴³

Usury in Renewal—Ratification.

§ 523. On the other hand, if a contract is originally legal, it will not be rendered invalid by a subsequent usurious contract in regard to it.³⁴⁴ A usurious extension will not make it so.³⁴⁵ And, if a note, originally legal, is renewed for a usurious consideration, the new security will be void, but the original debt will remain.³⁴⁶ And such renewal is usurious and void, although the usurious premiums charged be put into a separate note.³⁴⁷ In like manner, a valid debt is not rendered invalid by the subsequent taking of usurious interest on it.³⁴⁸ Where, however, a valid note is pledged as security for payment of a usurious loan, no title is acquired by the usurious pledgee.³⁴⁹ And, where the note was valid when made, a renewal at the same rate, after a change of law had made that rate usurious, will be disregarded.³⁵⁰

³⁴² 1 Edw. Bills & N. § 490.

³⁴³ *Clark v. Rodes*, 12 Bush (Ky.) 13. So as to cut off all recovery of statutory penalty. *Kearney v. Bank*, 129 Pa. St. 577, 18 Atl. 598.

³⁴⁴ *Pollard v. Scholy*, Cro. Eliz. 20, cited in 1 Saund. 295a. See, too, *Phillips v. Cockayne*, 3 Camp. 119; *Wood v. Grimwood*, 10 Barn. & C. 679.

³⁴⁵ *Morse v. Wellcome* (Minn.) 70 N. W. 978; *Hynes v. Stevens*, 62 Ark. 491, 36 S. W. 689.

³⁴⁶ *Gray v. Fowler*, 1 H. Bl. 462; *Central City Bank v. Dana*, 32 Barb. 296; *Stewart v. Manufacturing Co.*, 95 Tenn. 497, 32 S. W. 464. So, the collateral originally given will remain good. *Dotterer v. Freeman*, 88 Ga. 479, 14 S. E. 863. The usurious renewal will, however, stop the interest on the original debt from that time. *Warmack v. Boyd*, 63 Miss. 488.

³⁴⁷ *Swartwout v. Payne*, 19 Johns. (N. Y.) 294. And although the renewal note be given to a subsequent indorsee other than a bona fide holder for value. *Treadwell v. Archer*, 76 N. Y. 196, reversing *Sherwood v. Archer*, 10 Hun (N. Y.) 73. In like manner, a note, given in settlement of an account which includes a usurious note is usurious. *Pickett v. Bank*, 32 Ark. 346.

³⁴⁸ *Chit. Bills*, 107; *Ferrall v. Shaen*, 1 Saund. 291; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249. And a subsequent agreement to pay more than legal interest will not vitiate a bond given for the principal. *Reg. v. Sewel*, 7 Mod. 118.

³⁴⁹ *Bell v. Lent*, 24 Wend. (N. Y.) 230.

³⁵⁰ *Kilgore v. Emmitt*, 33 Ohio St. 410.

In England, before the recent acts abolishing the usury laws, any security given as a substitute for a usurious bill or note, or in renewal of it, was void like the original instrument,³⁵¹ even though the old securities were given up and canceled.³⁵² In like manner, under the usury laws in the United States, a note by A. for B.'s usurious debt to C.,³⁵³ or a note given to take up other usurious notes,³⁵⁴ is itself usurious and void. This is true, likewise, where a note payable in goods or a contract for goods is substituted for the original usurious note or given as collateral for it.³⁵⁵ So, if money be loaned on a usurious note and partially paid on its maturity, and a new note be given for the balance, it will be void for usury.³⁵⁶ But a note given for money advanced to pay a usurious note is not usurious.³⁵⁷

Usury—Substitution of New Contract.

§ 524. If the usurious contract is rescinded, and a renewal bill or note given for the principal and interest justly due, it will be valid.³⁵⁸ But merely changing the security in a renewal—e. g. giving another note with another security—leaves the contract still

³⁵¹ Chit. Bills, 107; *Chapman v. Black*, 2 Barn. & Ald. 588; *Wynne v. Callander*, 1 Russ. 293; *Preston v. Jackson*, 2 Starkie, 237; *Davison v. Franklin*, 1 Barn. & Adol. 142; *Marchant v. Dodgin*, 2 Moore & S. 632. Unless the original usury was first purged. *Wicks v. Gogerly*, Ryan & M. 123.

³⁵² *Preston v. Jackson*, 2 Starkie, 237.

³⁵³ *Goldman v. Uhlmann*, 16 App. Div. 324, 44 N. Y. Supp. 636. But see *Macungie Sav. Bank v. Hottenstein*, 89 Pa. St. 328; *Smith v. Young*, 11 Bush (Ky.) 393.

³⁵⁴ *Brigham v. Marean*, 7 Pick. (Mass.) 40.

³⁵⁵ *Dunning v. Merrill*, 1 Clarke, Ch. (N. Y.) 252.

³⁵⁶ *Warren v. Crabtree*, 1 Me. 167.

³⁵⁷ *Cottrell v. Southwick*, 71 Iowa, 50, 32 N. W. 22; *Thompson v. Bank*, 99 Ga. 651, 26 S. E. 79.

³⁵⁸ *Barnes v. Headley*, 2 Taunt. 184; *Wright v. Wheeler*, 1 Camp. 165, note; *Preston v. Jackson*, 2 Starkie, 238; *Marchant v. Dodgin*, 2 Moore & S. 632; *Kilbourn v. Bradley*, 3 Day (Conn.) 356; *Scott v. Lewis*, 2 Conn. 132; *Fisher v. Bidwell*, 27 Conn. 363; *Bank of Monroe v. Strong*, Clarke, Ch. (N. Y.) 76; *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, and 37 S. W. 569; *McConkey v. Petterson*, 15 App. Div. 77, 44 N. Y. Supp. 286. So, where the original surety on a usurious note for valuable consideration assumes the debt and gives his own note. *Tenny v. Porter*, 61 Ark. 329, 33 S. W. 211.

usurious and void.³⁵⁹ And a note given in renewal of a usurious note is illegal, although there had been between the original note and this renewal an intervening note given to a third person, which had been canceled.³⁶⁰

But where a usurious note has been transferred for value to a purchaser without notice, and a new note has been given to him in payment, the usury in the first note cannot be set up against him in defense to the second.³⁶¹ And where the bond of a third person has been substituted for a usurious note, in consideration of the maker of the note promising to pay the amount to the maker of the bond, which he afterwards did, this was held to amount to a voluntary waiver of the statute by the maker of the note, and the bond was held to be valid.³⁶²

Usury—As Affecting Bona Fide Holders.

§ 525. Under the usury act of 12 Anne, a bill or note founded on a usurious consideration was void even in the hands of a bona fide holder for value.³⁶³ And a bill of exchange has been held to be void in the hands of a bona fide holder for value, if drawn to carry out an agreement for a usurious discount, although the drawer to whose order it was payable had no knowledge of this agreement.³⁶⁴ By the English act of 58 Geo. III., evidence that a bill or note was founded on usurious consideration threw upon the plaintiff the bur-

³⁵⁹ *Campbell v. Sloan*, 62 Pa. St. 481; *Feldman v. McGraw*, 1 App. Div. 574, 37 N. Y. Supp. 434; *Laux v. Gildersleeve*, 23 App. Div. 352, 48 N. Y. Supp. 301; *Simpson v. Evans*, 44 Minn. 419, 46 N. W. 908; *First Nat. Bank of Milwaukee v. Plankinton*, 27 Wis. 177; *Merchants' Bank of Fayetteville v. Lutterloh*, 81 N. C. 142; *Schutt v. Evans*, 109 Pa. St. 625, 1 Atl. 76; *Mathews' Adm'r v. Bank (Va.)* 27 S. E. 609. And see § 536, *infra*.

³⁶⁰ *Archer v. McCray*, 59 Ga. 547. But see *Drake's Ex'r v. Chandler*, 18 Grat. (Va.) 909.

³⁶¹ *Cuthbert v. Haley*, 8 Term R. 390; *Kent v. Walton*, 7 Wend. (N. Y.) 256; *Smalley v. Doughty*, 6 Bosw. (N. Y.) 66. So, where the note of a new maker, indorsed by the original maker, is used to take up the original note. *Palmer v. Carpenter (Neb.)* 73 N. W. 690.

³⁶² *Wales v. Webb*, 5 Conn. 154.

³⁶³ 12 Anne, c. 16; *Lowe v. Waller*, 2 Doug. 736; *Lowes v. Mazzaredo*, 1 Starkie, 385; *Chapman v. Black*, 2 Barn. & Ald. 590; *Henderson v. Benson*, 8 Price, 288.

³⁶⁴ *Ackland v. Pearce*, 2 Camp. 599.

den of proving himself to be a holder for value, and the burden then fell on the defendant to show that the plaintiff had notice of the usury.³⁶⁵

In the United States, the usury laws, in general, affect paper in the hands of a bona fide holder for value only so far as the statute expressly or by necessary implication makes the instrument void, without saving the rights of such holders.³⁶⁶ This is the case in New York,³⁶⁷ and, as to the recovery of interest, in Mississippi and Texas.³⁶⁸ In Minnesota and some other states the rights of bona fide holders are expressly reserved;³⁶⁹ while in other states the statute has been held not to affect such holders.³⁷⁰ Where, however, a note was dated at Boston, but actually made in New York, and void by the usury laws of New York, these facts cannot be set up to avoid the note in the hands of a bona fide holder for value.³⁷¹ And even in New York, if a note originally usurious be indorsed to a bona fide holder for value, the usury cannot be set up as a defense in a suit brought against the payee as indorser.³⁷² And, where a joint action can be brought against maker and indorser, the indorser is liable in such an action.³⁷³

Usurious Discount—Accommodation Paper—National Bank Act.

§ 526. If a note is free from usury at its inception, the subsequent sale of it at a greater discount than legal interest will not render it usurious.³⁷⁴ As against the maker, the indorsee in such

³⁶⁵ Chit. Bills, 106; 58 Geo. III. c. 93.

³⁶⁶ See § 1890, *infra*.

³⁶⁷ *Wilkie v. Roosevelt*, 3 Johns. Cas. 66.

³⁶⁸ *Union Nat. Bank v. Fraser*, 63 Miss. 231; *First Nat. Bank v. Ledbetter* (Tex. Civ. App.) 34 S. W. 1042. Notwithstanding a waiver of the statutory defense in the note itself. *Union Nat. Bank v. Fraser*, *supra*.

³⁶⁹ *Robinson v. Smith*, 62 Minn. 62, 64 N. W. 90. And see § 1890, *infra*.

³⁷⁰ *State Sav. Bank v. Scott*, 10 Neb. 83, 4 N. W. 314; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88; and, since 1873, in Virginia, *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487.

³⁷¹ *Towne v. Rice*, 122 Mass. 67.

³⁷² *McKnight v. Wheeler*, 6 Hill (N. Y.) 492.

³⁷³ *Moffett v. Bickle*, 21 Grat. (Va.) 280.

³⁷⁴ *French v. Grindle*, 15 Me. 163; *Farmer v. Sewall*, 16 Me. 456; *Importers'*

transfer is not affected by any usury between himself and his indorser.³⁷⁵ And even where a note has been issued for the purpose of borrowing money with the payee's name in blank, and a discount is afterwards procured by the person to whom it was intrusted for that purpose at more than legal rate of interest, and the payee's name then filled in, the note has been held not to be usurious, and the payee so named was allowed to recover.³⁷⁶ So, where notes of a municipal corporation are sold below par, they will still be valid in the hands of a bona fide holder for value.³⁷⁷ A bona fide holder for value, however, purchasing a note at a discount, is only a holder for value to the extent of the price paid by him, with legal interest.³⁷⁸

Where a note is made to be discounted, and is indorsed for accommodation for that purpose, and is in its inception negotiated at a usurious rate to a party having knowledge of the circumstances, such party is not an innocent holder, and cannot sue the indorser either on the original note or a renewal of it.³⁷⁹ But if accommodation

& Traders' Nat. Bank v. Littell, 47 N. J. Law, 233; Alabama Gold Life Ins. Co. v. Hall, 58 Ala. 1; Wildsmith v. Tracy, 80 Ala. 258; Sherman v. Blackman, 24 Ill. 345; Becker's Investment Agency v. Rea, 63 Minn. 459, 65 N. W. 928; Steen v. Stretch, 50 Neb. 572, 70 N. W. 48. As to interest taken in advance, see § 527, *infra*. Whether the transaction is a valid discount or mere collateral for a usurious loan is a question of fact. Standen v. Brown, 152 N. Y. 129, 46 N. E. 167; Becker's Investment Agency v. Rea, *supra*.

³⁷⁵ Parr v. Eliason, 1 East, 92; Daniel v. Cartony, 1 Esp. 274; Knights v. Putnam, 3 Pick. (Mass.) 184; Stewart v. Bramhall, 11 Hun (N. Y.) 139; Archer v. Shea, 14 Hun (N. Y.) 493; Importers' & Traders' Nat. Bank v. Littell, 47 N. J. Law, 233. This is true also of other defenses, such as fraud between indorser and indorsee not being available to a prior party. Prouty v. Roberts, 6 Cush. (Mass.) 19. If, however, the contract really had its inception in the transfer, it is affected *ab initio* by usury in such transfer. Eastman v. Shaw, 65 N. Y. 522; Tufts v. Shepherd, 49 Me. 312; Rodecker v. Littauer, 8 C. C. A. 320, 59 Fed. 857; French v. Hoffmire, 43 N. Y. Supp. 496, 19 Misc. Rep. 714; Bennet v. Smith, 15 Johns. (N. Y.) 355; Nailor v. Daniel, 5 Houst. (Del.) 455. So, a discount for the maker of a note to his own order. German Bank v. De Shon, 41 Ark. 331.

³⁷⁶ Brummel v. Enders, 18 Grat. (Va.) 573.

³⁷⁷ Rockwell v. Charles, 2 Hill (N. Y.) 499.

³⁷⁸ Fant v. Miller, 17 Grat. (Va.) 77; Saylor v. Daniels, 37 Ill. 331.

³⁷⁹ Powell v. Waters, 8 Cow. (N. Y.) 669, affirming 17 Johns. (N. Y.) 179; although its accommodation character was not known to the buyer, Clark v. Sisson, 22 N. Y. 312.

paper is sold at an illegal discount to a bona fide purchaser, with a representation that it is business paper belonging to the seller, usury cannot be set up in defense by the seller.³⁸⁰ And, where a bond is given by the payee to the maker of an accommodation note to provide for the payment of such note, he cannot afterwards set up, at suit of the payee or his personal representatives, the defense of usury in the transfer of the note by him.³⁸¹ So, if an accommodation note has been discounted at a usurious rate without the knowledge of the accommodation indorser, and afterwards paid by him, this payment would be a sufficient consideration for a new note given him by the party accommodated.³⁸²

The provision of the United States statutes limiting rates of discount in the case of the national banks applies to both accommodation and business paper.³⁸³ The penalty provided by this act is the exclusive remedy;³⁸⁴ and the act supersedes state laws declar-

³⁸⁰ *Holmes v. Williams*, 10 Paige (N. Y.) 326; *Holmes v. Bank*, 53 Minn. 350, 55 N. W. 555.

³⁸¹ *Moncure v. Dermott*, 13 Pet. 345.

³⁸² *Cassebeer v. Kalbfleisch*, 11 Hun (N. Y.) 119.

³⁸³ Rev. St. U. S. §§ 5197, 5198; *Johnson v. Bank*, 74 N. Y. 329. The recovery of a penalty under this act bars the subsequent recovery of excess of interest paid. *Hill v. Bank*, 56 Vt. 582. A creditor of the borrower cannot sue for the penalty. *Barrett v. Bank*, 85 Tenn. 426, 3 S. W. 117. But the receiver of an insolvent borrower may do so. *Barbour v. Bank*, 45 Ohio St. 133, 12 N. E. 5.

³⁸⁴ The usury charged by a national bank cannot be set up as a defense to defeat the note. *Stephens v. Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 337; *Chase Nat. Bank v. Faurot*, 149 N. Y. 536, 44 N. E. 164; *Cox v. Beck*, 83 Fed. 269. But it will defeat the recovery of interest, *Guthrie v. Reid*, 107 Pa. St. 251; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073; *First Nat. Bank v. Ledbetter* (Tex. Civ. App.) 34 S. W. 1042; *Tomblin v. Higgins* (Neb.) 73 N. W. 461; and is available in a suit brought in a state court, *Wachovia Nat. Bank v. Ireland* (N. C.) 29 S. E. 835. And usury paid on such note is recoverable only in an action for the penalty, and cannot be used as a set-off against the note, *Barnet v. Bank*, 98 U. S. 555; *Driesbach v. Bank*, 104 U. S. 52; *Cox v. Beck*, *supra*; *Norfolk Nat. Bank v. Schwenk*, *supra*; *Montgomery v. Bank*, 50 Neb. 652, 70 N. W. 239; *Lanham v. Bank*, 46 Neb. 633, 65 N. W. 786; *Marion Nat. Bank v. Thompson* (Ky.) 40 S. W. 903; *National Bank of Fayette Co. v. Dushane*, 96 Pa. St. 340; *Comanche Nat. Bank v. Dabney* (Tex. Civ. App.) 44 S. W. 413; until after judgment recovered for the penalty, *Lloyd v. Bank*, 4 Kan. App. 512, 47 Pac. 575. And the right

ing the contract void for usury,³⁸⁵ or prohibiting it as a misdemeanor.³⁸⁶ The amount recoverable is twice the entire interest paid, and not merely twice the illegal excess.³⁸⁷

Usury—Compound Interest.

§ 527. It has sometimes been thought that the rule of the common law against compounding of interest was the outgrowth of the usury laws. The rule is founded upon the principles of a sound public policy. The taking of compound interest has, however, been said to be usurious. An agreement to pay such interest, made after the interest to be compounded has accrued, is not so.³⁸⁸ Thus, a note given for a balance of account, on which compound interest has been charged and added in, is not usurious.³⁸⁹ An agreement, however, to pay interest upon interest not yet accrued, although not usurious, is against public policy, and cannot be enforced.³⁹⁰ But the soundness of the distinction as to compound interest between interest already accrued and interest not yet accrued has been questioned.³⁹¹ It frequently happens, however, that compound interest is allowed by way of damages for the detention of interest long accrued and

of action is not assignable. *Id.* And even two joint makers cannot sue for usury paid by one of them. *Teague v. Bank*, 5 Kan. App. 300, 48 Pac. 603.

³⁸⁵ *Importers' & Traders' Nat. Bank v. Littell*, 46 N. J. Law, 506.

³⁸⁶ *Slaughter v. Bank*, 109 Ala. 157, 19 South. 430.

³⁸⁷ *First Nat. Bank of Newton v. Turner* (Kan. App.) 42 Pac. 936; *Boerner v. Bank*, 90 Tex. 443, 39 S. W. 285; *Smith v. Chilton* (Tex. Sup.) 39 S. W. 287 (also by Rev. St. Tex. 1895, art. 3106).

³⁸⁸ *Hamilton v. Le Grange*, 2 H. Bl. 144; *Fobes v. Cantfield*, 3 Ohio, 17; *Watkinson v. Root*, 4 Ohio, 374; *Stansbury v. Stansbury*, 24 W. Va. 634.

³⁸⁹ *Leonard v. Mason*, 1 Wend. (N. Y.) 522; *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818; *Haworth v. Huling*, 87 Ill. 23; *Gilmore v. Bissell*, 124 Ill. 488, 16 N. E. 925.

³⁹⁰ *Townsend v. Corning*, 1 Barb. (N. Y.) 627; *Miner v. Bank*, 53 Tex. 559; *Bowman v. Neely*, 137 Ill. 443, 27 N. E. 758. But see *Lewis v. Paschal*, 37 Tex. 315; *Cridler v. Association* (Tex. Sup.) 35 S. W. 1047. Also, under statute allowing such interest at rate fixed for principal. *Yudart v. Den*, 116 Cal. 533, 48 Pac. 618; Civ. Code, § 1919.

³⁹¹ *Pawling v. Pawling*, 4 Yeates (Pa.) 220.

due.³⁹² And the practice of allowing interest after maturity on interest coupons is not uncommon, nor unlawful.³⁹³

It has also been held that taking interest in advance upon a loan is usurious.³⁹⁴ This would be the case where the interest taken in advance was for a term of years.³⁹⁵ But, in general, the deducting of interest in advance for short periods, for the time which the principal has to run, is not usurious.³⁹⁶ Neither will a mistake in reckoning the interest in a bill or note constitute usury.³⁹⁷ But it has been held that it is usury to discount a bill or note at a rate based upon the calculation of 360 days to the year.³⁹⁸

Usury by Way of Exchange—Fees—Commissions.

§ 528. As we have seen, it is not unlawful to include exchange in a bill or note payable at a different place from that where it is drawn;³⁹⁹ although, if the rate of exchange be used as a mere device to cover usury, it is illegal.⁴⁰⁰ Nor, on the other hand, is it usury to omit a provision for exchange, where the rate is in favor

³⁹² *Peirce v. Rowe*, 1 N. H. 179; *Greenleaf v. Kellogg*, 2 Mass. 568; *Kenyon v. Dickens*, 1 N. C. 357. So, by statute in Missouri, on yearly rests. Rev. St. § 5977.

³⁹³ *Stickney v. Moore*, 108 Ala. 590, 19 South. 76; *Ragan v. Day*, 46 Iowa, 239; *Lewis Inv. Co. v. Boyd*, 48 Neb. 604, 67 N. W. 456. But see, contra, *Vermont Loan & Trust Co. v. Hoffman* (Idaho) 49 Pac. 314.

³⁹⁴ *Insurance Co. v. Carpenter*, 40 Ohio St. 260; *Hiller v. Ellis* (Miss.) 18 South. 95.

³⁹⁵ *Marsh v. Martindale*, 3 Bos. & P. 154. But see, contra, for one year, *Tholen v. Duffy*, 7 Kan. 405.

³⁹⁶ *New York Firemen's Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Manhattan Co. v. Osgood*, 15 Johns. (N. Y.) 168; *Bank of Alexandria v. Mandeville*, 1 Cranch, C. C. 552, Fed. Cas. No. 850; *McLean v. Bank*, 3 McLean, 587, Fed. Cas. No. 8,888; *Telford v. Garrels*, 132 Ill. 550, 24 N. E. 573; *Newell v. Bank*, 12 Bush (Ky.) 57; *Warren Deposit Bank v. Robinson* (Ky.) 35 S. W. 275.

³⁹⁷ *Nevison v. Whitley*, Cro. Car. 501; *Buckley v. Guildbank*, Cro. Jac. 678; *Glassford v. Laing*, 1 Camp. 149.

³⁹⁸ *Bank of Utica v. Wager*, 2 Cow. (N. Y.) 769, 8 Cow. (N. Y.) 398; *Utica Ins. Co. v. Tilman*, 1 Wend. (N. Y.) 555.

³⁹⁹ *Marvine v. Hymers*, 12 N. Y. 223; *Merritt v. Benton*, 10 Wend. (N. Y.) 117; *Mosher v. Randall*, 52 N. Y. 649.

⁴⁰⁰ *Ontario Bank v. Schermerhorn*, 10 Paige (N. Y.) 109; *Churchman v. Martin*, 54 Ind. 380.

of the place of payment.⁴⁰¹ But an agreement to pay a note by drafts on New York to be delivered at their par value, although they are worth a premium, is usurious.⁴⁰² On the other hand, a person may agree to take uncurrent bills in payment at a higher rate than their actual market value, if no usury is intended by the agreement.⁴⁰³ So, if notes are given in payment of checks which were made payable in Canadian and Western bank bills, received and paid out at less than par, they are valid, in the absence of a prior agreement for drawing and paying the checks in that way.⁴⁰⁴ On the other hand, an agreement requiring a borrower to take shares of stock or uncurrent notes at more than their actual current value is usurious.⁴⁰⁵

As has been already observed, it is a question about which different state courts differ whether it is usury to include attorney's fees or costs in a commercial instrument. In some states this is held to be usury;⁴⁰⁶ in others, not.⁴⁰⁷

The fact that an indorser or guarantor receives more than a legal rate of interest for his compensation will not render the instrument void for usury, even at suit of a holder with notice.⁴⁰⁸ Nor will a mortgage be held usurious which is given to an agent to secure a high rate of commissions for the acceptance of bills drawn on him

⁴⁰¹ *Cuyler v. Sanford*, 13 Barb. (N. Y.) 339.

⁴⁰² *Seneca Co. Bank v. Schermerhorn*, 1 Denio (N. Y.) 133.

⁴⁰³ *Bank of U. S. v. Waggener*, 9 Pet. 378.

⁴⁰⁴ *Codd v. Rathbone*, 19 N. Y. 37.

⁴⁰⁵ *Eagleson v. Shotwell*, 1 Johns. Ch. (N. Y.) 536. So, the addition of fines and premiums in a building loan. *United States Savings & Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 235.

⁴⁰⁶ *Myer v. Hart*, 40 Mich. 517; *Miller v. Gardner*, 49 Iowa, 234; *Bean v. Jones*, 8 N. H. 149; *Wright v. Traver*, 73 Mich. 493, 41 N. W. 517. And see § 203, *supra*.

⁴⁰⁷ *Gaar v. Banking Co.*, 11 Bush (Ky.) 180; *Barton v. Bank*, 122 Ill. 354, 13 N. E. 503; *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. 495; *Mumford v. Tolman*, 157 Ind. 258, 41 N. E. 617; *Harris Mfg. Co. v. Antinson*, 31 Minn. 182, 17 N. W. 274; *Williams v. Rich*, 117 N. C. 235, 23 S. E. 257; *Gaston v. McLeran*, 3 Or. 389; *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89.

⁴⁰⁸ *Ketchum v. Barber*, 4 Hill (N. Y.) 224; *Barber v. Ketchum*, 7 Hill (N. Y.) 444; *More v. Howland*, 4 Denio (N. Y.) 264; *Van Duzer v. Howe*, 21 N. Y. 531; *Kitchel v. Schenck*, 29 N. Y. 515; *Gannon v. Forgotson*, 34 N. Y. Supp. 34; *Forgotson v. McKeon*, 14 App. Div. 342, 43 N. Y. Supp. 939; *Corning v. Pond*, 29 Hun (N. Y.) 129; *Lay v. Seago*, 47 Ga. 82.

by his principal, even though drawn against moneys to be furnished by the principal.⁴⁰⁹ So, commissions at a higher rate than legal interest, charged by a commission merchant for accepting drafts in advance, are not usurious.⁴¹⁰

Payment in Other Currency—Interest after Maturity.

§ 529. It is not usury, in discounting a bill at legal rate, to give instead of money a certificate of deposit payable at a future day;⁴¹¹ or a draft on another place, deducting interest for time it had to run.⁴¹² Neither is it usury to make a note payable "in gold or its equivalent";⁴¹³ although it would be so to give a note payable in gold (then at a premium) for a loan made in currency of less value.⁴¹⁴ So, it is not usury to give a note in payment for land with interest at more than legal rate, the whole principal and interest being reckoned together as purchase money;⁴¹⁵ or a note for the price of goods, but intended to raise money and conditioned for redelivery of the goods on payment of the amount actually raised.⁴¹⁶

And it does not constitute usury to reserve as a penalty a usurious rate of interest after maturity.⁴¹⁷

⁴⁰⁹ *Suydam v. Bartle*, 10 Paige (N. Y.) 94; *Suydam v. Westfall*, 4 Hill (N. Y.) 211; *Trotter v. Curtis*, 19 Johns. (N. Y.) 160.

⁴¹⁰ *De Forest v. Strong*, 8 Conn. 513.

⁴¹¹ *Knox v. Goodwin*, 25 Wend. (N. Y.) 643.

⁴¹² *Cayuga Co. Bank v. Hunt*, 2 Hill (N. Y.) 635.

⁴¹³ *Isett v. Caldwell*, 101 Pa. St. 32.

⁴¹⁴ *Glass v. Pullen*, 6 Bush (Ky.) 346.

⁴¹⁵ *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375.

⁴¹⁶ *Barker v. Van Sommer*, 1 Brown, Ch. 149.

⁴¹⁷ *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Conrad v. Gibbon*, 29 Iowa, 120; *Green v. Brown*, 22 Misc. Rep. 279, 49 N. Y. Supp. 163; *Ward's Adm'r v. Cornett*, 91 Va. 676, 22 S. E. 494. And such higher rate may be recovered. *Omaha Loan & Trust Co. v. Hanson*, 46 Neb. 850, 65 N. W. 1058. But see, contra, *Bang v. Windmill Co.*, 96 Tenn. 361, 34 S. W. 516. A fortiori, the payment of such interest without previous agreement is not usury. *Rosenstein v. Fox*, 150 N. Y. 354, 44 N. E. 1027. But see, contra, under South Carolina statute, *Ehrhardt v. Varn* (S. C.) 29 S. E. 225.

Usury by Agent—In Collaterals.

§ 530. If money is loaned by an agent who takes usurious interest for his principal, it is usurious and void.⁴¹⁸ But not so a commission or bonus taken⁴¹⁹ or given⁴²⁰ by the agent without his principal's knowledge. So, a note given for the purchase of other notes, the maker of these taking more than legal interest as commissions, is illegal and void between the payee and a subsequent holder.⁴²¹ So, a note given as collateral security for a usurious loan is illegal.⁴²² But the doctrine once held, that collaterals for a usurious loan which had been repudiated might be retained in defiance of an action of trover until the holder had received the amount legally due him, has been overruled.⁴²³ And a judgment at law founded on a warrant of attorney securing a usurious contract will be set aside without requiring the debtor to make payment of the amount lawfully due from him.⁴²⁴

The payment of usurious interest, being illegal, constitutes no sufficient consideration, as we have seen, for the extension of a note

⁴¹⁸ *Reed v. Smith*, 9 Cow. (N. Y.) 647; *Cheney v. White*, 5 Neb. 261; *Cheney v. Eberhardt*, 8 Neb. 423; *Grant v. Merrill*, 36 Wis. 390; *McNeely v. Ford* (Iowa) 72 N. W. 672. Although it is in form a transfer to the agent, and by him to the lender. *Freeport Bank v. Hagemeyer*, 91 Hun, 194, 36 N. Y. Supp. 214.

⁴¹⁹ *Muir v. Institution*, 16 N. J. Eq. 537; *Condit v. Baldwin*, 21 N. Y. 219; *Ditmars v. Sackett* (Sup.) 36 N. Y. Supp. 690; *Ludington v. Kirk*, 17 Misc. Rep. 129, 39 N. Y. Supp. 419; *Sherwood v. Swift* (Ark.) 43 S. W. 507; *Sherwood v. Wilkins* (Ark.) 45 S. W. 988; *Barger v. Taylor*, 30 Or. 228, 47 Pac. 618. But see *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898.

⁴²⁰ *Carter v. Carusi*, 112 U. S. 478, 5 S. C. 281. But see, contra, where it was given by the husband of the maker, *Hamilton v. Brennan*, 90 Hun, 340, 35 N. Y. Supp. 805.

⁴²¹ *Dunham v. Gould*, 16 Johns. (N. Y.) 367. And see, where such exchange is intended as a cover for usury, *Schermerhorn v. Talman*, 14 N. Y. 93.

⁴²² *Bell v. Lent*, 24 Wend. (N. Y.) 230. So, too, a collateral mortgage. *Dix v. Van Wyck*, 2 Hill (N. Y.) 522.

⁴²³ *Chit. Bills*, 118; *Fitzroy v. Gwillim*, 1 Term R. 153; *Wood v. Grimwood*, 10 Barn. & C. 679; *Barnard v. Young*, 17 Ves. 44.

⁴²⁴ *Roberts v. Goff*, 4 Barn. & Ald. 92; *Cole v. Gill*, 7 Moore, 353; *Edmonson v. Popkin*, 1 Bos. & P. 270; *Hindle v. O'Brien*, 1 Taunt. 413.

or bill.⁴²⁵ So, too, a bill or note which is void for usury is no payment of a prior debt; and, if a former note which is valid is given for such usurious note, the original note will still remain as a subsisting debt.⁴²⁶

Usury as a Defense.

§ 531. In general, the defense of usury is confined to the immediate parties to the transaction. It has even been held that a surety for the maker in an action brought by the payee against him alone cannot set up usury between the principal maker and the payee.⁴²⁷ So, where three joint makers have afterwards severed, and given their several acceptances for portions, usury paid by them jointly on the original note can only be set off pro rata against each acceptance.⁴²⁸

Banks and other corporations, unless specially excepted, are governed by usury laws in the same manner as individuals;⁴²⁹ although in some states corporations are not permitted to plead usury. But the usury statutes cannot be controlled by any usage of trade or custom of merchants.⁴³⁰ On the other hand, usury in a debt secured by collateral has been held to affect the collateral only to the extent of the illegal excess.⁴³¹

In general, voluntary payments of usurious interest cannot be recovered.⁴³² But this is not the case, as between the maker and the

⁴²⁵ *Ray v. McMurtry*, 20 Ind. 307; *First Nat. Bank v. Lineberger*, 83 N. C. 454. And a surety will not be discharged by reason of an extension based on such consideration. *Howell v. Sevier*, 1 Lea (Tenn.) 360; *First Nat. Bank v. Lineberger*, supra.

⁴²⁶ *Ramsdell v. Soule*, 12 Pick. (Mass.) 126.

⁴²⁷ *Savage v. Fox*, 60 N. H. 17. But see, contra, *Prather v. Smith*, 101 Ga. 283, 28 S. E. 857; and, as to a guarantor, *Conger v. Babbet*, 67 Iowa, 13, 24 N. W. 569.

⁴²⁸ *Deposit Bank v. Robertson* (Ky.) 34 S. W. 23.

⁴²⁹ *Maine Bank v. Butts*, 9 Mass. 49; *Chafin v. Bank*, 7 Heisk. (Tenn.) 499. Where a corporation maker cannot plead usury, the indorser cannot. *Ludington v. Smith*, 16 Misc. Rep. 301, 37 N. Y. Supp. 1141.

⁴³⁰ *Ex parte Aynsworth*, 4 Ves. 678.

⁴³¹ *Partridge v. Williams*, 72 Ga. 807.

⁴³² *Reed v. Loan Co.*, 160 Mass. 237, 35 N. E. 677. But see, contra, *Duncan v. Helm*, 22 La. Ann. 418. And when two usurious notes are secured by one

payee, where the usury was included in a renewal, and paid to a bona fide holder,⁴³³ or paid under a judgment recovered by a bona fide holder.⁴³⁴ In some of the states, however, all payments of usurious interest are credited on the principal, and may be set off as such in an action on the note,⁴³⁵ or on a renewal of it.⁴³⁶ And it has been held that this may be done without offering to restore benefits received.⁴³⁷

Offenses Against Liquor Laws.

§ 532. Among the statutes, the violation of which gives rise most frequently to questions on notes and bills, are those prohibiting the sale of liquor or prescribing license as necessary to a legal sale. Contracts in violation of such statutes are void, and so are commercial and other instruments founded on them.⁴³⁸ So, too, would be a mortgage securing a note of this sort.⁴³⁹ Notes given for liquor sold in violation of the existing license law are illegal.⁴⁴⁰ So, for a permit to sell liquor under a license granted to the payee, such license not being transferable.⁴⁴¹ But if several notes are taken,

judgment, and one has been paid, only the usurious interest paid on the other can be deducted from it. *Maher's Appeal*, 91 Pa. St. 516.

⁴³³ *Brown v. Lacy*, 83 Ind. 436. For the admissibility of such defense against a bona fide holder, see § 559, *infra*.

⁴³⁴ *Lacy v. Brown*, 67 Ind. 478.

⁴³⁵ *Caponigri v. Altieri* (Sup.) 48 N. Y. Supp. 808. So, too, a payment of excessive interest made by mistake. *Stotsenburg v. Fordice*, 142 Ind. 490, 41 N. E. 313.

⁴³⁶ *McGee v. Long*, 83 Ga. 156, 9 S. E. 1107; *Harris v. Bressler*, 119 Ill. 471, 10 N. E. 188. But see, *contra*, *Morrison v. State Bank*, 3 Kan. App. 201, 43 Pac. 441; the remedy in Kansas being only by forfeiture and action for penalty.

⁴³⁷ *First Nat. Bank v. Ledbetter* (Tex.) 34 S. W. 1042.

⁴³⁸ *Hubbell v. Flint*, 13 Gray (Mass.) 277.

⁴³⁹ *Brigham v. Potter*, 14 Gray (Mass.) 522.

⁴⁴⁰ *Turck v. Richmond*, 13 Barb. (N. Y.) 533; *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Widoe v. Webb*, 20 Ohio St. 431; *Caldwell v. Wentworth*, 14 N. H. 431; *Carlton v. Bailey*, 27 N. H. 230. Even though the parties supposed themselves to be within the act. *Inhabitants of Webster v. Sanborn*, 47 Me. 471. And, where the statute prescribes a penalty for sales exceeding \$10, the entire note is void in such sales. *Covington v. Threadgill*, 88 N. C. 187. And see § 559, *infra*.

⁴⁴¹ *Sanderson v. Goodrich*, 46 Barb. (N. Y.) 616.

and the illegal part is less in amount than one of them, the illegality may be confined to one note, and recovery had on the others.⁴⁴² And it has been held in Pennsylvania that a note given for whisky sold without a United States license is good, the statute being a penal one, but not expressly making such sales void.⁴⁴³ In Vermont the statute is more stringent, and no action is maintainable under it for the possession or value of intoxicating liquors sold without statutory authority.⁴⁴⁴ In Michigan, a note given for liquor sold contrary to law is made void by statute, except in the hands of a bona fide holder for value, the burden of proof being on the holder to show himself such holder for value without notice.⁴⁴⁵

Where a note given for sale of liquor is illegal, and has been surrendered, and a new note taken for it, the illegality renders the new note also void.⁴⁴⁶ And it has even been held that where A. owes money to B. for an illegal sale of liquor, and B. owes a lawful debt to C., and both debts are adjusted by a note given by A. to C., who knows of the illegal character of B.'s claim against A., the note thus given is void.⁴⁴⁷

So, a note is illegal which is given for the purpose of indemnifying against a mortgage given to the maker of the note to prevent collection of penalties under the liquor laws.⁴⁴⁸ And, where a note given for liquor sold in violation of the statute has been paid by the maker, the amount so paid may be recovered from the payee.⁴⁴⁹ So, a credit of this character given in the settlement of mutual accounts may be recovered as so much money paid.⁴⁵⁰ The illegality of a note given for liquor sold in violation of the statute affects a surety's liability, and releases him, although he may have been indemnified for becoming surety.⁴⁵¹

⁴⁴² *Canadine v. Wilson*, 61 Miss. 573.

⁴⁴³ *Rahter v. First Nat. Bank*, 92 Pa. St. 393.

⁴⁴⁴ Gen. St. c. 94, § 32; R. L. 1880, § 3801. And see § 559, *infra*.

⁴⁴⁵ *Paton v. Coit*, 5 Mich. 505. So, too, in Maine, *Cottle v. Cleaves*, 70 Me. 256; and in New Hampshire, *Doolittle v. Lyman*, 44 N. H. 608.

⁴⁴⁶ *Kidder v. Blake*, 45 N. H. 539.

⁴⁴⁷ *Baker v. Collins*, 9 Allen (Mass.) 253.

⁴⁴⁸ *Merrick v. Butler*, 2 Lans. (N. Y.) 103.

⁴⁴⁹ *Oreutt v. Symonds*, 107 Mass. 382.

⁴⁵⁰ *Walan v. Kerby*, 99 Mass. 1.

⁴⁵¹ *Nourse v. Pope*, 13 Allen (Mass.) 87.

There is, in general, no presumption of illegality in a note because it was given for a sale of liquor; but the burden is on the defendant to show the want of license or other violation of the statute.⁴⁵² In New Hampshire, however, there is such a presumption since the statute of 1855, and the burden is on the holder of the note to prove a license.⁴⁵³

Liquor Laws—Repeal—Foreign Law.

§ 533. Where a note has been given for a sale which is illegal at the time, the note remains illegal and void though the statute be afterwards repealed.⁴⁵⁴ And such subsequent repeal of the act will not prevent a recovery of money previously paid on the illegal contract.⁴⁵⁵ In like manner, the sale of liquor under a statutory license granted for one year will not be rendered illegal by the repeal of the license law during the year, and before the making of the sale.⁴⁵⁶

And where a note was made in another state, in violation of the statutes of that state as to sales of liquor, it is a good defense to the note.⁴⁵⁷ But the burden of proof is upon the defendant in such case to show the violation of the foreign statute.⁴⁵⁸

Statutes Against Dealing in Slaves.

§ 534. Since the war, statutes and constitutional provisions have been adopted in some of the Southern states rendering void all contracts growing out of the sale of slaves. Such contracts are declared to be null and void by the Louisiana constitution of 1868.⁴⁵⁹ And a note given for the purchase of a slave is now illegal and void in the state of Louisiana even in the hands of a bona fide holder for

⁴⁵² *Blake v. Sawin*, 10 Allen (Mass.) 340.

⁴⁵³ *Doolittle v. Lyman*, 44 N. H. 608. And this is also the case in some other states. *Paton v. Coit*, 5 Mich. 505; *Cottle v. Cleaves*, 70 Me. 256.

⁴⁵⁴ *Bancher v. Mansel*, 47 Me. 58; *Gorsuth v. Butterfield*, 2 Wis. 237.

⁴⁵⁵ *Adams v. Goodnow*, 101 Mass. 81.

⁴⁵⁶ *Adams v. Hackett*, 27 N. H. 289.

⁴⁵⁷ *Fuller v. Bean*, 30 N. H. 181.

⁴⁵⁸ *Doolittle v. Lyman*, 44 N. H. 608.

⁴⁵⁹ Const. La. 1868, art. 128; *Austin v. Sandel*, 19 La. Ann. 309; *Lapice v. Bowman*, 20 La. Ann. 234; *Lytle v. Whicher*, 21 La. Ann. 182; *Nunez v. Winston*, Id. 666.

value.⁴⁶⁰ It has, however, been held that the indorsement of such a note forms a new contract, upon which a recovery could be had by the indorsee.⁴⁶¹ But this case has been since overruled.⁴⁶²

A like prohibition exists in the state of Mississippi, and, where a bill of exchange has been given for such prohibited sale, a plea setting up the illegality was held to be sufficient, without making any offer to return the slave.⁴⁶³ And a note given in Mississippi for such consideration, and illegal there, was held to be illegal in Arkansas.⁴⁶⁴ There is a similar provision in the constitutions of Arkansas, Florida, and Georgia.⁴⁶⁵ And, under such provision, it has been held that a judgment rendered on such a note may be set aside as void.⁴⁶⁶ But in Georgia this provision has been held not to extend to an indorsement of such illegal note for a new and lawful consideration.⁴⁶⁷ And where A. owed B. for slaves purchased, and B. was indebted to C. for land purchased, a note given by A. to C. in satisfaction of such debts was held to be for good consideration and valid.⁴⁶⁸ So, a new note given by B. to C., in satisfaction of an old note for such illegal consideration given by A. to B., has been held to be rendered valid by the novation.⁴⁶⁹ So, a note given for a slave in 1861, before the emancipation proclamation and the amendment of the United States constitution, has been held to be valid.⁴⁷⁰

⁴⁶⁰ *Groves v. Clark*, 21 La. Ann. 567; *Levy v. Gremillion*, Id. 635.

⁴⁶¹ *Weil, Succession of*, 24 La. Ann. 139.

⁴⁶² *Duperier v. Darby*, 25 La. Ann. 477.

⁴⁶³ *Barker v. Justice*, 41 Miss. 241.

⁴⁶⁴ *Moore v. Clopton*, 22 Ark. 125.

⁴⁶⁵ *White v. Hart*, 13 Wall. 646, holding that the Georgia constitution did not affect existing contracts. But it did affect a note for slaves hired with the purpose of removing them beyond the federal jurisdiction. *Martin v. Iron Works*, 35 Ga. 320.

⁴⁶⁶ *McNealy v. Gregory*, 13 Fla. 417. But a note given by an administrator in settlement of a judgment against his intestate on a note given for the purchase of a slave has been held not to be illegal. *Redwine v. Glover*, 45 Ga. 135.

⁴⁶⁷ *Graham v. Maguire*, 39 Ga. 531.

⁴⁶⁸ *Dever v. Akin*, 40 Ga. 423.

⁴⁶⁹ *Gresham v. Morrow*, 40 Ga. 487.

⁴⁷⁰ *Boyce v. Tabb*, 18 Wall. 548; *Osborn v. Nicholson*, 13 Wall. 654. But before the war such a note was presumed to be void in Illinois. *Hone v. Ammons*, 14 Ill. 29.

And, in Texas, such a note made before the close of the war, although after the emancipation proclamation, has been held to be valid.⁴⁷¹

Knowledge of Illegal Intention.

§ 535. It may be laid down as a general rule of law that a contract is illegal and void if it leads directly to a violation of the law;⁴⁷² or if it furnishes another with the means of breaking the law, and is entered into for that purpose.⁴⁷³ And money lent to accomplish such illegal purpose cannot be recovered again by the lender.⁴⁷⁴ Nor can there be a recovery upon a contract for the purchase and use of property for such illegal purpose.⁴⁷⁵ In like manner, a contract to indemnify any one against the consequences of a trespass or other unlawful act is void;⁴⁷⁶ although such a contract would be good, if the payee did not know at the time that the act contemplated was a trespass.⁴⁷⁷

And it has been held that mere knowledge on the part of a seller of goods that the purchaser intended to make an illegal use of them, without any aid in such illegal purpose on the seller's part, will not defeat his right of action on the contract.⁴⁷⁸ Thus, where a bank discounts a note with knowledge that the proceeds are to be used in the Confederate service, the note is not rendered invalid thereby.⁴⁷⁹

⁴⁷¹ Hall v. Keese, 31 Tex. 504.

⁴⁷² 1 Pars. Notes & B. 214.

⁴⁷³ De Groot v. Van Duzer, 20 Wend. (N. Y.) 390. So, a note given for bills known to be counterfeit. Blont v. Proctor, 5 Blackf. (Ind.) 265.

⁴⁷⁴ Byles, Bills, 141; 1 Daniel, Neg. Inst. 204; 1 Pars. Notes & B. 216; Cannan v. Bryce, 3 Barn. & Ald. 179; McKinnell v. Robinson, 3 Mees. & W. 434.

⁴⁷⁵ Tracy v. Talmage, 14 N. Y. 162.

⁴⁷⁶ Chit. Bills, 102; 1 Daniel, Neg. Inst. 197; Story, Prom. Notes, § 189.

⁴⁷⁷ Stone v. Hooker, 9 Cow. (N. Y.) 154; Coventry v. Barton, 17 Johns. (N. Y.) 142.

⁴⁷⁸ Byles, Bills, 138; Hodgson v. Temple, 5 Taunt. 181; Puryear v. McGavock, 9 Heisk. (Tenn.) 461; James v. Planters' Bank, Id. 455. In the same term of the same court a note for money loaned for the express purpose of making saltpeter for the Confederate government was also held valid. Bank of Tennessee v. Cummings, Id. 470. But in Langton v. Hughes, 1 Maule & S. 593, a sale of noxious drugs with knowledge of the buyer's intent to use them in brewing, in violation of 42 Geo. III. c. 38, and 51 Geo. III. c. 87, was held to be illegal.

⁴⁷⁹ McGavock v. Puryear, 6 Cold. (Tenn.) 34.

Or, if liquor is sold with knowledge on the seller's part that it is to be used for retail sales in violation of a license law, this will not render it illegal.⁴⁸⁰ This is true also where the intention is to violate the laws of another state, in the absence of active aid or participation on the seller's part.⁴⁸¹ And, without any knowledge of such illegal intention, the rule is still plainer.⁴⁸² And a mere belief that such illegal purpose exists will not amount to such knowledge.⁴⁸³ The Massachusetts cases seem, however, to hold that the knowledge on the seller's part of an intention to violate the law, is sufficient to render the sale illegal and void.⁴⁸⁴ But the burden of proof is on the maker of the note or bill in such case to show the payee's knowledge of the illegal intention.⁴⁸⁵

Where liquor is sold in Massachusetts for the purpose of resale in Vermont, where it is prohibited by penal statute, and a note is given for it in Massachusetts, the illegality constitutes no defense in Vermont against a bona fide holder for value.⁴⁸⁶ If, on the other hand, a note be made in Massachusetts for liquor sold by a New York dealer with the intention, known to the seller and aided by him, of reselling it in violation of Massachusetts laws, it will be void.⁴⁸⁷ So, a note for liquor illegally sold in one state by an agent from another state, to be delivered in the first state in violation of its laws, is void between original parties knowing and aiding in the evasion of the statute.⁴⁸⁸

Renewal of Illegal Instrument—Merger.

§ 536. Where a bill or note has been founded originally upon an illegal consideration, a renewal of it is tainted and rendered void by

⁴⁸⁰ *Kreiss v. Seligman*, 8 Barb. (N. Y.) 439.

⁴⁸¹ *Gaylord v. Soragen*, 32 Vt. 110.

⁴⁸² *Ely v. Webster*, 102 Mass. 304.

⁴⁸³ *Savage v. Mallory*, 4 Allen (Mass.) 492.

⁴⁸⁴ *Webster v. Munger*, 8 Gray (Mass.) 584.

⁴⁸⁵ *Kellogg v. Moore*, 2 Allen (Mass.) 266.

⁴⁸⁶ *Converse v. Foster*, 32 Vt. 828.

⁴⁸⁷ *Hubbell v. Flint*, 13 Gray (Mass.) 277. So, too, in Maine, *Bancher v. Mansel*, 47 Me. 58, notwithstanding the subsequent repeal of the act which had been violated.

⁴⁸⁸ *Wilson v. Stratton*, 47 Me. 120; *Bancher v. Mansel*, *supra*.

the same illegality.⁴⁸⁹ So, if the original note be surrendered, and another note or bill between the same parties be substituted for it.⁴⁹⁰ But if, in the renewal, the amount which represents the illegal part of the consideration of the original bill be excluded, the renewal will then be valid.⁴⁹¹ Where a note is given in renewal of another note, which is merely voidable by reason of a consideration based on a *malum prohibitum* and not void, the renewal will be valid.⁴⁹² And the renewal of an illegal bill or note given to a bona fide holder for value before maturity is good.⁴⁹³

Where judgment has been rendered by default on a bill originally given for illegal or insufficient consideration, the right to object to such insufficiency or illegality is lost in the judgment.⁴⁹⁴ And such a judgment will not be set aside on account of the original illegal consideration, unless the plaintiff can be shown to have had knowledge of such illegality.⁴⁹⁵

Construction — Recovery of Payments — Partial Illegality.

§ 537. Where an instrument is capable of two constructions, one of which is a legal one, and the other illegal, the former will be preferred, and the instrument held good.⁴⁹⁶ An illegal bill or note can-

⁴⁸⁹ *Chapman v. Black*, 2 Barn. & Ald. 588; *Wynne v. Callander*, 1 Russ. 293; *Preston v. Jackson*, 2 Starkie, 237. But a new note, given after foreclosure sale by the purchaser of the land to the holder of the original illegal mortgage note, is not tainted by the original illegality. *Gibson's Heirs v. Niblett*, 1 Smedes & M. Ch. (Miss.) 278. And see § 524, *supra*.

⁴⁹⁰ *Southall v. Rigg*, 11 C. B. 481; *Flight v. Reed*, 32 Law J. Exch. 265, 1 Hurl. & C. 703.

⁴⁹¹ *Boulton v. Coghlan*, 1 Bing. (N. C.) 640; *Hay v. Ayling*, 20 Law J. Q. B. 171, 16 Q. B. 423.

⁴⁹² *Witham v. Lee*, 4 Esp. 264. So, if a partnership is carrying on an illegal trade, this will not vitiate a note made by one partner to the other for a partnership settlement. *De Leon v. Trevino*, 49 Tex. 88.

⁴⁹³ *George v. Stanley*, 4 Taunt. 683; although the renewal is made directly to such holder or payee, *Calvert v. Williams*, 64 N. C. 168. But the renewal of an unconstitutional note made after judgment on the original note to the receiver of the payee is itself void. *Comstock v. Draher*, 1 Mich. 481.

⁴⁹⁴ *Shepherd v. Charter*, 4 Term R. 275; *George v. Stanley*, 4 Taunt. 683. See § 523, *supra*.

⁴⁹⁵ *Byles, Bills*, 146; *Chit. Bills*, 117; *George v. Stanley*, 4 Taunt. 683; *Davison v. Franklin*, 1 Barn. & Adol. 142.

⁴⁹⁶ *Hanauer v. Gray*, 25 Ark. 350.

not be proved in bankruptcy as a debt.⁴⁹⁷ Nor, on the other hand, can one who has paid money on an illegal contract, which is not void by statute, recover the money paid.⁴⁹⁸ But an agent, who has paid money on an illegal contract for his principal at his request, can recover from the principal the money paid for him.⁴⁹⁹

Where a note or bill is given in part for an illegal consideration, the general rule is that the whole instrument is void.⁵⁰⁰ This is true, likewise, of a mortgage given to secure a note, part of the

⁴⁹⁷ Chit. Bills, 117; *Benfield v. Solomons*, 9 Ves. 84; *Fitzroy v. Gwillim*, 1 Term R. 153; *Hindle v. O'Brien*, 1 Tannt. 413.

⁴⁹⁸ *Howson v. Hancock*, 8 Term R. 575; *Knowlton v. Spring Co.*, 57 N. Y. 518.

⁴⁹⁹ *Knight v. Cambers*, 24 Law J. C. P. 121, 15 C. B. 562; *Knight v. Fitch*, 24 Law J. C. P. 122, 15 C. B. 566; *Rosewarne v. Billing*, 33 Law J. C. P. 55, 15 C. B. (N. S.) 316.

⁵⁰⁰ Byles, Bills, 145; Chit. Bills, 114; 1 Daniel, Neg. Inst. 207; 1 Edw. Bills & N. § 363; *Robinson v. Bland*, 2 Burrows, 1077; *Scott v. Gilmore*, 3 Taunt. 226; *Cruikshank v. Rose*, 5 Car. & P. 19; *Chapman v. Black*, 2 Barn. & Ald. 588; *Owens v. Porter*, 4 Car. & P. 367; *Perkins v. Cummings*, 2 Gray (Mass.) 258; *Brigham v. Potter*, 14 Gray (Mass.) 522; *Carleton v. Woods*, 28 N. H. 290; *Coburn v. Odell*, 30 N. H. 540; *Clark v. Ricker*, 14 N. H. 44; *Deering v. Chapman*, 22 Me. 488; *Saratoga Co. Bank v. King*, 44 N. Y. 87; *Widoe v. Webb*, 20 Ohio St. 431; *Snyder v. Willey*, 33 Mich. 483; *Wisner v. Bardwell*, 38 Mich. 278; *Woodruff v. Hinman*, 11 Vt. 592; *Wilkins v. Riley*, 47 Miss. 306; *Cotten v. McKenzie*, 57 Miss. 418; *Wynne v. Whisenant*, 37 Ala. 46; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; *Averbeck v. Hall*, 14 Bush (Ky.) 505; *Everhart v. Puckett*, 73 Ind. 409; *Covington v. Threadgill*, 88 N. C. 186; *Beard v. Beard* (Cal. Sup. Ct.) 19 Cent. Law J. 78; *Gamble v. Grimes*, 2 Ind. 392; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90; *Hynds v. Hays*, 25 Ind. 31; *Hoyt v. Macon*, 2 Colo. 502; *Taylor v. Pickett*, 52 Iowa, 467, 3 N. W. 514; *Quigley v. Duffey*, 52 Iowa, 610, 3 N. W. 659; *Craig v. Andrews*, 7 Iowa, 17. Especially if the illegal part is indefinite, *Everhart v. Puckett*, *supra*; or inseparable from the rest, *Potts v. Gray*, 3 Cold. (Tenn.) 468. The Code of Iowa (section 1550) excepts from this provision "negotiable paper in the hands of holders thereof in good faith for valuable consideration without notice of any illegality in its inception or transfer." The legal part of the consideration, not being paid by a note which is thus illegal, may be sued upon as though there were no note. *Pecker v. Kennison*, 46 N. H. 488. See, too, *Lemon v. Grosskopf*, 22 Wis. 447; *Pacific Guano Co. v. Mullen*, 66 Ala. 582. So, payment by a forged bill is no payment, although neither party to the intended payment knew of the forgery. *Markle v. Hatfield*, 2 Johns. (N. Y.) 455.

consideration of which is illegal.⁵⁰¹ But it has been held in England that, if a payment be made on account of such indebtedness generally, it may be appropriated to satisfy the illegal part, leaving the balance for a legal consideration recoverable.⁵⁰² And it seems that, where the illegal part of the consideration can be distinguished and separated from the legal part, recovery may be had as to the latter.⁵⁰³

⁵⁰¹ *Brigham v. Potter*, 14 Gray (Mass.) 522.

⁵⁰² *Byles, Bills*, 145; *Cruikshanks v. Rose*, 1 Moody & R. 100, 5 Car. & P. 19. But see, contra, *Gammon v. Plaisted*, 51 N. H. 444.

⁵⁰³ *Byles, Bills*, 145; *Chit. Bills*, 115; 1 *Daniel, Neg. Inst.* 207; *Scott v. Gillmore*, 3 Taunt. 226; *Cruikshanks v. Rose*, supra; *Warren v. Chapman*, 105 Mass. 87; *Guild v. Belcher*, 119 Mass. 257; *McGuinness v. Bligh*, 11 R. I. 94; *Clopton v. Elkin*, 49 Miss. 95. This has also been held in numerous cases in Louisiana, where the note was partly given for slaves and avoided by the constitutional provision. *Brou v. Decnel*, 20 La. Ann. 254, 22 La. Ann. 189; *Burbridge v. Harrison*, 20 La. Ann. 357; *Wainwright v. Bridges*, 19 La. Ann. 234; *Sandidge v. Sanderson*, 21 La. Ann. 757; *Satterfield v. Spurlock*, Id. 771; *Merritt v. Merle*, 22 La. Ann. 257; *Hebert v. Chastant*, Id. 152; *Allen v. Tarlton*, Id. 427; *Castille v. Offutt*, Id. 430; *Conrad v. Callery*, Id. 428; *Smith v. McWaters*, Id. 431; *Spyker v. Hart*, Id. 534; *Walker v. Ducros*, Id. 214. If there are several notes, each exceeding the amount of the illegal consideration, it has been held that the holder may apply the defense to whichever he may elect, and recover on the other. *Carradine v. Wilson*, 61 Miss. 573.

CHAPTER XV.

CONSIDERATION—FAILURE—DEFENSE.

I. FAILURE OF CONSIDERATION.

II. DEFENSES RELATING TO CONSIDERATION.

I. FAILURE OF CONSIDERATION.

- § 538. Total Failure—In General.
- 539. Partial Failure—Definitely Ascertainable.
- 540. — Indefinite—Statutes.
- 541. Failure in Value—Quality.
- 544. — In Quantity.
- 545. — In Title.
- 546. — Of Title—Warranty—Eviction.
- 547. — Of Title—Eviction—Fraud.
- 548. Fraudulent Warranty.
- 549. Unsoundness without Fraud—False Representations.
- 550. Failure—By Mistake.
- 551. — Unperformed Agreement.
- 553. — Nonperformance—Not a Failure.
- 555. — Failure after Consideration Received.

Total Failure—In General.

§ 538. The original want of consideration for a bill or note is not to be confounded with the subsequent failure of a consideration originally sufficient, although they are often treated as identical. A total failure of consideration has the same effect upon the liability of the parties as an original want of consideration, and furnishes a good defense between immediate parties and against parties with notice, as well as against holders not for value and purchasers after maturity.¹ This defense of total fail-

¹ Byles, Bills, 131; Chit. Bills, 91; 1 Daniel, Neg. Inst. 205; 1 Edw. Bills & N. § 462; 1 Pars. Notes & B. 203; Story, Prom. Notes, § 187; Jefferies v. Austin, 1 Strange, 674; Jackson v. Warwick, 7 Term R. 121; Solly v. Hinde, 2 Crompt. & M. 516, 6 Car. & P. 316; Wells v. Hopkins, 5 Mees. & W. 7;

ure is a sufficient one at common law, but is especially provided for in some states by statute. In a suit upon a renewal note, failure in the consideration of the original note is available as a defense.² But in Louisiana, where a note contained the words "without plea or offset," failure of consideration could not formerly be set up as a defense to it.³ And the maker of a note may be estopped from defense of failure of consideration by a settlement of accounts, showing a balance for which the note was given.⁴ And he may waive such defense by giving a new note to a subsequent holder to take up the disputed note, upon the strength of the original payee's promise to make good the original consideration.⁵ But the putting of a memorandum on a note to the effect that it was given for part of the purchase money of a piece of land is not equivalent to a notice of the failure of the consideration, and will not put the purchaser upon inquiry as to the consideration.⁶ In some cases the most effective relief possible to a maker for loss or liability to loss by failure of consideration lies in equity; but if the amount of such failure is unliquidated, and cannot be computed, a bill in equity will not lie for an injunction and accounting.⁷ Where there are several notes, and the

Starr v. Torrey, 22 N. J. Law, 190; *Leslie v. Bassett*, 129 N. Y. 523, 29 N. E. 834. So, too, in the case of a sealed note. *Anthony v. Harrison*, 14 Hun (N. Y.) 198; *Case v. Boughton*, 11 Wend. (N. Y.) 109. Such defense is provided for by statute in Illinois. *Gage v. Lewis*, 68 Ill. 604. And the defense of failure of consideration is available on a note made in another state. *Roots v. Merriwether*, 8 Bush (Ky.) 397.

² *Hooker v. Hubbard*, 102 Mass. 239, 97 Mass. 175; *Commonwealth Ins. Co. v. Whitney*, 1 Mete. (Mass.) 21; *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. 942.

³ *Grand Gulf Railroad & Banking Co. v. Stanbrough*, 1 La. Ann. 261.

⁴ *Carruth v. Carter*, 26 La. Ann. 331.

⁵ *Griffith v. Trabue*, 11 Heisk. (Tenn.) 645. But, where several notes provide for a forfeiture of a certain agreement at the holder's option on any default, a new note taken on part payment of one note for the balance due on it is no waiver of a subsequent default, and the forfeiture constitutes a failure of consideration of the latter notes. *Montelius v. Wood*, 56 Iowa, 254, 9 N. W. 212.

⁶ *Henneberry v. Morse*, 56 Ill. 394.

⁷ *Byles, Bills*, 133; *Glennie v. Imri, '3 Younge & C.* 436. On the other hand, relief can be had only in equity, where the defense is unsettled part-

whole amount of failure is less than the aggregate of the notes, it is a defense only so far as may be necessary.⁸

Partial Failure—Definitely Ascertainable.

§ 539. Whether a partial failure of consideration can be set up in defense to a bill or note, and under what circumstances, has been questioned both in England and in the United States. It may be stated, however, as a general rule, that a partial failure of consideration is a sufficient defense pro tanto to a bill or note.⁹ This rule was formerly limited in its operation to cases of failure where the amount was definite and could be ascertained by computation.¹⁰ Partial failure may consist in the bad quality of the goods for the purchase of which the note is given;¹¹ or in the fact that part of a debt for which the note was made was the debt of a firm contracted before the maker of the note became a member of it, the balance of the note being for his own debt;¹² or that a slave purchased with the note was subject to a paramount title in a third person, which was subsequently bought by the maker of the

nership transactions as constituting a failure. *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865.

⁸ *Hansford v. Mills*, 9 Port. (Ala.) 509. And if the notes are not negotiable, and have been transferred, it should be confined to that which was transferred last. *Ellison v. McCullough*, 2 Rich. Law (S. C.) 170. See, too, *Wilber v. Buchanan*, 85 Ind. 42.

⁹ *Byles*, Bills, 132; *Chit. Bills*, 86; 1 *Daniel*, Neg. Inst. 207; 1 *Pars. Notes & B.* 203; *Story*, Prom. Notes, § 187; 1 *Edw. Bills & N.* § 469; *Darnell v. Williams*, 2 *Starkie*, 166; *Jefferies v. Austin*, 1 *Strange*, 674; *Peden v. Moore*, 1 *Stew. & P.* 71; *Gamble v. Grimes*, 2 *Ind.* 392; *Braly v. Henry*, 71 *Cal.* 481, 11 *Pac.* 385, and 12 *Pac.* 623; *Lanning v. Burns*, 36 *Neb.* 236, 54 *N. W.* 427; *Morgan v. Fallenstein*, 27 *Ill.* 31; *Pettillo v. Hopson*, 23 *Ark.* 196; *Sawyer v. Chambers*, 44 *Barb. (N. Y.)* 42; *Black v. Ridgway*, 131 *Mass.* 80; *Wyckoff v. Runyon*, 33 *N. J. Law*, 107, overruling in New Jersey such cases as established a contrary "course of practice." So, as to indefinite and unliquidated damages. *Davis v. Wait*, 12 *Or.* 425, 8 *Pac.* 356. But a partial failure will not sustain an averment of total failure. *Burnap v. Cook*, 32 *Ill.* 168.

¹⁰ *Chit. Bills*, 91; *Story*, Prom. Notes, § 187; *Day v. Nix*, 9 *Moore*, 159. But it is no defense that the article purchased was of less value than was anticipated. *Id.*

¹¹ *Nations v. Thomas*, 25 *Tex. Supp.* 221.

¹² *Guild v. Belcher*, 119 *Mass.* 257.

note for his own protection;¹³ or that an agreement for which a note was given has been only partially performed.¹⁴

Indefinite Partial Failure—Statutes.

§ 540. But in some states, in the absence of statutory provision, a partial failure of consideration, whether of definite or indefinite amount, constitutes no defense to a bill or note.¹⁵ Thus, a note given for land, it was held, could not be contested on the ground of partial failure in the title, but the purchaser was left to his remedy on the covenants in his deed.¹⁶ And, where a note has been given in payment for land, the existence of a mortgage was held to constitute no defense by way of failure of consideration, the presumption being that the equity of redemption conveyed was a thing of some value.¹⁷ And this has been held to be the case even where the mortgage exceeded the value of the land.¹⁸ In like manner, a judgment lien upon the land sold has been held to constitute no defense as a partial failure of the consideration of the purchase-

¹³ *Moore v. Lanham*, 3 Hill (S. C.) 299; *Smith v. Ackerman*, 5 Blackf. (Ind.) 541; *Edwards v. Porter*, 2 Cold. (Tenn.) 42.

¹⁴ *Stacy v. Kemp*, 97 Mass. 166; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Burnett v. Smith*, 4 Gray (Mass.) 50; *Holzworth v. Koch*, 26 Ohio St. 33; *Purkett v. Gregory*, 3 Ill. 44; *Barr v. Baker*, 9 Mo. 850; *Griffey v. Payne*, *Morris* (Iowa) 68; *Coburn v. Ware*, 30 Me. 202; *Cline v. Miller*, 8 Md. 274; *Payne v. Cutler*, 13 Wend. (N. Y.) 605; *Spalding v. Vandercook*, 2 Wend. (N. Y.) 431.

¹⁵ *Fletcher v. Chase*, 16 N. H. 38; *Drew v. Towle*, 27 N. H. 412; *Stone v. Peake*, 16 Vt. 218; *Foster v. Phaley*, 35 Vt. 303; *Burton v. Schermerhorn*, 21 Vt. 289; *Evans v. Williamson*, 79 N. C. 86; *Washburn v. Picot*, 14 N. C. 390; *Jordan v. Jordan*, *Dudl.* (Ga.) 181.

¹⁶ *Drew v. Towle*, 27 N. H. 412; *Chase v. Weston*, 12 N. H. 413. But in *Rumsey v. Sargent*, 21 N. H. 397, the defendant was allowed to set off partial failure in personal property sold for the note with a warranty. See, too, *Knapp v. Lee*, 3 Pick. (Mass.) 452; *Taft v. Inhabitants of Montague*, 14 Mass. 285; *McAlister v. Reab*, 4 Wend. (N. Y.) 492.

¹⁷ *Greenleaf v. Cook*, 2 Wheat. 13. So, too, in a similar case where the land has been conveyed with covenant of warranty. *Chase v. Weston*, 12 N. H. 413.

¹⁸ *Jenness v. Parker*, 24 Me. 289; *Thompson v. Mansfield*, 43 Me. 490; *Reese v. Gordon*, 19 Cal. 147; *Smith v. Ackerman*, 5 Blackf. (Ind.) 541; *Latin v. Vail*, 17 Wend. (N. Y.) 188.

money note.¹⁹ So, if a note be given for land, the failure of title to a part of the land has been held to be no defense to the note.²⁰ And it has been held in Pennsylvania that the evidence of a partial failure in the consideration of a note given for goods purchased, even though a part of the goods have been returned, will not throw upon the holder the burden of proving himself to be a bona fide holder for value.²¹

The rule formerly prevailing in England, and to some extent in the United States, did not permit an indefinite and unliquidated partial failure of consideration to be set up in defense to a negotiable instrument;²² although such a defense could be set up in an action of assumpsit on a contract which was not negotiable.²³ And, in obedience to this rule, it has been held that unliquidated damages due to a fraudulent representation as to the quantity of land sold cannot be set up in defense to a note given for the land.²⁴ And the same rule has been applied to a surety, not permitting him to set up an indefinite partial failure of consideration between the original principal parties.²⁵

In many of the states where this rule was originally followed, it has been changed by statute so as to permit the defense of partial failure.²⁶ In Vermont, the statute applies only to defense in

¹⁹ *Martin v. Foreman*, 18 Ark. 249.

²⁰ 1 Pars. Notes & B. 210; *Morrison v. Jewell*, 34 Me. 146.

²¹ *Dingman v. Amsink*, 77 Pa. St. 114; *Albrecht v. Strimpler*, 7 Pa. St. 476; *Knight v. Pugh*, 4 Watts & S. 445; *Brown v. Street*, 6 Watts & S. 221.

²² *Chit. Bills*, 92; 1 Pars. Notes & B. 207; 1 *Daniel*, Neg. Inst. 207; *Morgan v. Richardson*, 1 Camp. 40, note; *Tye v. Gwynne*, 2 Camp. 346; *Allen v. Bank*, 20 N. J. Law, 621; *Walker v. Smith*, 2 Vt. 539; *Hinton v. Scott*, *Dudl. (Ga.)* 245.

²³ *Chapel v. Hiekes*, 2 Crompt. & M. 214; *Poulton v. Lattimore*, 9 Barn. & C. 259; *Newton v. Forster*, 12 Mees. & W. 772; *Gregory v. Mack*, 3 Hill (N. Y.) 380; *Bouker v. Randles*, 31 N. J. Law, 335.

²⁴ *Drew v. Towle*, 27 N. H. 412.

²⁵ *Briggs v. Boyd*, 37 Vt. 534; *Richardson v. Sanborn*, 33 Vt. 75; *Burton v. Schermerhorn*, 21 Vt. 289; *Harrington v. Lee*, 33 Vt. 249.

²⁶ *Stafford v. Anders*, 8 Fla. 38; *Simmions v. Blackman*, 14 Ga. 318; *Williams v. Warnell*, 28 Tex. 610. COLORADO (Neg. Inst. Law, § 28); CONNECTICUT (Neg. Inst. Law, § 28); FLORIDA (Neg. Inst. Law, § 28); GEORGIA (Code, § 5091); ILLINOIS (Hurd's Rev. St. c. 98, § 9); INDIANA (Horne's St. § 5503); IOWA (Code, § 3070); MAINE (P. L. 1897, c. 322), as to notes for land purchased; MARYLAND (Neg. Inst. Law, § 47); NEW

action between the original parties to the instrument.²⁷ and creates no defense to a bill or note in the hands of an indorsee for value, although he knew of the original consideration.²⁸

Failure in Value—Quality.

§ 541. The most common instances of failure in consideration occur where the thing received proves of less value than the consideration called for, or where the amount of money constituting the consideration is insufficient. Thus, if a note be given for a debt due for money loaned, and be made for too large an amount, there is a failure pro tanto, which constitutes a good defense between the parties themselves.²⁹ So, if it be given as collateral for a loan, there is a failure of consideration so far as it exceeds the amount due on the loan.³⁰ But it has been held that where several notes have been given for a balance due on the settlement of an account, and the balance has been made too large, this excess in the aggregate amount of the notes cannot be set up as a failure of consideration in defense to any one note, even at suit of the payee.³¹ On the other hand, where a note has been given for borrowed money, and part of the amount borrowed is a forged bank bill, this has been allowed as a defense in equity to the extent of the bill forged.³²

In general, it may be laid down as the rule of the common law that a mere defect in the quality or value of property making up the consideration of a bill or note is no failure of consideration, and cannot be set up as a defense,³³ even though the goods sold

HAMPSHIRE (Pub. St. c. 202, § 7); NEW YORK (Neg. Inst. Law, § 54); TEXAS (Rev. Civ. St. art. 272); VERMONT (St. § 1152); VIRGINIA (Neg. Inst. Law, § 28).

²⁷ Farrar v. Freeman, 44 Vt. 63; Hoyt v. McNally, 66 Vt. 38, 28 Atl. 417.

²⁸ Thrall v. Horton, 44 Vt. 386. But see, contra, Noyes v. Landon, 59 Vt. 569, 10 Atl. 342, where the holder took the note as collateral for an existing debt.

²⁹ McCord v. Crooker, 83 Ill. 556; Whitacre v. Culver, 9 Minn. 295.

³⁰ Exchange Bank v. Butner, 60 Ga. 654.

³¹ Leighton v. Grant, 20 Minn. 345 (Gil. 298).

³² Key v. Knott, 9 Gill & J. (Md.) 342.

³³ Byles, Bills, 133; 1 Pars. Notes & B. 205; Morgan v. Richardson, cited in 7 East, 482, note; Tye v. Gwynne, 2 Camp 346; Obbard v. Betham, Moody

were to be "of good quality and moderate price," and proved to be worth less than was agreed on.³⁴ So, if the goods for which the note is given are partly worthless, this, in the absence of fraud, has been held to be no defense even at suit of the payee.³⁵ And the worthlessness of the consideration, it is said, must be absolute and entire, in order to constitute a failure.³⁶ So that, where a note was given on an exchange of horses for a difference in value between them, the fact that there was no such actual difference was held to be no defense to the note.³⁷ The unsoundness of the goods sold, where the contract has not been rescinded nor the goods returned to the seller, is no defense.³⁸ And even where a horse for which the note was given was returned within a week after the sale, on a parol agreement for the return of the horse and the note if the buyer should be dissatisfied, this is no failure of consideration, and constitutes no defense to a note absolute in

& M. 483; *Warwick v. Nairn*, 10 Exch. 762; *Trickey v. Larne*, 6 Mees. & W. 278; *Blaney v. Pelton*, 60 Vt. 275, 13 Atl. 564. *People's Bank v. Trudeau*, 38 La. Ann. 898; *Blue Springs Min. Co. v. Melvieu*, 97 Tenn. 225, 36 S. W. 1094. So, where the value is overestimated. *Crosby v. Tucker*, 21 La. Ann. 512. As to warranty of soundness, see § 548, *infra*.

³⁴ *Obbard v. Betham*, *Moody & M.* 483; *Gray v. Cox*, 4 Barn. & C. 108; *Laing v. Fidgeon*, 6 Taunt. 108, 4 Camp. 169; *Jones v. Bright*, 5 Bing. 533, 3 Moore & P. 155. Per Lord Tenterden, C. J., in *Obbard v. Betham*, *supra*: "If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action. The warranty relied on in this case makes no difference."

³⁵ *O'Neal v. Bacon*, 1 Houst. (Del.) 215.

³⁶ *Johnson v. Titus*, 2 Hill (N. Y.) 606. Thus, a note given for a supposed slave, who is actually a freeman, cannot be enforced by the payee. *Livingston v. Bain*, 10 Wend. (N. Y.) 384. But see, *contra*, where the note received in exchange was barred by the statute of limitations. *Young v. Fuller*, 29 Ala. 464. And even where the consideration received for a mortgage was a worthless note, it was held to be no defense on the mortgagor's part, he having disposed of the note without suffering any loss. *Orchard v. Hughes*, 1 Wall. 73. And a defense growing out of a defect in the goods is waived by executing a renewal note. *Atlanta City St. Ry. Co. v. American Car Co. (Ga.)* 29 S. E. 925.

³⁷ *Beninger v. Corwin*, 24 N. J. Law, 257.

³⁸ *Chit. Bills*, 92; *Morgan v. Richardson*, 1 Camp. 40, note, 7 East, 482; especially where the loss is unliquidated and partial, *Richardson v. Sanborn*, 33 Vt. 75; *Nichols v. Hinton*, 45 N. H. 470.

its terms.³⁹ And where a note has been given for the purchase of an article of no value, and afterwards paid with full knowledge of that fact, the money paid cannot be recovered by the maker.⁴⁰

Where there is a condition precedent to payment, and the happening of it is unavoidably prevented, it will constitute a failure of consideration.⁴¹ But change in value after delivery of property purchased will not be.⁴²

§ 542. — On the other hand, where the goods for which a note is given prove to be of no value whatever, this is a failure of consideration, which constitutes a good defense;⁴³ and such defense may be shown under the general issue.⁴⁴ Thus, where a note was given for the purchase of a slave, who was then mortally sick and died soon after, this constituted a failure of consideration.⁴⁵ If, on the other hand, a note is given for property to be inspected by the buyer, both parties agreeing to be bound by the inspection, the buyer cannot afterwards set up the worthlessness of the property in defense.⁴⁶

If the thing sold is perfectly valueless for the purpose for which it was sold, this has been held to constitute a total failure of consideration, although the property may still have some value for

³⁹ *Allen v. Furbish*, 4 Gray (Mass.) 504. But see *Barlow v. Flemming*, 6 Ala. 146.

⁴⁰ *Matthews v. Smith*, 67 N. C. 374. But see *Stark v. Alford*, 49 Tex. 260.

⁴¹ E. g. where the goods, which were to pass on payment of the note, are destroyed by fire before the note matures. *Arthur v. Blackman*, 63 Fed. 536.

⁴² E. g. a note for a mail route afterwards reduced in value by change in the law, *Wells v. Carr*, 25 Fed. 541; or a note for a release of dower and subsequent divorce for adultery of the releasor, *Nichols v. Nichols*, 136 Mass. 256; and see § 555, *infra*.

⁴³ *Crocker v. Crane*, 21 Wend. (N. Y.) 211; *French v. Gordon*, 10 Kan. 370. In the case of *Crocker v. Crane*, *supra*, a check was given for stock issued by commissioners not lawfully organized, and it was held to be void in the payee's hands. See, too, *Spies v. Roberts*, 50 N. Y. Super. Ct. 301. So, where the note was given for an insurance premium, and the company suspended during the year. *Home Ins. Co. v. Daubenspeck*, 115 Ind. 306, 17 N. E. 601. But not where the company was really solvent, and had reinsured. *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092.

⁴⁴ *Payne v. Cutler*, 13 Wend. (N. Y.) 605.

⁴⁵ *Rogers v. McKnight*, 4 J. J. Marsh. (Ky.) 154; *Ferguson v. Oliver*, 8 Smiles & M. (Miss.) 332.

⁴⁶ *Wiggins v. Cleghorn*, 61 Ga. 364.

other purposes.⁴⁷ And it has been held in a recent case in England that where a note is given for goods to be delivered, which are rendered of no use by a failure to deliver the entire quantity contracted for, the consideration of the note fails, and the failure can be set up in defense.⁴⁸ Where, however, a note has been given for land purchased at a valuation made in depreciated or unlawful currency, its failure to reach this estimate is no failure of consideration for the note.⁴⁹

§ 543. — And if an article, sold without a warranty, proves not to be genuine, but still has some value, in the absence of fraud on the part of the seller the want of genuineness in the article is no failure of consideration.⁵⁰ Where a note is given for a patent which proves worthless, this has been held to be a total failure.⁵¹ And, if it has been given for a mill with the exclusive use of a patent which proved to be void, this is a partial failure.⁵² So, if given for a right to sell a machine constructed under a worthless patent, there is a failure;⁵³ or if given for a void patent and for patented goods which are worthless except for the patent.⁵⁴

Again, if a note be given on a dissolution of partnership for a share of the partnership assets at their face value, and a part of such assets afterwards prove to be worthless, there is a failure pro tanto, which can be set up in defense to the note without the need of a bill in equity for a partnership settlement.⁵⁵ So, if a

⁴⁷ *Barr v. Baker*, 9 Mo. 850.

⁴⁸ *Agra & Masterman's Bank v. Leighton*, L. R. 2 Exch. 56.

⁴⁹ *Crosby v. Tucker*, 21 La. Ann. 512.

⁵⁰ *Welsh v. Carter*, 1 Wend. (N. Y.) 185; *Rudderow v. Huntington*, 3 Sandf. (N. Y.) 252.

⁵¹ *Clough v. Patrick*, 37 Vt. 421; *Bierce v. Stocking*, 11 Gray (Mass.) 174; *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804. But see, contra, *Wilson v. Hentges*, 26 Minn. 288, 3 N. W. 338. And it is no defense that the invention was of less value than expected. *Day v. Nix*, 9 Moore, 159.

⁵² *Earl v. Page*, 6 N. H. 477; *Pacific Iron Works v. Newball*, 34 Conn. 67. So, where a note is given for the assignment of a patent "in full force and effect," with a proviso that otherwise the note is "not to be paid," and the patent is shown to be invalid. *Chemical Electric Light & Power Co. v. Howard*, 148 Mass. 352, 20 N. E. 92.

⁵³ *Cragin v. Fowler*, 34 Vt. 326; *Smith v. Hightower*, 76 Ga. 629.

⁵⁴ 1 Pars. Notes & B. 206; 1 Daniel, Neg. Inst. 207.

⁵⁵ *Bethel v. Franklin*, 57 Mo. 466. But see, contra, where the note was for corporation stock, without express warranty or fraud, and its principal as-

note be given for the stock of a projected railroad which is watered and of no value, there is a failure of consideration.⁵⁶ So, if a note be given for a contract for the sale of property which is afterwards rescinded;⁵⁷ or for goods purchased on the receipt of a bill of lading, and the contract is altered in the bill of lading, the fact of such alteration being a question for the jury.⁵⁸ So, if a note be given on a contract of partnership for capital in the partnership, and the contract prove worthless, and there be no performance, there will be a failure in whole or part.⁵⁹ So, if a note be bequeathed to a person named as executor in the will for his services as such executor, his death before that of the testator will constitute a failure of consideration of the note.⁶⁰ But, if a note be given to a member of a firm for the purchase of his interest in it, the refusal of the other members to admit the purchaser into the firm will constitute no failure of consideration for the note.⁶¹

Failure in Quantity.

§ 544. Failure in whole or part sometimes occurs in respect to the quantity of property sold. Thus, it has been held to constitute a partial failure, where the note was given for land.⁶² or for personal property⁶³ which proved to be short in quantity. But if

sets were patents, which proved to be invalid, *Watts v. Stevenson*, 165 Mass. 518, 43 N. E. 497.

⁵⁶ *Merrill v. Gamble*, 46 Iowa, 615.

⁵⁷ *Chit. Bills*, 95; 1 *Pars. Notes & B.* 204; *Lewis v. Cosgrave*, 2 Taunt. 2; *Ledger v. Ewer, Peake*, 216; *Hallett v. Dewis*, 1 Moore & P. 79.

⁵⁸ *Hammett v. Barnard*, 1 Hun (N. Y.) 198.

⁵⁹ *Ledger v. Ewer, Peake*, 216.

⁶⁰ *Solly v. Hinde*, 2 *Crompt. & M.* 516, 6 *Car. & P.* 316; *Wells v. Hopkins*, 5 *Mees. & W.* 9.

⁶¹ *Varnum v. Mauro*, 2 *Cranch, C. C.* 425, *Fed. Cas. No.* 16,889.

⁶² *Hamilton v. Conyers*, 28 *Ga.* 276; especially if the quantity be fraudulently warranted in the deed, *Gauldin v. Shehee*, 20 *Ga.* 531; or if the note was given, with a payment in cash, for an agreement to convey certain lands, and the part conveyed was less in value than the cash paid, and the grantor refused to convey the balance, *Cooper v. King*, 73 *Iowa*, 136, 34 *N. W.* 781. But no failure can be set up after a delay of several years, and compromise of suit by a new note. *Keyes v. Mann*, 63 *Iowa*, 560, 19 *N. W.* 666.

⁶³ *Brady v. Henry*, 71 *Cal.* 481, 11 *Pac.* 385, and 12 *Pac.* 623; especially where it was sold with a warranty and agreement for deductions if found

a note be given for a contract for land erroneously supposed to include a lot not conveyed, and there be no rescission of the contract, this will not constitute a failure.⁶⁴ On the other hand, it has been held that if a note be given for one-half of an inherited estate, conveyed under a mistaken belief that the vendor was entitled to such share, when in reality he was only entitled to one-quarter of the estate, there will be a partial failure of consideration.⁶⁵

Failure in Title.

§ 545. Failure of consideration is often due to want of title in the vendor to property sold, for which the bill or note is given. Total want of title constitutes a total failure of consideration,⁶⁶ whether the defect be due to the seller's want of authority to sell,⁶⁷ or to his incapacity by reason of infancy, etc.,⁶⁸ or to his own want of title. And, if the note given for the property matures be-

short, *Shepherd v. Temple*, 3 N. H. 455. But to the effect that the remedy is on the contract, and not on the note, where there is no agreement for deduction, see *Pratt v. Gulick*, 13 Barb. (N. Y.) 297.

⁶⁴ *Lough v. Bragg*, 18 Minn. 121 (Gil. 106).

⁶⁵ *Marlow v. King*, 17 Tex. 177.

⁶⁶ *Scudder v. Andrews*, 2 McLean, 464, Fed. Cas. No. 12,564; *Heaton v. Myers*, 4 Colo. 59; *Jones v. Noe*, 71 Ind. 368; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558; *Fleetwood v. Brown*, 109 Ind. 567, 9 N. E. 352, and 11 N. E. 779; *Hall v. McArthur*, 82 Ga. 572, 9 S. E. 534; *Wright v. McDonald*, 44 Ga. 452. So, total failure of title to part of the property is a partial failure of consideration. *Brooks v. Hiatt*, 13 Neb. 503, 14 N. W. 480; *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. 909. So, failure of title and rescission of the agreement without conveyance. *Sayre v. Mohney*, 30 Or. 238, 47 Pac. 197. But a prospective failure of title on an unperformed agreement for sale of land is no defense to a note given for it. *Wiley v. Howard*, 15 Ind. 169. So, a partial failure of title is no defense. *Hodgdon v. Golder*, 75 Me. 293; *Bean v. Harrington*, 88 Me. 460, 34 Atl. 268. But see, contra, in Indiana, notwithstanding that the deed was for a married woman's property, and her covenants of title were not binding on her. *Beal v. Beal*, 79 Ind. 280.

⁶⁷ *Bliss v. Clark*, 16 Gray (Mass.) 60; *Campbell v. Brown*, 6 How. (Miss.) 106. This is plainly the case where a note was given for land conveyed by an attorney acting under a forged power of attorney for a pretended owner. *Wheeler v. Standley*, 50 Mo. 509.

⁶⁸ *Stewart v. Insall*, 9 Tex. 397. But it is not a failure of title that the title is incomplete at the time of the maturity of the note, *Spiller v. Westlake*, 2 Barn. & Adol. 155.

fore the buyer is entitled to his deed, the failure of title is nevertheless a good defense to the note.⁶⁹ If a note be given for the purchase of land, and the purchaser pay off a judgment, which was recovered before the conveyance and constituted an incumbrance on the land, there is a failure of consideration *pro tanto*.⁷⁰ And it has been held that an eviction is not necessary in case of failure of title, in order to make the defense available.⁷¹ So, if a note be given for a patent right, the previous sale of the same right for the same territory constitutes a failure of consideration for the note.⁷² So, if a note be given for stock sold by the payee, which was not his property.⁷³ So, if a note be given for property purchased pending an attachment suit and garnishee proceeding, with a verbal agreement that any judgment recovered against the garnishee may be deducted from the amount of the note, such judgment afterwards recovered will constitute a failure of consideration *pro tanto*.⁷⁴

But, if a note be given for the purchase of a slave after the emancipation proclamation, it has been held that this constitutes no failure, if there be no actual emancipation.⁷⁵ Again, if a note be given for land purchased at an administrator's sale, which has been confirmed by the court, the mere want of a deed for the land is no failure of consideration unless the title prove defective.⁷⁶

⁶⁹ Garrett v. Crosson, 32 Pa. St. 373.

⁷⁰ Holman v. Creagmiles, 14 Ind. 177; Doremus v. Bond, 8 Blackf. (Ind.) 368. So, as to an outstanding dower right. Zebbley v. Sears, 38 Iowa, 507. And in Indiana such failure may be set up against any holder. Holman v. Creagmiles, *supra*; Doremus v. Bond, *supra*. But an unnecessary surrender of possession without legal proceedings will not constitute a failure of title. First Nat. Bank of Helena v. How, 1 Mont. 604.

⁷¹ Sumter v. Welsh, 1 Brev. (S. C.) 539. Contra, Wilson v. Jordan, 3 Stew. & P. (Ala.) 92; Johnson v. Bedwell, 15 Ind. App. 236, 43 N. E. 246.

⁷² Morrow v. Brown, 31 Ind. 378. So, in general, where no title passes by the assignment. Snyder v. Kurtz, 61 Iowa, 593, 16 N. W. 722.

⁷³ Rock v. Nichols, 3 Allen (Mass.) 342.

⁷⁴ Peterson v. Johnson, 22 Wis. 21; and parol evidence is admissible to prove such agreement, *Id.*; and an execution sale against the vendor, even without such agreement, will constitute a failure, Chenault v. Bush, 84 Ky. 528, 2 S. W. 100.

⁷⁵ Blease v. Pratt, 3 S. C. 513; McElvain v. Mudd, 44 Ala. 48

⁷⁶ Rock v. Heald, 27 Tex. 523.

Nor, in such case, is irregularity in the administrator's proceedings a defense.⁷⁷ Nor is it a defense that the deed of the land for which the note was given was inoperative in law for want of a seal, the title passing in equity.⁷⁸ And, if the note be given merely for an agreement to convey all the payee's right and title to a piece of land, his want of title will not constitute a failure of consideration in the absence of fraud.⁷⁹ So, in the case of a note given for a pre-emption right to land, the fact that this right is rendered of no value by an adverse title constitutes no failure.⁸⁰ And a failure of consideration is not caused by the existence of an unfounded claim against the title,⁸¹ or adverse possession unlawfully held by a lessee,⁸² or by the fact that release of an incumbrance has been procured by the vendor by fraud on the incumbrancer.⁸³

Failure of Title—Warranty—Eviction.

§ 546. The fact that land for which a note is given is conveyed with covenants of warranty has been held not to affect the question of failure of consideration by reason of want of title,⁸⁴ or partial failure by reason of incumbrances on the land.⁸⁵ On the other hand, if a note be given for the purchase of land with an agreement on the payee's part to indemnify the buyer against an outstanding dower right of his wife, the nonperformance of this

⁷⁷ *Lee v. White*, 4 Stew. & P. (Ala.) 178. Nor failure to report an assignee's sale for confirmation. *Breyfogle v. Stotsenburg*, 148 Ind. 552, 47 N. E. 1057.

⁷⁸ *Brinkley v. Bethel*, 9 Heisk. (Tenn.) 786. But see, contra, *Curtis v. Clark*, 133 Mass. 509, although the maker had possession of the land.

⁷⁹ *Kerney v. Gardner*, 27 Ill. 162; *Condrey v. West*, 11 Ill. 146; *Owens v. Thompson*, 4 Ill. 502; *Mullen v. Hawkins*, 141 Ind. 363, 40 N. E. 797.

⁸⁰ *Ferguson v. McCain*, 23 Ark. 210.

⁸¹ *Noyes v. Rockwood*, 56 Vt. 647.

⁸² *Noyes v. Rockwood*, 56 Vt. 647.

⁸³ *Burton v. Reagan*, 75 Ind. 77.

⁸⁴ 1 Edw. Bills, § 462; 1 Pars. Notes & B. 210; *Cook v. Mix*, 11 Conn. 432; *Slack v. McLagan*, 15 Ill. 242; *Frisbee v. Hoffnagle*, 11 Johns. (N. Y.) 50. But see, contra, *Grubbs v. Barber*, 102 Ind. 131, 1 N. E. 636. So, in Mississippi, if the covenantor is solvent. *Guice v. Sellers*, 43 Miss. 52. And see, as to a like sale of personal property, *Linton v. Porter*, 31 Ill. 107.

⁸⁵ *Schuchmann v. Knoebel*, 27 Ill. 175; *McHenry v. Yokum*, Id. 160. But see, contra, *Hassam v. Dompier*, 28 Vt. 32.

agreement constitutes no defense to the note.⁸⁶ It is, however, a good defense to a note given for the purchase of property, that the contract of sale falsely represented the vendor to be possessed and seised in fee of the property.⁸⁷

Where a note has been given for the purchase of land sold with a warranty, the failure of title accompanied by dispossession of the purchaser is a failure of consideration of the note.⁸⁸ But, if the title failed after two years' occupancy, the failure would be only partial;⁸⁹ and therefore, until recently, no defense in Vermont.⁹⁰ So, if a note be given for machinery purchased, and part of it is afterwards sold under a prior attachment, there is a partial failure of consideration.⁹¹ So, if it is given for land, and the land is afterwards sold to satisfy an incumbrance against the vendor, this is a failure of consideration.⁹² So, if a note is given for land sold with a covenant of warranty, and a mortgage incumbrance greater than the amount of the note is afterwards discharged by the purchaser, the vendor being insolvent.⁹³ So, if a note be given for the purchase money of land which is afterwards paid in open court to a third party.⁹⁴ But, where a note is given for land purchased with a warranty and an existing incumbrance is afterwards bought in by the purchaser at less than its face value,

⁸⁶ *Billan v. Hecklebrath*, 23 Ind. 71.

⁸⁷ *Coburn v. Haley*, 57 Me. 346; *Stone v. Fowle*, 22 Pick. (Mass.) 166.

⁸⁸ *Rice v. Goddard*, 14 Pick. (Mass.) 293.

⁸⁹ *Sunderland v. Bell*, 39 Kan. 21, 17 Pac. 600; *Hodgdon v. Golder*, 75 Me. 293. And failure of title to an undivided part would be a partial failure of consideration without eviction. *Wilber v. Buchanan*, 85 Ind. 42.

⁹⁰ *Foster v. Phaley*, 35 Vt. 303; unless, indeed, the occupancy had been rendered valueless by necessary repairs equal to it in value, *Id.* So, in Kentucky, where the maker had possession of part of the land warranted. *Abner v. York* (Ky.) 41 S. W. 309. So, if the failure of title occurs after the property had passed into the maker's possession and been destroyed by fire. *Horton v. Arnold*, 18 Wis. 212.

⁹¹ *Riddle v. Gage*, 37 N. H. 519.

⁹² *Lapene v. Delaporte*, 27 La. Ann. 252.

⁹³ *Miller v. Gibbs*, 29 Ind. 228. If the incumbrance is less than the note, he may have it deducted, and pay the balance. *Dunkleberger v. Whitehall*, 70 Ind. 214.

⁹⁴ *Reagan v. Burton*, 67 Ind. 347.

only the amount actually paid by him can be set up in defense to the note.⁹⁵

Where, however, a note is given for a deed of land containing a covenant against incumbrances, a breach of the covenant, without accompanying damage by payment of the incumbrances, is no defense to the note.⁹⁶ And where A., in consideration of a contract for indemnity against certain debts, quitclaims a piece of land to his co-tenant, who conveys it to B., and B. gives A. a note for his interest in the land, the fact that B. is afterwards compelled to pay the debts in question as incumbrances on the land constitutes no defense to his note.⁹⁷ Where, on the other hand, a note is given for land purchased of two grantors, and the title of one proves defective, and the deed is thereupon rescinded by the purchaser as to both, the note has been held to be without consideration, and therefore void, as to the defective title only.⁹⁸

Failure of Title—Eviction—Fraud.

§ 547. It has been held, indeed, that there is no failure of consideration of a note by reason of want of title in the land conveyed, *unless there be an eviction* from the land;⁹⁹ and that, where the land is conveyed with a warranty of title, an adverse claim, without any disturbance of possession, constitutes no failure of consideration.¹⁰⁰ So, if a note be given for land, of which the purchaser holds possession under a warranty deed, a mistake as to the land constitutes no defense against an indorsee of the note, although he had notice of it.¹⁰¹ And it has been held that, where a note was given for a deed of land with a covenant against incumbrances, the existence of a mortgage was no defense until eviction or payment of the mortgage by the purchaser.¹⁰² So, if a note is given for the purchase of land held under a contract, a

⁹⁵ McDowell v. Milroy, 69 Ill. 498.

⁹⁶ Cheney v. Bank, 77 Ill. 562.

⁹⁷ Sanger v. Cleveland, 10 Mass. 415.

⁹⁸ Bringham v. Leighty, 61 Ind. 524.

⁹⁹ See §§ 545, 450, et seq., supra.

¹⁰⁰ Lothrop v. Snell, 11 Cush. (Mass.) 453; Lynch v. Baxter, 4 Tex. 431.

¹⁰¹ Nichols v. Hill, 32 Tex. 516.

¹⁰² Pomeroy v. Burnett, 8 Blackf. (Ind.) 142.

clause in the contract providing for re-entry at the vendor's option on nonpayment of the note constitutes no failure of consideration for the note without an actual re-entry.¹⁰³

In apparent opposition to the authorities above cited, it has been held in a recent case in North Carolina that the rule of caveat emptor applies to such cases, and that, where a note is given for land, the want of title to the land is no defense in the absence of fraud.¹⁰⁴ And it is said that the buyer must rescind the contract in order to avail himself of a defense arising out of a want of title.¹⁰⁵ And, where a note is given for land purchased, the contract providing for a warranty deed to be given, the pendency of a suit against the title, known at the time to the maker of the note, is no bar to a suit on the note; and such action can be brought without waiting for the termination of the earlier suit as to the title.¹⁰⁶

A distinction has been made, as already seen, in some cases, between transfers of land with a warranty by an insolvent grantor and like transfers where the grantor is solvent. In the former case want of title has been held to constitute a failure of consideration.¹⁰⁷ In the latter case it has been held that the purchaser must seek his remedy by an action on his covenants.¹⁰⁸ This distinction, however, does not seem to be supported by the weight of authority in the cases already cited. It has also been held that, where a note is given by A. for land conveyed to B., the want of title can only be set up in defense between the parties to the deed.¹⁰⁹ And in Texas, it seems, that failure for want of title to the land sold must be specially pleaded, with an averment either of want of title or of an eviction.¹¹⁰

¹⁰³ *Chandler v. Marsh*, 3 Vt. 162.

¹⁰⁴ *Foy v. Haughton*, 85 N. C. 168.

¹⁰⁵ *Wade v. Killough*, 3 Stew. & P. (Ala.) 431.

¹⁰⁶ *Baldrige v. Cook*, 27 Tex. 565.

¹⁰⁷ *Knapp v. Lee*, 3 Pick. (Mass.) 452.

¹⁰⁸ *Guice v. Sellers*, 43 Miss. 52.

¹⁰⁹ *Bass v. Randall*, 1 Minn. 404 (Gil. 292).

¹¹⁰ *Tooke v. Bonds*, 29 Tex. 419.

Failure by Fraudulent Warranty.

§ 548. Where a note is given for goods fraudulently warranted, and the goods are afterwards returned and the contract rescinded, there is plainly a failure of the consideration.¹¹¹ But, in general, either a warranty or a false representation is necessary to constitute a failure by reason of defect in the value or quality of the goods sold.¹¹² And in Indiana, it seems, such failure must be specially pleaded with an averment of warranty or fraud.¹¹³

It has been stated as the common-law rule that, although goods are sold with a warranty, the breach of warranty constitutes no failure of the consideration of a note given for the goods, unless they are entirely worthless.¹¹⁴ In the United States, however, a breach of warranty amounting to a partial failure has been held to be a good defense pro tanto.¹¹⁵ And if the property is totally worthless, it is a total failure.¹¹⁶ And where goods sold have been warranted for a particular purpose, and are worthless for that purpose, there is a failure of the consideration, although the property

¹¹¹ Chit. Bills, 94; 1 Pars. Notes & B. 205; *Lewis v. Cosgrave*, 2 Taunt. 2; *Solomon v. Turner*, 1 Starkie, 51.

¹¹² *Reed v. Prentiss*, 1 N. H. 174; *Richards v. Betzer*, 53 Ill. 466; *Detrick v. McGlone*, 46 Ind. 291; *Bryant v. Pember*, 45 Vt. 487; *Buhrman v. Baylis*, 14 Hun (N. Y.) 608. See § 541, supra. Breach of warranty of soundness is a sufficient failure. *Matlock v. Gibson*, 8 Rich. Law (S. C.) 437. So, that an insurance company, for insurance in which the note was given, had no real capital. *Terry v. Hickman*, 1 Mo. App. 119.

¹¹³ *Myers v. Conway*, 62 Ind. 474.

¹¹⁴ 1 Pars. Notes & B. 204. So stated by Judge Daniel also as the rule in England and in many of the states. 1 Daniel, Neg. Inst. 206.

¹¹⁵ *Payne v. Cutler*, 13 Wend. (N. Y.) 605; *Butler v. Titus*, 13 Wis. 429; *Stockton Savings & Loan Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016; *Beers v. Williams*, 16 Ill. 69; *Rugland v. Thompson*, 48 Minn. 539, 51 N. W. 604. But, to the effect that the warranty must be expressed in the note, see *Reed v. Wood*, 9 Vt. 285. And the warranty may be waived by an express agreement to make the article good before the note is paid. *Kelso v. Frye*, 4 Bibb (Ky.) 493.

¹¹⁶ *Slater v. Foster*, 62 Minn. 150, 64 N. W. 160; *Cochrane v. Jones*, 85 Ga. 678, 11 S. E. 811; *McCormick Harvesting Mach. Co. v. Gray*, 100 Ind. 285. But not where the maker has failed in his own performance of the conditions. *Worden v. Harvester Co.*, 11 Neb. 116, 7 N. W. 756.

may have a value for other purposes.¹¹⁷ So, where a slave is warranted sound and is returned within a reasonable time for unsoundness, this is sufficient defense to a note given for it without proof of an immediate return of the slave.¹¹⁸ But, where a breach of warranty is held to be a good legal defense by way of failure of consideration, an injunction will not be granted in equity to restrain the transfer of the note.¹¹⁹

A note given for a worthless patent, which is warranted, is subject to defense for the worthlessness of the patent and the breach of warranty.¹²⁰ And, notwithstanding the covenant of warranty, such worthlessness is a defense.¹²¹ So, it is a good defense that the patent warranted is bad for want of originality, although not repealed;¹²² or that a machine, warranted as to its quality, is not as warranted;¹²³ especially where there is an agreement for refunding the money if it does not work as warranted.¹²⁴ So, where a note is given for a hedge warranted for five years, and the hedge dies within that time, there is a failure of consideration.¹²⁵ But where a note is given for goods sold, with a warranty to the maker of the note, an accommodation indorser cannot set up the

¹¹⁷ *Starr v. Torrey*, 22 N. J. Law, 190.

¹¹⁸ *Clements v. Smith's Adm'rs*, 9 Gill (Md.) 156. See, too, as to such breach of warranty constituting a defense between the original parties to the note, *Dancey v. Sugg*, 46 Miss. 606. See § 451, *supra*.

¹¹⁹ *McMillion v. Pigg*, 3 Stew. (Ala.) 165.

¹²⁰ *Johnson v. McCabe*, 37 Ind. 535.

¹²¹ *Dickinson v. Hall*, 14 Pick. (Mass.) 217. And a failure of consideration of this sort is not waived by making a payment on account after receiving notice of the defect in the goods. *Atkins v. Cobb*, 56 Ga. 86. But such worthlessness of goods sold with a warranty constitutes no failure in the acceptance of a bill of exchange drawn by the buyer on a third person. *Marsh v. Low*, 55 Ind. 271.

¹²² *Parrot v. Farnsworth*, Brayt. (Vt.) 174.

¹²³ *Aldrich v. Stockwell*, 9 Allen (Mass.) 45; *Thompson v. Manufacturing Co.*, 29 Kan. 476; *Osborne v. McQueen*, 67 Wis. 392, 29 N. W. 636; *Beers v. Williams*, 16 Ill. 69. But a contemporaneous agreement of warranty has been held in Iowa to constitute no defense to a negotiable note. *Cook v. Weirman*, 51 Iowa, 561, 2 N. W. 386.

¹²⁴ *Runsey v. Sargent*, 21 N. H. 399.

¹²⁵ *Edwards v. Pyle*, 23 Ill. 354; *Davis v. McVickers*, 11 Ill. 327. And, in general, as to breach of warranty constituting a failure of consideration, see *Shepherd v. Temple*, 3 N. H. 455.

breach of warranty as a defense.¹²⁶ Where, however, a note is given for a machine sold with a warranty, and the machine is returned as useless, and accepted by the seller, the consideration for the note fails, even though the machine answers fully the purpose for which it was warranted.¹²⁷

Unsoundness without Fraud—False Representations.

§ 549. On the other hand, if there be no fraud in the warranty and no return of the property, the unsoundness constituting a breach of the warranty can only be availed of in an action on the covenant, and not by way of defense to the note.¹²⁸ And it has been held that the settling and stating of an account estops the maker of a note given for a balance due on a contract from setting up a failure of consideration by reason of breach of warranty.¹²⁹ But the mere giving of a renewal note is not of itself conclusive evidence of a waiver on the maker's part of a defense founded on a breach of warranty in the sale of the property for which the original note was given.¹³⁰

Again, where a note is given for the purchase of property, *fraudulent representations* as to it constitute a failure of consideration;¹³¹ especially if the sale be rescinded on account of the fraud and the goods returned.¹³² So, the worthlessness of a patent and

¹²⁶ *Hiner v. Newton*, 30 Wis. 640.

¹²⁷ *Manny v. Glendinning*, 15 Wis. 50.

¹²⁸ *Thornton v. Wynn*, 12 Wheat. 183. But see, *contra*, *Harrington v. Stratton*, 22 Pick. (Mass.) 510.

¹²⁹ *Colby v. Lyman*, 4 Neb. 429.

¹³⁰ *Aultman v. Wheeler*, 49 Iowa, 647.

¹³¹ *Mills v. Oddy*, 2 Crompt. M. & R. 103, 5 Tyrw. 571; *Beall v. Pearre*, 12 Md. 550. So, a material misrepresentation as to improvements, *Hodges v. Torrey*, 28 Mo. 99; or liability to flooding, *Jones v. Hathaway*, 77 Ind. 14. But fraudulent misrepresentation in the sale of goods without a warranty has been held not to amount to failure of consideration of the note given for them. *Raines v. Dooley*, 23 Ark. 329. See, however, as to a note for the endowment of a scholarship, *Elsass v. Institute*, 77 Ind. 72. And a fraudulent representation as to past dividends on stock purchased is said to be an equitable defense, and to be available in an action on the note by way of counterclaim, rather than as a partial failure of consideration. *Boggs v. Wann*, 58 Fed. 681.

¹³² *Beckner v. Willson*, 68 Ind. 533.

fraudulent representations as to it constitute good defense to a note given for it without a return or retransfer.¹³³ But not a mere partial failure by reason of the patent being less valuable than was represented, the loss of value not being ascertainable by computation.¹³⁴

Again, if a note is given for property purchased by sample, the failure of the property to correspond with the sample constitutes a total failure of consideration.¹³⁵ And, if a bill accepted for such sale be paid by the acceptor, he may recover the amount paid against the drawer.¹³⁶ Where a note has been given for the purchase of property at cost price, and this has been misrepresented, it is said that fraud in the sale and an offer to rescind are necessary to constitute a failure of consideration, and also that the amount be capable of computation.¹³⁷

On the other hand, where a note is given for a debt of the maker on a false representation that the amount was due, there being nothing due, there is a failure of consideration.¹³⁸ So, where goods have been sold with a fraudulent warranty, and their full value has been already paid, a bill given by the purchaser for the balance is without consideration, and the drawer cannot be held.¹³⁹

Failure by Mistake.

§ 550. Sometimes the failure of consideration is due to a mistake, e. g. where a note is given in discharge of a *supposed* lia-

¹³³ Beecker v. Vrooman, 13 Johns. (N. Y.) 302; Spalding v. Vandercook, 2 Wend. (N. Y.) 432; Whitney v. Allaire, 4 Denio (N. Y.) 554; Franklin v. Long, 7 Gill & J. (Md.) 419; Groff v. Hansel, 33 Md. 161.

¹³⁴ Pulsifer v. Hotchkiss, 12 Conn. 233.

¹³⁵ Wells v. Hopkins, 5 Mees. & W. 7, 3 Jur. 797. But see, as to representations on the information of another without profession of personal knowledge, Davidson v. Jordan, 47 Cal. 351.

¹³⁶ Hooper v. Treffry, 1 Exch. 17.

¹³⁷ Harrington v. Lee, 33 Vt. 249, before the present statute.

¹³⁸ Southall v. Rigg, 11 C. B. 481. So, on a false representation as to services rendered, Andros v. Childers, 14 Or. 447, 13 Pac. 65.

¹³⁹ Archer v. Bamford, 3 Starkie, 175. So, where the false warranty related to the quantity of land sold, Still v. Snow, 66 Vt. 277, 29 Atl. 250; or as to annual sales of a business sold, Rawson v. Pratt, 91 Ind. 9; or as to the collateral security, Hacker v. Brown, 81 Mo. 68; or as to the soundness of a wall, Applegarth v. Robertson, 65 Md. 493, 4 Atl. 896.

bility;¹⁴⁰ or in payment of an illegal assessment, the maker being ignorant of the illegality;¹⁴¹ or, on dissolution of a partnership, for the supposed value of the partnership accounts.¹⁴² A mistake on the maker's part, to constitute a failure of consideration, must not be a mistake of law.¹⁴³ And, where a note has been given to compromise a suit against the maker's title, it is no defense that the suit could not have prevailed.¹⁴⁴ So, where a note is given for an award rendered, a legal objection to the award constitutes no defense.¹⁴⁵ If a note be given in compromise of a bastardy proceeding, the maker cannot set up in defense that he could afterwards prove he was not the father of the child.¹⁴⁶ But where a note has been given in settlement of a charge of slandering the payee's wife, with an agreement that it shall be canceled if the charge be proved true, the falsity of the charge may be shown by parol, as well as the agreement for canceling the note, not, however, it was held, as establishing a failure or want of consideration, but as a payment of the note.¹⁴⁷

Failure—Unperformed Agreement.

§ 551. Failure of consideration frequently consists in the non-performance of an agreement for which the bill or note is given;¹⁴⁸

¹⁴⁰ Haynes v. Thom, 28 N. H. 386.

¹⁴¹ Maddy v. Turnpike Co., 57 Ind. 148; or for a threshing machine prohibited by law, Wadleigh v. Develling, 1 Ill. App. 596.

¹⁴² Rogers v. Rogers, 1 Hall (N. Y.) 391, as an equitable defense only.

¹⁴³ Carpentier v. Minturn, 6 Lans. (N. Y.) 56.

¹⁴⁴ Billingsley v. Niblett, 56 Miss. 537.

¹⁴⁵ Boynton v. Butterfield, 6 Allen (Mass.) 67.

¹⁴⁶ Compton v. Davidson, 31 Ind. 62.

¹⁴⁷ Sanders v. Howe, 1 D. Chip. (Vt.) 363.

¹⁴⁸ Watson v. Russell, 3 Best & S. 34; Fink v. Chambers, 95 Mich. 508, 55 N. W. 375; Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co. (Cal.) 52 Pac. 995; Gale v. Harp (Ark.) 43 S. W. 144; J. A. Fay & Co. v. James Jenks & Co., 93 Mich. 130, 53 N. W. 163. So, the nondelivery of property purchased, as agreed. Mitchell v. Stinson, 80 Ind. 324. And no demand is necessary. Booth v. Fitzer, 82 Ind. 66. Such performance is a condition precedent, Chit. Bills, 91; Irving v. King, 4 Car. & P. 309; although the damages may be uncertain, Lewis v. Cosgrave, 2 Taunt. 2; but if an acceptance be given for a balance of work to be done on a contract, which is never completed beyond the amount already paid for in cash, the failure to perform the contract is a

whether the agreement be one under seal, or a mere verbal agreement.¹⁴⁹ So, where the consideration is partly an agreement to sell goods, its nonperformance constitutes a partial failure.¹⁵⁰ So, an unperformed agreement to indemnify a surety by the surrender of another note.¹⁵¹ So, an unperformed agreement for the delivery of flour on a certain day.¹⁵² And where a note is given for land, and is made payable on the day fixed for delivery of the deed, the agreements are dependent one on the other, and there can be no recovery on the note without performance of the agreement.¹⁵³ Especially if the nonperformance of the agreement for a deed is accompanied by a sale of the land to another.¹⁵⁴ So, where a note is given to the payee for an agreement on his part to name a price which he would give or take for an interest in land held by him jointly with the maker, his subsequent refusal to accept the price named by him is a failure of consideration for the note.¹⁵⁵ So, if a note be given for an agreement by the payee to convey land, or to buy it if he was not then owner and convey it, the payee's death before performance of the contract causes a total failure of consideration for the note.¹⁵⁶ So, if a note be given to the payee for

partial failure only, as though the acceptance had been for the entire contract price, *Trickey v. Larne*, 6 Mees. & W. 278. And see § 486 et seq., supra.

¹⁴⁹ *Miller v. Wood*, 23 Ark. 546; *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. 145; *Musser v. Stauffer*, 178 Pa. St. 99, 35 Atl. 709.

¹⁵⁰ *Barnes v. Stevens*, 62 Ind. 226.

¹⁵¹ *Jeffries v. Lamb*, 73 Ind. 202. So, to hold one another harmless on notes exchanged. *Wolverton v. George H. Taylor & Co.*, 157 Ill. 485, 42 N. E. 49. So, where the consideration of the note is the assignment of A.'s debts to the payee, and the payee has failed to deliver to the maker one of A.'s notes held by him. *Powell v. Subers*, 67 Ga. 418.

¹⁵² *Corwith v. Colter*, 82 Ill. 585. But in *Kelly v. Webb*, 27 Tex. 368, the holder of the note was held to be entitled to payment before delivery of the goods. But an indorsee with notice of the contract does not take subject to a failure to deliver goods after the indorsement to him. *Trigg v. Saxton* (Tenn. Ch. App.) 37 S. W. 567; *State Nat. Bank v. Cason*, 39 La. Ann. 865, 2 South. 881.

¹⁵³ *Hoag v. Parr*, 13 Hun (N. Y.) 95; *Cook v. Bean*, 17 Ind. 504.

¹⁵⁴ *Little v. Thurston*, 58 Me. 86; *Ft. Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 39 N. E. 786.

¹⁵⁵ *Hawks v. Truesdell*, 12 Allen (Mass.) 564.

¹⁵⁶ *Tillotson v. Grapes*, 4 N. H. 444.

rent of premises, of which he failed to give possession as agreed.¹⁵⁷ So, if a note be given for goods with a verbal agreement to procure the rent of a store, breach of this agreement is a failure of the consideration of the note.¹⁵⁸ So, if a note be given for a policy of insurance, and the policy be not delivered;¹⁵⁹ or for a policy of insurance to be delivered with certain conditions, and a different policy be tendered. And in such case, if the maker has already been obliged to pay the note to a bona fide holder, he may have an action for the amount paid against the payee.¹⁶⁰

It has been held, however, that if a note is given for a contract of sale to be delivered, and the contract when delivered is different from what was agreed on, this will not constitute a total failure.¹⁶¹ Again, if a note is given for stock to be delivered at once, and not delivered,¹⁶² or to be issued when ready, and the corporation is never organized nor the stock issued, there is a failure of consideration.¹⁶³

§ 552. — In like manner, the nonperformance of an agreement to discontinue a suit is a failure of consideration of a note or indorsement given therefor.¹⁶⁴ So, too, it has been held, the non-

¹⁵⁷ *Andrews v. Woodecock*, 14 Iowa, 397.

¹⁵⁸ *Stanford v. Davis*, 54 Ind. 45.

¹⁵⁹ *Lawrence v. Griswold*, 30 Mich. 410.

¹⁶⁰ *Tift v. Insurance Co.*, 6 Lans. (N. Y.) 198.

¹⁶¹ *Boone v. Queen*, 2 Cranch, C. C. 371, Fed. Cas. No. 1,643. But it seems that, if the defects in the contract were by reason of fraudulent instructions of the payee, the note would be void. *Id.* So, if the draft to be accepted was a different draft, *Sherwin v. Brigham*, 39 Ohio St. 137; or the deed delivered was for a different piece of land from that agreed on, *Glover v. Chase*, 3 McCrary, 599, 11 Fed. 375.

¹⁶² *Hedge v. Gibson*, 58 Iowa, 656, 12 N. W. 713.

¹⁶³ *Iron Works v. Holden*, 58 Me. 146. So, if the stock was never issued as agreed, *Seotten v. Randolph*, 96 Ind. 581; or if the railroad, to be built before the note for stock matured, was not built, *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; or was to be running in a reasonable time, and was not running until 14 years after, *Blake v. Brown*, 80 Iowa, 277, 45 N. W. 751. But a substantial performance is sufficient. *Fisher v. Briscoe*, 10 Mont. 124, 25 Pac. 30; *Smith v. Gillen*, 52 Ark. 442, 12 S. W. 1073.

¹⁶⁴ *Bookstaver v. Jayne*, 60 N. Y. 146; or to settle a charge and keep the matter secret, *Wells v. Sutton*, 85 Ind. 70. So, if part of the consideration is an agreement for definite delay in a suit, nonperformance will be a partial failure. *Hill v. Enders*, 19 Ill. 163.

performance of an agreement to return an old note on the giving of a renewal note;¹⁶⁵ or to surrender a mortgage on giving a note for a mortgage debt.¹⁶⁶ So, if a note be assigned in consideration of an agreement to pay the assignor's debts the payment of the debts by the assignor himself causes the consideration of the note to fail.¹⁶⁷ So, if a note be given for services, a subsequent receipt given for the same services shows a failure of consideration for the note.¹⁶⁸ So, if an indorsement be made for an agreement to buy up a mortgage incumbrance, the breach of the agreement constitutes a failure of consideration.¹⁶⁹ So, the breach of an agreement to indemnify the maker against partnership debts, a judgment being subsequently rendered against both partners, and not paid by the payee of the note.¹⁷⁰ So, in general, an agreement for any service not rendered,¹⁷¹ or rendered only in part;¹⁷² especially if the performance is prevented by the payee himself.¹⁷³

So, if a note is given for the purchase of a draft, with a written agreement for a release if the draft be not collected, failure to collect the draft constitutes a failure of consideration for the note.¹⁷⁴ So, where a note is given under a composition agreement with creditors, and indorsed for the debtor's accommodation, upon an agreement that the transaction should be void unless all the creditors signed, the failure to get the signature of all the creditors constitutes a failure of consideration for the indorsement.¹⁷⁵ Again, if a note is given on a partnership settlement, with a contemporaneous written agreement that, if a certain partnership account was

¹⁶⁵ *Miller v. Ritz*, 3 E. D. Smith (N. Y.) 253; *Beauford v. Patterson*, 63 How. Prac. (N. Y.) 81. But not in the absence of an express agreement. *Low v. Learned*, 13 Misc. Rep. 150, 34 N. Y. Supp. 68.

¹⁶⁶ *Richards v. Thomas*, 1 Crompt., M. & R. 772; or to redeem from a mortgage sale, *Jessup v. Front*, 77 Ind. 194.

¹⁶⁷ *Compton v. Jones*, 65 Ind. 117.

¹⁶⁸ *Dubois v. Baker*, 40 Barb. (N. Y.) 556.

¹⁶⁹ *Kirkham v. Boston*, 67 Ill. 599.

¹⁷⁰ *Pope v. Hays*, 19 Tex. 375.

¹⁷¹ *Toombs v. West*, 94 Ga. 280, 21 S. E. 522; *Dodge v. Oatis*, 27 Kan. 762; *Perkins v. Brown* (Mich.) 72 N. W. 1095.

¹⁷² *Agnew v. Walden*, 84 Ala. 502, 4 South. 672.

¹⁷³ *Montgomery v. Hunt*, 99 Ga. 499, 27 S. E. 701.

¹⁷⁴ *Hall v. Henderson*, 84 Ill. 611.

¹⁷⁵ *Doughty v. Savage*, 28 Conn. 146.

not paid, the maker should be credited with his share of the account, the failure to pay such account may be shown in defense by the maker, the burden of proof in such case resting on him.¹⁷⁶ Where a note held by a husband is transferred to his wife in consideration of her agreement not to defend a divorce suit, the breach of this agreement is a failure of consideration for the transfer; and payment of the note to the husband will defeat an action subsequently brought upon it by the wife.¹⁷⁷

Nonperformance—Not a Failure of Consideration.

§ 553. It is said, however, by Prof. Parsons, that nonperformance of an agreement forming the consideration of a bill or note is no failure unless the agreement be rescinded.¹⁷⁸ In many cases the intention to make the agreement and the promise founded on it independent of one another is apparent. Where an agreement to accept a bill of exchange has been made in consideration of another agreement, the nonperformance of the latter has been held to constitute no defense to the agreement for acceptance.¹⁷⁹ So, where a note has been given for a college endowment, the nonperformance of a contemporaneous agreement not to diminish the principal fund of such endowment constitutes no failure of consideration for the note.¹⁸⁰ And where a note is given for an agreement for the sale of land, to be conveyed on condition that the note is paid, the giving up of the land by the maker, and its sale to another person, will not prevent a recovery on the note.¹⁸¹ Nor will the rescinding of such contract by the maker bar a recovery on the note.¹⁸² And, where a note is given for the purchase of

¹⁷⁶ *McSherry v. Brooks*, 46 Md. 103.

¹⁷⁷ *Pearson v. Cummings*, 28 Iowa, 344.

¹⁷⁸ 1 Pars. Notes & B. 203. So, *Vanstrum v. Liljengren*, 37 Minn. 191, 33 N. W. 555. Especially where the maker afterwards enforces the agreement. *Bliss v. Tripp*, 14 Gray (Mass.) 136.

¹⁷⁹ *Jones v. Bank*, 34 Ill. 313. So, the assumption by A. of B.'s note on receiving the draft of C. cannot be defeated by the insolvency of C. and the nonpayment of his draft. *Commercial Bank v. Wood*, 7 Watts & S. (Pa.) 89.

¹⁸⁰ *Simpson Centenary College v. Bryan*, 50 Iowa, 293.

¹⁸¹ *Bacon v. Porter*, 1 Root (Conn.) 370; *Bacon v. Pettibone*, 2 Root (Conn.) 284.

¹⁸² *Crawford v. Robie*, 42 N. H. 162.

land, the fact that it is not conveyed before the maturity of the note constitutes no defense, there being no refusal to convey.¹⁸³ So, if a note be given for land to be conveyed on payment of the note, nondelivery of a deed for the land is no failure of consideration for the note.¹⁸⁴ So, it is held in England that the failure to perform an agreement for a lease is no failure of the consideration of a note given for it, but can only be availed of by a cross action.¹⁸⁵ So, in Indiana, the nonperformance of an agreement to transfer an agency indefinite in its term of duration.¹⁸⁶

And where a note is given for the purchase of railroad bonds, with an agreement for their indorsement by another corporation, the failure to perform this agreement is no failure of consideration for the note.¹⁸⁷ So, where a note is given for a share of partnership assets, with an agreement on the maker's part to procure a release of the payee from certain liabilities, his failure to do this is no defense to the note.¹⁸⁸ Where a note has been given for the purchase of a business, with a bond on the seller's part not to carry on a like business within certain limits, the breach of this latter stipulation does not constitute a failure of consideration of the note.¹⁸⁹ So, where the note is given for repairs to be made on a machine, nonperformance on the payee's part constitutes no defense until demand and refusal.¹⁹⁰ If, however, such note is given for an exchange in machines and repairs to be made, and there is a

¹⁸³ *Spiller v. Westlake*, 2 Barn. & Adol. 155. So, refusal to execute an assignment of a lease for which a bill was accepted is no defense as a failure of consideration, if the purchaser is in possession of the land. *Chit. Bills*, 94; *Moggridge v. Jones*, 3 Camp. 38. So, where a note was given for land sold, to be conveyed on payment of the note, dispossession under proceedings by the vendor is not a failure of the consideration of the note, the agreement making no provision for possession by the purchaser. *Babcock v. Hamende*, 3 Ill. App. 426.

¹⁸⁴ *Bourland v. Gibson*, 91 Ill. 470.

¹⁸⁵ *Moggridge v. Jones*, 14 East, 486, 3 Camp. 38; *Spiller v. Westlake*, 2 Barn. & Adol. 155; *Mann v. Lent*, 10 Barn. & C. 877; *Grant v. Welchman*, 16 East, 207; *Cuff v. Brown*, 5 Price, 297.

¹⁸⁶ *Burr v. Wilson*, 26 Ind. 389.

¹⁸⁷ *Stanton v. Maynard*, 7 Allen (Mass.) 335.

¹⁸⁸ *Henshaw v. Dutton*, 59 Mo. 139.

¹⁸⁹ *Clough v. Baker*, 48 N. H. 254, under the statute.

¹⁹⁰ *Mountjoy v. Mullikin*, 16 Ind. 226.

failure in the latter, the damages on account of the failure will be measured by the cost of making the repairs.¹⁹¹

§ 554. — Other cases in which nonperformance of the agreement for which a note or bill was given has been held to constitute no failure of consideration are: An agreement to show the maker certain property out of which he could collect a debt due him;¹⁹² or to render certain services as attorney in defense of a suit, the attorney being absent from court at the time required;¹⁹³ or having died before trial of the case;¹⁹⁴ or judgment having been rendered against the maker notwithstanding the attorney's advice.¹⁹⁵ So, an agreement that the maker might collect a certain debt due to the payee from a third person, the collection being prevented afterwards by the insolvency of such person.¹⁹⁶ And where a note of A. is guarantied by B. in consideration of indulgence shown to A., and of A.'s agreement to make a certain cash payment, this latter agreement being broken on his part, and his creditor losing priority by reason of the extension, A.'s breach of agreement is no defense to an action by the payee against the guarantor.¹⁹⁷

¹⁹¹ *Howe Machine Co. v. Reber*, 66 Ind. 498.

¹⁹² *Plumb v. Niles*, 34 Vt. 230. So, the nonperformance of an agreement to apply in a specified manner the proceeds of an accommodation discount. *Brooks v. Hey*, 23 Hun (N. Y.) 372. Or to surrender a mortgage note, which had been released, but was afterwards foreclosed against the property. *Hutson v. Pressnall*, 83 Ind. 163. Or to make certain improvements on property sold at auction, for which the note was given. *Miller v. Howell*, 2 Ill. 499.

¹⁹³ *Douglass v. Eason*, 36 Ala. 687. The question in this case was rather as to the burden of proof, which lay on the defendant, and was not satisfied by mere evidence of the payee's absence from court.

¹⁹⁴ *Headley v. Good*, 24 Tex. 232. So, where the services were prevented by the suicide of the maker of the note before trial. *Mitcherson v. Dozier*, 7 J. J. Marsh. (Ky.) 53. Or where an agreement to cure for \$200 was waived by giving a note for the amount before the cure was effected. *Swank v. Nichols' Adm'r*, 20 Ind. 198. But a note for anticipated services as executor has been held to fail on the services of the payee being prevented by his death before the maker. *Byles, Bills*, 208; *Chit. Bills*, 83; *Solly v. Hinde*, 2 *Crompt. & M.* 516, 6 *Car. & P.* 316.

¹⁹⁵ *Lester v. Fowler*, 43 Ga. 190.

¹⁹⁶ *Hodgkins v. Moulton*, 100 Mass. 309; *Waterhouse v. Kendall*, 11 *Cush. (Mass.)* 128; *Traver v. Stevens*, *Id.* 167; *Pitkin v. Frink*, 8 *Metc. (Mass.)* 12.

¹⁹⁷ *Mechanics' Nat. Bank v. Frazer*, 86 Ill. 133.

Again, where a note is given for another note transferred to the maker, and is afterwards surrendered, this surrender constitutes no defense to the note transferred, although it was so transferred on an oral agreement that it should be payable conditionally upon the other note being paid.¹⁹⁸ So, where a note was made partly in compromise of a suit against A. and B. and partly for a note of A., and was not to be delivered to B. until the note of A. had been paid, but was delivered to B. without notice of that condition, the breach of the condition constitutes no failure.¹⁹⁹ So, where a draft by a contractor on the owner of a building is given to a material man, and is accepted by the owner, payable "when the house is ready for occupancy," the fact that the contract was broken by the drawer, and the house finished by the drawee himself, constitutes no failure of consideration, the actual consideration for the draft being the material furnished by the payee, and not the completion of the drawer's contract.²⁰⁰ Where, on the other hand, a note is given for an agreement to convey land, the payee to have possession under the agreement on default of payment of the note, the payee may, upon default, have his election to sue on the note, or to rescind the note and sue in equity on the agreement.²⁰¹

Subsequent Failure After Consideration Once Received.

§ 555. Where the apparent failure is due to a subsequent change in value of the consideration, this is not in law such failure of consideration as can be made available in defense.²⁰² But if a note be given in part payment of a judgment, and the judgment be afterwards settled in another way, this is a failure of consideration.²⁰³ So, if a note be given in satisfaction of a judgment

¹⁹⁸ *Adams v. Wilson*, 12 Metc. (Mass.) 138. So, where the payee guaranteed that the note given as consideration to the maker should be paid before maturity of his note. *State v. Hobbs*, 40 N. H. 229.

¹⁹⁹ *Stewart v. Anderson*, 59 Ind. 375.

²⁰⁰ *Cook v. Wolfendale*, 105 Mass. 401.

²⁰¹ *Arbuckle v. Hawks*, 20 Vt. 538.

²⁰² E. g. where the note was given by a tenant for rent, and, after transfer of the note, the accruing rent was extinguished by the purchase of the land by the tenant. *Alabama Gold Life Ins. Co. v. Oliver*, 78 Ala. 158.

²⁰³ *Campbell v. Skinner*, 30 Mich. 32.

which is afterwards reversed on appeal;²⁰⁴ or in satisfaction of a rule for the payment of money on an execution, which rule is afterwards discharged.²⁰⁵ Where, on the other hand, a note was given by a surety for an extension of his principal's debt, and was fraudulently negotiated, and the original debt was subsequently paid by the principal, this could not be set up in defense as failure of consideration at suit of bona fide purchaser.²⁰⁶ It is, however, a partial failure of the consideration of a note given for an army substitute, who deserted before the time of service had expired,²⁰⁷ or for the hire of a servant for a year with provision for a reduction upon his death within the year, if he so die.²⁰⁸

On the contrary, it has been held that, where a note was given for goods purchased, subsequent dispossession would not, of itself, amount to a failure of consideration.²⁰⁹ Nor would a retaking of the goods by an act of trespass two months after their delivery.²¹⁰ So, if a note be given for purchase of a mule, which afterwards dies of a latent disease, in the absence of fraud and of warranty, this is not a failure of consideration.²¹¹ So, if a note be given for the good will of a business, and its value is subsequently destroyed by a panic;²¹² or for an apprentice fee, the apprenticeship being afterwards brought to an end by the misconduct of the master;²¹³ or for settlement of partnership accounts, the defense arising after

²⁰⁴ *Dennison v. Brown*, 3 Vt. 170.

²⁰⁵ *Barron v. Chipman*, 4 Ga. 200.

²⁰⁶ *Woodruff v. Webb*, 32 Ark. 612.

²⁰⁷ *Strickler v. Landis*, 47 Pa. St. 518.

²⁰⁸ *Smith v. Brooks*, 18 Ga. 440; or on his return before the year's end to his former employer, *Tompkins v. Tigner*, 17 Ga. 103.

²⁰⁹ *Byles, Bills*, 133; *Stephens v. Wilkinson*, 2 Barn. & Adol. 320; *Jones v. Jones*, 6 Mees. & W. 84; *Lomas v. Bradshaw*, 9 C. B. 620. So, a seizure of the goods by the vendor to enforce payment of another installment (after that represented by the note in suit). *Post v. Green*, 10 App. Div. 316, 41 N. Y. Supp. 758.

²¹⁰ *Stephens v. Wilkinson*, 2 Barn. & Adol. 320.

²¹¹ *Winslow v. Wood*, 70 N. C. 430.

²¹² *Smock v. Pierson*, 68 Ind. 405. So, for an interest in a mail contract subsequently rendered valueless by the contractor's failure to pay. *Blackman v. Dowling*, 63 Ala. 304; *Dowling v. Blackman*, 70 Ala. 303.

²¹³ *Grant v. Welchman*, 16 East, 207. The case would have been otherwise, if there had been an original agreement for the return of the fee on the discharge of the apprentice. *Chit. Bills*, 95.

transfer of the note.²¹⁴ So, a note for the purchase of land which afterwards became worthless.²¹⁵ And if a note be given for land which is described as bounding on a proposed road, and the grantor of the land afterwards fails to join in constructing the road as agreed, this will not amount to a failure of consideration for the note.²¹⁶ So, if a note be given for the future rent of a house, and the house be afterwards destroyed by fire, this is no failure.²¹⁷ And even where a note has been given for the surrender of a lease, containing a provision that the rent should cease on the destruction of the premises by fire, the subsequent destruction of the property by fire constitutes no failure of consideration of the note.²¹⁸ So, if a note be given for the services of a substitute in the army, to be void if the maker should be drafted, the note will be binding, although the maker was afterwards drafted and discharged from the draft as a miller.²¹⁹ So, if a note be given for a patent right, the subsequent granting of another patent for the same invention will not constitute a failure of consideration.²²⁰ So, if it be given for the assignment of a patent, with an agreement that the commissioner should be required to issue a new patent to the assignee, and this reissue was prevented by the act of the assignor in surrendering the patent.²²¹ So, if a note be given to found a scholarship, or endow an institution, which fails on account of the maker's default in paying the note, this is not a failure of the consideration of the note.²²² So, a note for an award in a bastardy case

²¹⁴ *First Nat. Bank v. Wood*, 128 N. Y. 35, 27 N. E. 1020.

²¹⁵ *Button v. Clark*, 16 Ohio, 297. Or for stock which became worthless. *Kerchner v. Gettys*, 18 S. C. 521. So, a wife's divorce for adultery is no failure in the consideration of a note previously given for her release of dower. *Nichols v. Nichols*, 136 Mass. 256. Nor a sale of decedent's land for debts, to a note given to an heir for the purchase of his interest. *Williams v. Bartlett*, 4 Lea, 620.

²¹⁶ *Loring v. Otis*, 7 Gray (Mass.) 563.

²¹⁷ *Diamond v. Harris*, 33 Tex. 634. So, where the consideration was an agreement to build a house, and it was destroyed by fire just before completion. *Rees v. Sessions*, 41 Ohio St. 234.

²¹⁸ *Brooks v. Cutter*, 119 Mass. 132.

²¹⁹ *Lively v. Robbins*, 39 Ala. 461.

²²⁰ *Crow v. Eichinger*, 34 Ind. 65.

²²¹ *Clark v. Smith*, 21 Minn. 539.

²²² *Cook v. Whitfield*, 41 Miss. 541; especially if expenses have been already incurred on the strength of it, *Koch v. Lay*, 38 Mo. 147.

does not fail of consideration by reason of the death of the child.²²³ So, a breach of agreement for delivery of goods, occurring after transfer of the note to a bona fide holder.²²⁴ So, a note given for railroad stock is not rendered unavailable by the failure of the railroad to make a certain valuable connection, which the company had agreed to make.²²⁵

Again, where a note was given for the purchase of a slave, his subsequent emancipation is not a failure of consideration,²²⁶ although he had been warranted for life.²²⁷ In such case, the maker of the note cannot be held as mere hirer of the slave until emancipation.²²⁸ And where the vendor's title proved to be a defective one, but the slave was emancipated before that fact was discovered, even this was held to constitute no failure of consideration.²²⁹ Nor yet the fact that the slaves were sold subject to the provision of a will which directed their enfranchisement, there having been no actual emancipation.²³⁰ And even where a note was given in 1860 partly for rent of land and partly for hire of slaves in the year 1863, the fact that they were then of no value was held to be no defense to the note.²³¹ So, where a note was given for the hire of a slave, his subsequent escape without fault of the owner was held to be no failure of consideration.²³²

²²³ *Eaton v. Burns*, 31 Ind. 390.

²²⁴ *Maas v. Chatfield*, 90 N. Y. 303; *State Bank v. Cason*, 39 La. Ann. 865, 2 South. 881; *Trigg v. Saxton* (Tenn. Ch. App.) 37 S. W. 567.

²²⁵ *Merrill v. Gamble*, 46 Iowa, 615.

²²⁶ *Dowdy v. McLellan*, 52 Ga. 408; *Matthews v. Dunbar*, 3 W. Va. 138. And, a fortiori, a subsequent unconstitutional statute against a grantor's title will not defeat a purchase-money note. *Montgomery v. Kasson*, 16 Cal. 189.

²²⁷ *Hand v. Armstrong*, 34 Ga. 232; *Bass v. Ware*, Id. 386; *Whitworth v. Carter*, 43 Miss. 61; *Wilkinson v. Cook*, 44 Miss. 367. It has been held, however, that in the case of a bill of exchange given for slaves warranted for life, their emancipation is a good defense for the drawer, although not for the acceptor. *Coolidge v. Burnes*, 25 Ark. 241.

²²⁸ *Shearer v. Smith*, 35 Tex. 427.

²²⁹ *McMillan v. Causey*, 43 Miss. 227.

²³⁰ *Poydras v. Poydras*, 25 La. Ann. 405.

²³¹ *Loggins v. Buck*, 33 Tex. 113.

²³² *Scherer v. Upton*, 31 Tex. 617; *Hughes v. Todd*, 2 Duv. (Ky.) 188.

II. DEFENSES RELATING TO CONSIDERATION.

- § 556. Admissibility—By and against whom.
- 557. Bona Fide Holder—Defense: Want of Consideration.
- 558. — Defense: Failure.
- 559. — Defense: Illegality.
- 560. — Affected by Inadequacy—Notice.
- 561. Accommodation Paper—Estoppel.
- 562. Presumption of Consideration.
- 563. — Consideration Expressed—"Value Received."
- 564. Consideration—Pleading and Evidence.
- 565. — Parol Evidence.
- 566. — Burden of Proof.
- 567. — Burden as to Holder for Value.

Admissibility of Defense—By and against What Parties.

§ 556. Where the instrument is not negotiable, all holders are subject to defense of want of consideration, on failure or illegality of consideration, in the same manner as the original payee.²³³

And where the instrument is negotiable, such defense may be made against the payee or between immediate parties.²³⁴ It is

²³³ As to failure, *Muse v. Dantzler*, 85 Ala. 359, 5 South. 178; *Stockton Sav. & Loan Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016; as to illegality, *Johnston v. Allen*, 22 Fla. 224; *McCoy v. Green*, 83 Mo. 626.

²³⁴ *Bytes*, Bills, 131; *Chit. Bills*, 82; *Story*, Prom. Notes, § 199; *Duncan v. Scott*, 1 Camp. 100; *Ingersoll v. Martin*, 58 Md. 67; *Clough v. Patrick*, 37 Vt. 421; *Campbell v. Skinner*, 30 Mich. 32; *Ruggles v. Swanwick*, 6 Minn. 526 (Gil. 365); *Child v. McKean*, 2 Miles (Pa.) 192; *Stockton Loan & Sav. Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016; *Cohen v. Goux*, 48 Cal. 97; *Camp v. Sturdevant*, 16 Neb. 694, 21 N. W. 449; *Stenberg v. State*, 48 Neb. 299, 67 N. W. 190; *Williams v. Culver*, 30 Or. 375, 48 Pac. 365; *Seeligson v. Lewis*, 65 Tex. 215; *Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. 834; unless barred by estoppel or waiver, *Ware v. Morgan*, 67 Ala. 461; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79; *Mead v. Bank* (Sup.) 34 N. Y. Supp. 1054; and equity will grant relief between immediate parties notwithstanding a transfer of the note to a bona fide holder, *Wilson v. Lazier*, 11 Grat. (Va.) 477; or to prevent such transfer, *Dickenson v. Investment Co.*, 93 Va. 498, 25 S. E. 548. A fraudulent attempt to create apparent assets may be shown as against the payee. *Lime Rock Bank v. Hewett*, 50 Me. 267. So, an indorsee against his indorser is subject to the defense of want of consideration for the indorsement. *Platt v. Snipes*, 43 Ark. 21. So, the original

not necessary that the consideration should have moved from the payee.²³⁵ The payee is subject to such defense, although he has transferred the note to a bona fide holder, if he afterwards becomes the owner again and sues on it as such.²³⁶ And a purchaser from the payee for the use of the maker is subject, like the payee, to a defense of usury.²³⁷

And, in general, any holder with notice of the defect in consideration, as well as any holder who is in privity with the original payee, takes the paper subject to such defense.²³⁸ Thus, if a note in payment of goods sold is made to the seller's agent, and by him transferred to the seller himself, the seller will be subject to the same defense for the want or failure of consideration that his agent would be subject to.²³⁹ So, where a bill is indorsed by several persons jointly, the acceptor may set up in defense against them all

holder, although he takes as indorsee of the payee, is subject to defense on the ground of want of consideration, *Produce Bank v. Bache*, 30 Hun (N. Y.) 351; or usury, *Darling v. March*, 22 Me. 184; *Eastman v. Shaw*, 65 N. Y. 522. So, an indorsee for collection. *Powell v. Inman*, 52 N. C. 28. So, an acceptor may show at suit of the drawer of a bill that the acceptance was made for too large a sum by mistake. *Third Nat. Bank v. Harrison*, 3 McCrary, 316, 10 Fed. 243. So, an accommodation party may show at suit of the party accommodated the character of the paper. *Thomas v. Watkins*, 16 Wis. 549; *Eastman v. Shaw*, 65 N. Y. 522; *Allaire v. Hartshorne*, 21 N. J. Law, 665; *Patten v. Pearson*, 55 Me. 39; *Darnell v. Williams*, 2 Starkie, 166; *Wiffen v. Roberts*, 1 Esp. 261, 536; *Jones v. Hibbert*, 2 Starkie, 304; *Sparrow v. Chisman*, 9 Barn. & C. 241; *Richmond v. Heapy*, 1 Starkie, 202; *Jacaud v. French*, 12 East, 323; *Sandilands v. Marsh*, 2 Barn. & Ald. 673; *Rapp v. Latham*, Id. 795; *Puller v. Roe*, Peake, 197; *Jones v. Yates*, 9 Barn. & C. 539; *Thompson v. Clubley*, 1 Mees. & W. 212.

²³⁵ *Bradshaw v. Bank*, 26 C. C. A. 673, 81 Fed. 902.

²³⁶ *Sawyer v. Wiswell*, 9 Allen (Mass.) 39.

²³⁷ *Zabriskie v. Spielman*, 46 N. J. Law, 35.

²³⁸ *National Bank of Rising Sun v. Brush*, 6 Fed. 132; *Gorham v. Keyes*, 137 Mass. 583; *Moore v. Hershey*, 90 Pa. St. 196; *Torinus v. Buckham*, 29 Minn. 128, 12 N. W. 348; *Whitwell v. Crehore*, 8 La. 540; *Skinner v. Raynor*, 95 Iowa, 536, 64 N. W. 601; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79; *Smith v. Carlson*, 36 Minn. 220, 30 N. W. 761; *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 South. 522; *Montgomery v. Hunt*, 99 Ga. 499, 27 S. E. 701; *Wolverton v. George H. Taylor & Co.*, 157 Ill. 485, 42 N. E. 49.

²³⁹ *Boit v. Whitehead*, 50 Ga. 76. So, if the failure was due to the default of the payee's agent. *Byles, Bills*, 131; *Puget de Bras v. Forbes*, 1 Esp. 117; *Astley v. Johnston*, 29 Law J. Exch. 161, 5 Hurl. & N. 137.

that the acceptance was given for the accommodation of one of them.²⁴⁰ So, if an accommodation note be transferred by the payee to his firm, the firm takes it subject to the defense that it was accommodation paper only.²⁴¹ But the notice must be of the want or failure of consideration, not of the mere warranty or condition, which has failed.²⁴²

Defenses as to consideration may also be set up against a holder purchasing after maturity,²⁴³ unless he claims under a bona fide holder for value before maturity. So, too, against a holder before maturity, who is not a purchaser for valuable consideration,²⁴⁴ or in due course of business.²⁴⁵

On the other hand, although the maker of a note might set up a defense of want of consideration moving to himself, he cannot avail himself as a defense of any want or failure of consideration between subsequent holders.²⁴⁶ So, a drawer of a bill given for goods purchased cannot set up in defense against the acceptor that the consideration has failed between him and the payee by reason of the worthlessness of the goods.²⁴⁷ Nor can an acceptor

²⁴⁰ *Sparrow v. Chisman*, 9 Barn. & C. 241; *Richmond v. Heapy*, 1 Starkie, 202.

²⁴¹ *Quinn v. Fuller*, 7 Cush. (Mass.) 224.

²⁴² *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79; *Rublee v. Davis*, 33 Neb. 783, 51 N. W. 135. For a consideration of what constitutes notice of defense, see §§ 987, 1002, et seq., *infra*.

²⁴³ *Risley v. Gray*, 98 Cal. 40, 32 Pac. 884; *King v. Ford*, 89 Me. 140, 35 Atl. 1023; *Slater v. Foster*, 62 Minn. 150, 64 N. W. 160; *Lipsmeier v. Vehslage*, 29 Fed. 175; *Diamond v. Harris*, 33 Tex. 634. See, too, § 674 et seq., *infra*.

²⁴⁴ For valuable consideration constituting a bona fide holder in the commercial sense not subject to defense, see, more particularly as to existing debt, § 641 et seq., *supra*, and, in general, § 901 et seq., *infra*.

²⁴⁵ E. g. against a holder by assignment, *Davis v. Sittig*, 65 Tex. 497; and, see §§ 988, 989, *infra*.

²⁴⁶ *Johnston v. Josey*, 34 Tex. 533; *Scribner v. Hanke*, 116 Cal. 613, 43 Pac. 714. And it makes no difference that a party purchasing the paper at more than legal rate of discount writes his own name as payee in the blank left for that purpose. *Brummel v. Enders*, 18 Grat. (Va.) 873.

²⁴⁷ *Chit. Bills*, 63; *Obbard v. Betham*, *Moody & M.* 483; *Gray v. Cox*, 4 Barn. & C. 108; *Laing v. Fidgeon*, 6 Taunt. 108, 4 Camp. 169; *Jones v. Bright*, 5 Bing. 533; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Perley v. Balch*, 23 Pick. (Mass.) 283; *Poulton v. Lattimore*, 4 Man. & R. 208; *Basten v. Butter*, 7 East, 479; *Farnsworth v. Garrard*, 1 Camp. 38; *Fisher v. Samuda*, *Id.* 190.

set up in defense against the payee or a later indorser of a bill any want of consideration for the acceptance between himself and the drawer.²⁴⁸ Nor can the guarantor of a note escape his liability to the payee on the ground of the consideration between maker and payee being illegal.²⁴⁹ And where a note is given for a consideration moving from some other person than the payee, and, at the request of such person, the maker cannot, at the suit of the payee, avail himself of the defense of failure in such consideration.²⁵⁰

And, in general, only the party affected by the want of consideration, or by its failure or illegality, can avail himself of it as a defense.²⁵¹

²⁴⁸ *Nowak v. Stone Co.*, 78 Ill. 307; *Ft. Dearborn Nat. Bank v. Carter, Rice & Co.*, 152 Mass. 34, 25 N. E. 27; *Heuertematie v. Morris*, 101 N. Y. 63, 4 N. E. 1; *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25; *American Boiler Co. v. Foutham*, 50 N. Y. Supp. 351; or between the drawer and the payee, *Marsh v. Low*, 55 Ind. 271. So, the acceptor cannot set up at the suit of an indorsee that the indorsement was in consideration of the suppression of a criminal prosecution. *Flower v. Sadler*, 9 Q. B. Div. 83, 10 Q. B. Div. 572. So, the original consideration of a bill may be valid, but the acceptance be based on an illegal consideration, which will furnish the acceptor with a defense. *Henderson v. Benson*, 8 Price, 281. But, in an action by payee against acceptor, failure or want of consideration is no defense, unless it applies both to the consideration received by the acceptor and that paid by the holder. *Hoffman v. Bank*, 12 Wall. 191.

²⁴⁹ *Laughmiller v. Syler*, 7 Cold. (Tenn.) 158; *Steadwell v. Morris*, 61 Ga. 97.

²⁵⁰ *Peterborough & S. R. R. v. Chamberlin*, 44 N. H. 494. But in Connecticut a purchaser of land, who gives a note for it to a creditor of the vendor at the vendor's request, may afterwards set up against such payee a partial failure, by reason of false representations as to the property. *Andrews v. Wheaton*, 23 Conn. 112.

²⁵¹ E. g. one joint maker, for himself only, *Mayer v. Brand*, 102 Ind. 301, 26 N. E. 125; or a surety, for the maker, as to failure of consideration to his principal, *Stockton Sav. & Loan Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016; or the maker's executor, *Copp v. Sawyer*, 6 N. H. 386. And not a maker, as to consideration between subsequent parties, *Martin v. Kercheval*, 4 McLean, 117, Fed. Cas. No. 9,163; or a pledgee, garnished as to balance due his pledgor, setting up accommodation character of maker, *Kirkpatrick v. Oldham*, 38 La. Ann. 553; nor a purchaser of the land covered by a mortgage collateral to the note, *West v. Miller*, 125 Ind. 70, 25 N. E. 143; nor a subsequent accommodation indorser, *Foster v. Leach*, 160 Mass. 418, 36 N. E. 69; nor any indorser, to set up usury between maker and payee, *Frank v. Longstreet*,

So, it may vitiate the note, but leave a collateral mortgage good.²⁵² Or it may vitiate, and be exhausted in amount, by one note of a series, leaving the others good,²⁵³ and beginning with those remaining in the hands of the payee.²⁵⁴

Bona Fide Holder—Defense—Want of Consideration.

§ 557. On the other hand, want of consideration of a bill or note cannot be set up against a bona fide holder for value before maturity and without notice.²⁵⁵ And this is true, even though the paper has been transferred to such a holder for the express purpose of cutting off such defense.²⁵⁶ And, as has been said already, the fact that the paper was given as accommodation paper is no defense against such holder.²⁵⁷ This is true, also, where the instrument was originally delivered to the payee as a mere gift, although this was once doubted.²⁵⁸ So, where the teller of a bank has cer-

44 Ga. 179. But in equity an accommodation indorser may be subrogated to the defense belonging to the maker, as against the payee. *McDonald Mfg. Co. v. Moran*, 52 Wis. 203, 8 N. W. 864.

²⁵² *Merritt v. Bank (Ky.)* 35 S. W. 285.

²⁵³ *Carradine v. Wilson*, 61 Miss. 573.

²⁵⁴ *Wilber v. Buchanan*, 85 Ind. 42.

²⁵⁵ *Collins v. Martin*, 1 Bos. & P. 651; *U. S. v. Bank of Metropolis*, 15 Pet. 393; *Armstrong v. Bank*, 133 U. S. 433, 10 Sup. Ct. 450; *Chicopee Bank v. Chapin*, 8 Mete. (Mass.) 40; *Sweetser v. French*, 13 Mete. (Mass.) 262; *Baker v. Arnold*, 3 Caines (N. Y.) 279; *Dalrymple v. Hillenbrand*, 2 Hun (N. Y.) 488; *Wareham Bank v. Lincoln*, 3 Allen (Mass.) 192; *Daniels v. Wilson*, 21 Minn. 530; *Polhemus v. Bank*, 27 Mich. 44; *Hunter v. Parsons*, 22 Mich. 96; *Matthews v. Crosby*, 56 N. H. 21; *Scott v. Seeley*, 27 La. Ann. 95; *Goddard v. Lyman*, 14 Pick. (Mass.) 268; *Harris v. Bradley*, 7 Yerg. (Tenn.) 310; *Hawkins v. Neal*, 60 Miss. 256; *Rahm v. Bridge Manufactory*, 16 Kan. 530; *National Bank of America v. National Bank*, 164 Ill. 503, 45 N. E. 968; *Kepley v. Schmidt*, 21 Ill. App. 402; *Ft. Dearborn Nat. Bank v. Carter, Rice & Co.*, 152 Mass. 34, 25 N. E. 27; *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611; *Blue Valley Lumber Co. v. Smith*, 48 Neb. 293, 67 N. W. 159; *Heuertematte v. Morris*, 101 N. Y. 63, 4 N. E. 1; *McCauley v. Murdock*, 97 Ind. 229.

²⁵⁶ *Price v. Emerson*, 16 La. Ann. 95.

²⁵⁷ See § 476, *supra*; *Bernstein v. Crow* (Sup.) 48 N. Y. Supp. 531; although the accommodation was by a corporation, *Farmers' Nat. Bank of Valparaiso v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191; or fraudulently diverted, *Maitland v. Bank*, 40 Md. 540. See, too, §§ 1803, 1894, *infra*.

²⁵⁸ *Chit. Bills*, §9; *Holliday v. Atkinson*, 5 Barn. & C. 501, 8 Dowl. & R.

tified a check for the drawer's accommodation to an amount exceeding his account, a bona fide holder for value can recover on such certificate against the bank, although the teller so certifying has exceeded his authority and violated his duty.²⁵⁹ But, where a note has been made by a lunatic without consideration, even a bona fide holder for value cannot recover upon it against the maker.²⁶⁰

Bona Fide Holder—Failure, When Admissible.

§ 558. Failure of consideration, like want of consideration, is no defense to commercial paper in the hands of a bona fide holder for value.²⁶¹ So, it is no defense against such holder that a note

163; *Woodbridge v. Spooner*, 3 Barn. & Ald. 235; *Tate v. Hilbert*, 2 Ves. Jr. 111, 4 Brown, Ch. (Belt's Ed.) 286; *Rann v. Hughes*, 7 Term R. 351, note; *Ridout v. Bristow*, 1 Tyrw. 84; *Seton v. Seton*, 2 Brown, Ch. 610; *Disher v. Disher*, 1 P. Wms. 204; *Easton v. Pratchett*, 1 Cromp. M. & R. 798; *Heydon v. Thompson*, 3 Nev. & M. 319; *Whitaker v. Edmunds*, 1 Adol. & E. 638; *Milnes v. Dawson*, 20 Law J. Exch. 81.

²⁵⁹ *Farmers' & Mechanics' Bank of Kent Co., Md., v. Butchers' & Drovers' Bank*, 16 N. Y. 125.

²⁶⁰ *Moore v. Hershey*, 90 Pa. St. 196.

²⁶¹ *Bramah v. Roberts*, 1 Bing. N. C. 469; *Robinson v. Reynolds*, 2 Q. B. 196; *Masters v. Ibberson*, 8 C. B. 100; *Munroe v. Bordier*, Id. 862; *Fearing v. Clark*, 16 Gray (Mass.) 74; *Thiedmann v. Goldschmidt*, 1 De Gex, F. & J. 4; *Leather v. Simpson*, L. R. 11 Eq. 398; *Hoffman v. Bank*, 12 Wall. 181; *Cone v. Baldwin*, 12 Pick. (Mass.) 545; *Goddard v. Lyman*, 14 Pick. (Mass.) 268; *Cowing v. Altman*, 71 N. Y. 435, reversing 5 Hun (N. Y.) 556; *Britton v. Hall*, 1 Hilt. (N. Y.) 528; *Blackmer v. Phillips*, 67 N. C. 340; *Smith v. Rawson*, 61 Ga. 208; *Faulkner v. Ware*, 34 Ga. 498; *Bank v. Anderson*, 32 S. C. 538; *Seymour v. Lumber Co.*, 7 C. C. A. 593, 58 Fed. 957; *Baxter v. Ellis*, 57 Me. 178; *Cooke v. Pearce*, 23 S. C. 239; *Coakley v. Christie*, 20 Neb. 509, 31 N. W. 73; *Western Cottage Organ Co. v. Boyle*, 10 Neb. 409, 6 N. W. 473; *Fink v. Chambers*, 95 Mich. 508, 55 N. W. 375; *Pavey v. Stauffer*, 45 La. Ann. 353, 12 South. 512; *Overhoff v. Trusdell*, 5 Kan. App. 881, 49 Pac. 331; *Post v. Railroad Co.*, 99 Ga. 232, 25 S. E. 405; *Reynolds v. Roth*, 61 Ark. 317, 33 S. W. 105; *Estes v. Bank*, 62 Ark. 7, 34 S. W. 85; *Cagle v. Lane*, 49 Ark. 465, 5 S. W. 790; *Wildsmith v. Tracy*, 80 Ala. 258; *McCaskill v. Ballard*, 8 Rich. Law (S. C.) 470; *Hancock v. Hale*, 17 Fla. 808; *Morris v. White*, 28 La. Ann. 855; *Citizens' Bank v. Strauss*, 26 La. Ann. 736; *Howell v. Crane*, 12 La. Ann. 126; *Stone v. Young*, 5 Kan. 229; *Merritt v. Duncan*, 7 Heisk. (Tenn.) 156; *Mobile Sav. Bank v. Supervisors of Oktibbeha Co.*, 22 Fed. 580;

was given as collateral for a less amount than its face,²⁶² or for a bill of lading which has proved to be a forgery.²⁶³ And, where an acceptance has been made on the strength of a forged bill of lading, an injunction will not be granted against a transfer of the bill by a bona fide holder for value.²⁶⁴ Nor can such acceptor, after payment of the bill, recover against the bank collecting the same, there being no warrant of its genuineness on the part of such bank.²⁶⁵

So, it is no defense at suit of a bona fide holder for value that the note was given for a patent which proves to be void;²⁶⁶ or for goods, sold with a warranty against prior liens, which prove to be subject to such liens;²⁶⁷ or for the purchase of lands to which the title fails;²⁶⁸ or lands which prove deficient in quantity;²⁶⁹ or for goods which were to be paid for in installments, and have been retaken by the seller on account of a prior default in such payment;²⁷⁰ or for goods purchased which have been only partly delivered.²⁷¹ So, the acceptors of a bill cannot set up against such holder the nonperformance of an agreement that a certain vessel, for which the bill was given, should be made seaworthy.²⁷² So, where a note is given in consideration of the guaranty of another note, an agreement that it should not be paid until the first

Shaw v. Jacobs, 89 Iowa, 713, 55 N. W. 333, and 56 N. W. 684; *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.* (Cal.) 52 Pac. 995; especially if the failure is after transfer of the note, *Bearden v. Moses*, 7 Lea (Tenn.) 459.

²⁶² *Tarbell v. Sturtevant*, 26 Vt. 513.

²⁶³ *Robinson v. Reynolds*, 2 Q. B. 196; *Craig v. Sibbett*, 15 Pa. St. 238.

²⁶⁴ *Thiedmann v. Goldschmidt*, 1 De Gex, F. & J. 4.

²⁶⁵ *Leather v. Simpson*, L. R. 11 Eq. 398; although the bank on presenting the bill for acceptance had informed the acceptor that it held the bill of lading, which the acceptor neglected to examine.

²⁶⁶ *Smith v. Hiscock*, 14 Me. 449.

²⁶⁷ *Sturges v. Miller*, 80 Ill. 241.

²⁶⁸ *Vallett v. Parker*, 6 Wend. (N. Y.) 615; or for which the transfer is otherwise invalid, *Balfour v. Insurance Co.*, 3 C. B. (N. S.) 300.

²⁶⁹ *Windham v. Doles*, 59 Ga. 265, although the note in suit was really a renewal note with an additional indorser.

²⁷⁰ *Houghtaling v. Randen*, 25 Barb. (N. Y.) 21.

²⁷¹ *Baldwin v. Killian*, 63 Ill. 550.

²⁷² *Davis v. McCready*, 17 N. Y. 230.

note was paid is no defense against such holder for value.²⁷³ Or where the note was given for a policy of insurance, which was afterwards canceled.²⁷⁴ So, an agreement for the surrender of a note, if the maker should not be discharged by his creditors, is no defense in such case.²⁷⁵

And where the statute expressly provides, as in Vermont, for setting up partial failure of consideration by way of defense, it does not apply to the case of a subsequent holder for value.²⁷⁶ One who takes an instrument from a bona fide holder for value acquires his rights, and is not subject to defense for want or failure of the original consideration.²⁷⁷ It seems to be a question whether a mortgage or other collateral securing negotiable paper in the hands of a bona fide holder for value enjoys the same immunity from defense as the bill or note secured. It is held in Michigan that this is the case,²⁷⁸ but the contrary is held in Illinois.²⁷⁹

Bona Fide Holder—Illegality, When Admissible.

§ 559. The same restriction applies, in general, to the defense of illegality of consideration, such defense not being available against a bona fide holder for value before maturity, except in the case of instruments expressly made void by statute.²⁸⁰ If the stat-

²⁷³ Taggart v. Rice, 37 Vt. 47.

²⁷⁴ Gillespie v. Manufacturing Co. (Miss.) 18 South. 120.

²⁷⁵ Tower v. Richardson, 6 Allen (Mass.) 351.

²⁷⁶ Farrar v. Freeman, 44 Vt. 63; Hoyt v. McNally, 66 Vt. 38. 28 Atl. 417.

In some of the statutes of this character bona fide holders for value are expressly protected. GEORGIA (Code, § 5091); ILLINOIS (Rev. St. c. 98, § 9); INDIANA (St. § 5505); IOWA (Code. § 3070); TEXAS (Rev. St. art. 272); VERMONT (St. § 1152). So, too, by Neg. Inst. Law in COLORADO, CONNECTICUT, FLORIDA (Laws, c. 4524, § 28), and NEW YORK (Laws, c. 612, § 54).

²⁷⁷ Watson v. Flanagan, 14 Tex. 354.

²⁷⁸ Judge v. Vogel, 38 Mich. 568.

²⁷⁹ Petillon v. Noble, 73 Ill. 567.

²⁸⁰ Byles, Bills, 145; Chit. Bills, 81; 1 Daniel. Neg. Inst. 199; 1 Edw. Bills & N. § 472; Wyatt v. Bulmer, 2 Esp. 538; Tilden v. Blair, 21 Wall. 241; Rockwell v. Charles, 2 Hill (N. Y.) 499; Grimes v. Hillenbrand, 6 Thomp. & C. (N. Y.) 620; Hill v. Northrup, 4 Thomp. & C. (N. Y.) 120; Clark v. Ricker, 14 N. H. 44; Norris v. Langley, 19 N. H. 423; Great Falls Bank v. Farmington, 41 N. H. 32; Knox v. White, 20 La. Ann. 326; Smith v. Bank, 9 Neb. 31, 1

note makes it void, it is subject to defense in the hands of all holders.²⁸¹ In some states, however, the negotiable character of commercial paper is so far destroyed by statute as to subject the assignee, in general, to all such defenses.²⁸² But where the transfer of a note given for the purchase of a patent right is prohibited by Pennsylvania statute for want of the words, "given for a patent right," required by statute to appear on the face of the note, a note made in Pennsylvania, and transferred in New York to a bona fide holder for value, will not be subject to the defense of such statutory prohibition.²⁸³ So, it is no defense against a bona fide holder for value that the note in suit was given for the purpose of aiding the rebellion;²⁸⁴ or in violation of the statutes

N. W. 893; *Johnston v. Dickson*, 1 Blackf. (Ind.) 256; *Thorne v. Yontz*, 4 Cal. 321; *Haight v. Joyce*, 2 Cal. 64; *Converse v. Foster*, 32 Vt. 828; *Bank v. Flanigan*, 15 Phila. 102; *Bowers v. Webber*, 69 Iowa, 286, 28 N. W. 600; *First Nat. Bank v. Connell*, 8 App. Div. 427, 40 N. Y. Supp. 850. So, too, as to statutes prohibiting gambling, *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 498; *Harper v. Young*, 112 Pa. St. 419, 3 Atl. 670; *Albertson v. Laughlin*, 173 Pa. St. 525, 34 Atl. 216; or prohibiting business by foreign corporations, *City Bank of Hartford v. Press Co.*, 56 Fed. 260; *Hart v. Machine Co.*, 72 Miss. 809, 17 South. 769.

²⁸¹ *Snoddy v. Bank*, 88 Tenn. 573, 13 S. W. 127; *Union Bank of Rochester v. Gilbert*, 83 Hun, 417, 31 N. Y. Supp. 945; *Cunningham v. Bank*, 71 Ga. 40; *German Bank v. De Shon*, 41 Ark. 331; *Root v. Merriam*, 27 Fed. 909; *Traders' Bank of Chicago v. Alsop*, 64 Iowa, 97, 19 N. W. 863. But see *Rhodes v. Beall*, 73 Ga. 641, where "void," in a prohibition of the bankruptcy act (U. S. Rev. St. § 5131), was held to refer only to the effect of the contract as between the original parties, and to permit no defense against a bona fide holder for value. So, too, the words "unlawful" and "void" in the New York statute prohibiting wagers. *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687.

²⁸² *Tatum v. Kelley*, 25 Ark. 209; *Coco v. Callihan*, 21 La. Ann. 624; *Booker v. Lastrapes*, 2 La. 52; *Griffith v. Hanks*, 46 Tex. 217; *Blood v. Northup*, 1 Kan. 28; *Board of Supervisors of Jefferson Co. v. Arrghi*, 51 Miss. 667; *Robertshaw v. Britton*, 74 Miss. 873, 21 South. 523; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753 (Ky. statute). And see § 737, *infra*. But, to the effect that the Mississippi statute does not apply to negotiable notes, see *Hart v. Taylor*, 70 Miss. 655, 12 South. 553.

²⁸³ *Palmer v. Minar*, 8 Hun, 342.

²⁸⁴ *Glenn v. Bank*, 70 N. C. 191; and this applies to a new note given to a bona fide holder of a note originally made for such consideration, *Torbett v. Worthy*, 1 Heisk. (Tenn.) 107.

against selling liquor;²⁸⁵ unless, indeed, as now in Vermont, the sale be declared void by the statute.²⁸⁶ Nor can it be set up against a bona fide holder for value that a note was given for an election wager,²⁸⁷ or for a fraudulent consideration.²⁸⁸ Although, under the Illinois statute, fraud in procuring the execution or delivery of a paper is available as a defense against such holder.²⁸⁹

But a declaration on the part of a deceased holder that the consideration of a note was for losses in gaming is not admissible against a bona fide holder to impeach the validity of the note.²⁹⁰

The illegality of the original consideration for a note or bill will not, in general, prevent a recovery by the holder against his immediate indorser.²⁹¹ But even a bona fide holder for value, in order to recover in such case against the maker, should be able to make title without the intervention of any illegal transfer.²⁹²

²⁸⁵ *Cazet v. Field*, 9 Gray (Mass.) 329; *Taylor v. Page*, 6 Allen (Mass.) 86; *Doe v. Burnham*, 31 N. H. 426; *Pindar v. Barlow*, 31 Vt. 529; and the interests of a bona fide holder are expressly saved by the statute in IOWA (Code, § 2423).

²⁸⁶ *Streit v. Sanborn*, 47 Vt. 702. The statute provides, in case of such sale, that "no action shall be had or maintained for the recovery or possession of intoxicating liquor or the value thereof." And see § 532, *supra*.

²⁸⁷ *Shirley v. Howard*, 53 Ill. 455; *Adams v. Wooldridge*, 4 Ill. 255; although the rule in Iowa is otherwise, *Craig v. Andrews*, 7 Iowa, 18. So, as to gambling in South Carolina, *Mordecai v. Dawkins*, 9 Rich. (S. C.) 262; but not in North Carolina, *Calvert v. Williams*, 64 N. C. 168. So, in Illinois, it is a good defense even against a bona fide holder that the note was given for the purchase of an "option," *Tenney v. Foote*, 4 Ill. App. 594; but in Missouri "futures" do not come within the statute against gaming, *Third Nat. Bank v. Tinsley*, 11 Mo. App. 498. See, too, § 515, *supra*.

²⁸⁸ *Heist v. Hart*, 73 Pa. St. 286.

²⁸⁹ *Hayden v. Olinger*, 5 Ill. App. 632. And see *Beall v. January*, 62 Mo. 434.

²⁹⁰ *Barough v. White*, 4 Barn. & C. 326; *De Bruhl v. Patterson*, 12 Rich. (S. C.) 363.

²⁹¹ *Edwards v. Dick*, 4 Barn. & Ald. 212; *Delaware Bank v. Jarvis*, 20 N. Y. 226. And, in general, such statute creates no defense against a bona fide holder. *New v. Walker*, 108 Ind. 365, 9 N. E. 386; *Tescher v. Merca*, 118 Ind. 586, 21 N. E. 316; *Harmon v. Hagerty*, 88 Tenn. 705, 13 S. W. 690.

²⁹² *Lowes v. Mazzaredo*, 1 Starkie, 385. So held in case of usury in a prior transfer. But see, in general, 1 Pars. Notes & B. 218; *Parr v. Eliason*, 1 East, 92; *Daniel v. Cartony*, 1 Esp. 274.

Where, however, the second indorsement under which he claims is for an illegal consideration, and there is a blank first indorsement, he may escape the intervening illegality by making title directly from the first indorser.²⁹³

The immunity from defense allowed to the bona fide holder of negotiable paper does not extend to nonnegotiable instruments, although the holder be a purchaser for value without notice and before maturity.²⁹⁴ So, if a note be transferred by delivery without the requisite indorsement, the holder takes it subject to defense, although he may file a bill in chancery to compel an indorsement.²⁹⁵ So, in Ohio, a sealed note payable to a certain person "or bearer," and transferred by mere delivery, is subject to defenses on the part of the maker.²⁹⁶

Bona Fide Holder—Affected by Inadequacy—Notice.

§ 560. If the consideration paid by the holder is grossly inadequate, he will not be considered a holder for value so far as to exclude defense for want of consideration.²⁹⁷ But the pledgee of a note or bill, holding it as collateral for a debt due him, is, as we have seen, a holder for value,²⁹⁸ unless the debt, for which he is holding it as collateral, has been paid since the transfer to him.²⁹⁹ The holder of such paper as collateral is not subject to an action of trover for its recovery on the ground that the paper was originally stolen from the owner,³⁰⁰ or given for the accommodation of one who has since become bankrupt.³⁰¹ As we have seen, one who takes such paper for a precedent debt due him is

²⁹³ 1 Pars. Notes & B. 217.

²⁹⁴ *Cohen v. Prater*, 56 Ga. 203.

²⁹⁵ *Lewis v. Wilson*, 1 Edw. Ch. (N. Y.) 305.

²⁹⁶ *Osborn v. Kistler*, 35 Ohio St. 99; *Second Nat. Bank of Lafayette v. Brady*, 96 Ind. 498.

²⁹⁷ *Anderson v. Nicholas*, 28 N. Y. 600; *De Witt v. Perkins*, 22 Wis. 451. And, in general, a bona fide holder is not protected against defenses beyond the amount actually paid by him. *Wiffen v. Roberts*, 1 Esp. 261.

²⁹⁸ *Collins v. Martin*, 1 Bos. & P. 648.

²⁹⁹ *Roche v. Ladd*, 1 Allen (Mass.) 436; *Drinkhouse v. Surette*, Id. 443, note.

³⁰⁰ *Merchants' & Planters' Nat. Bank v. Trustees of Masonic Hall*, 62 Ga. 271.

³⁰¹ *Collins v. Martin*, 1 Bos. & P. 648.

entitled to the privileges of a bona fide holder for value in excluding such defenses.³⁰²

If, however, the holder, although a purchaser for value, knew of the defense at the time of taking the paper, he takes it subject to such defense.³⁰³ But he is still in the position of a holder without notice, if he derives his title from a prior party, who took the paper for value before maturity without notice.³⁰⁴ A notice of defense must be well proved in order to affect a purchaser for value before maturity;³⁰⁵ although it has been held in Missouri that any notice sufficient to put a purchaser on inquiry authorizes the admission of evidence of want of original consideration.³⁰⁶ But, where a note was given for liquor illegally sold, mere knowledge on the purchaser's part that the payee was called "Whiskey Smith" is no proof of notice to him of the character of the consideration.³⁰⁷ So, where a note is given for rent and the consideration fails for want of title, the fact that the holder knew what the note was given for is no such notice of failure of consideration as will subject him to that defense.³⁰⁸

Accommodation Paper—Estoppel.

§ 561. Accommodation paper forms an exception to the general rule as to notice in such cases, and it is no defense against a holder for value that the paper was given originally for accommodation, although such holder knew that circumstance when he purchased the paper.³⁰⁹

³⁰² *Arnold v. Sprague*, 34 Vt. 402; *Conkling v. Vail*, 31 Ill. 166.

³⁰³ *Steers v. Lashley*, 6 Term R. 61; *Sylvester v. Crapo*, 15 Pick. (Mass.) 92; *Starr v. Torrey*, 22 N. J. Law, 190; *Williams v. Stewart*, 30 Ga. 210; *Litchfield v. Falconer*, 2 Ala. 280; *Burbridge v. Harrison*, 20 La. Ann. 357; *Pierce v. Kibbee*, 51 Vt. 559. And a contract to sell property on such consideration will not prevail over a subsequent attachment against the vendor. *Laing v. McCall*, 50 Vt. 657.

³⁰⁴ *Masters v. Ibberson*, 18 Law J. C. P. 348, S C. B. 100; *Hascall v. Whitmore*, 19 Me. 102.

³⁰⁵ *Merrick v. Phillips*, 58 Mo. 436.

³⁰⁶ *Bennett v. Torlina*, 56 Mo. 309.

³⁰⁷ *Wright v. Wheeler*, 72 Me. 278.

³⁰⁸ *Splivallo v. Patten*, 38 Cal. 138.

³⁰⁹ *Smith v. Knox*, 3 Esp. 47; *Charles v. Marsden*, 1 Taunt. 224; *Fentum*

If, indeed, the holder be a purchaser after the maturity of the paper, although without notice of defenses and for value, he takes it subject to defense for want of legal consideration or otherwise.³¹⁰ And this is true in the case of a note payable on demand, indorsed to the holder eight months after date.³¹¹ But the indorsee of a bill before maturity, but after its acceptance, is not such a holder.³¹² And in the case of accommodation paper its accommodation character is, in general, no defense against a holder for value, though taking it after maturity and with notice of its character.³¹³ But in such case the defendant may show that he is an accommodation maker, and that the payee has paid the note.³¹⁴

Sometimes the maker is estopped by some act or waiver on his part from setting up defenses arising out of a want or failure of consideration. But merely giving a note for certain work done, which proves to be defective and causes a failure in the consideration of the note, is no waiver of the defense between the parties.³¹⁵ If, however, the maker of the note has given it for land sold in violation of the United States confiscation act of 1862, and purchased by him, he being then engaged in rebellion and under the disabilities of the act, he will be estopped from afterwards setting up the illegality of consideration as a defense.³¹⁶ So, the maker of a note may be estopped from defense as to the consider-

v. Pocock, 5 Taunt. 193, 1 Marsh. 14; Bank of Ireland v. Beresford, 6 Dow. 237; Poplewell v. Wilson, 1 Strange, 264; Wiffen v. Roberts, 1 Esp. 261; Parr v. Jewell, 16 C. B. 684; Agra & Masterman's Bank v. Leighton, 36 Law J. Exch. 33, L. R. 2 Exch. 56; Grant v. Ellicott, 7 Wend. (N. Y.) 227; Tucker v. Jenckes, 5 Allen (Mass.) 330.

³¹⁰ Taylor v. Mather, 3 Term R. 83, note; Brown v. Davies, Id. 80; Thompson v. Hale, 6 Pick. (Mass.) 259; Tucker v. Smith, 4 Me. 415; Burrough v. Moss, 10 Barn. & C. 558; Whitehead v. Walker, 10 Mees. & W. 696; Baxter v. Little, 6 Mete. (Mass.) 7; Merrick v. Butler, 2 Laus. (N. Y.) 103; Billings v. Everett, 52 Cal. 661; Rogers v. Broadnax, 24 Tex. 538; Lansing v. Lansing, 8 Johns. (N. Y.) 354.

³¹¹ Ayer v. Hutchins, 4 Mass. 370.

³¹² Bridge v. Livingston, 11 Iowa, 57.

³¹³ See section 677, *infra*.

³¹⁴ Blenn v. Lyford, 70 Me. 149.

³¹⁵ Clement v. Reppard, 15 Pa. St. 111.

³¹⁶ Leggett v. Goodrich, 20 La. Ann. 165.

ation by his own representations concerning it.³¹⁷ So, where a draft is drawn on the apparent owner of a farm for moneys to apply to the satisfaction of incumbrances on it, and is so expressed, the acceptor is estopped by his acceptance from setting up want of consideration against the drawer.³¹⁸ But the denial of an injunction against the transfer of certain notes, and a decree for their surrender and cancellation, does not estop the maker from setting up, in a suit brought on the notes by an indorsee, the very want of consideration on which his unsuccessful bill in equity against the payee was founded.³¹⁹

Presumption of Consideration.

§ 562. Unlike other contracts, the law presumes a consideration in case of commercial paper, and this presumption applies equally to all negotiable bills of exchange, notes, checks, and other instruments.³²⁰ It is therefore unnecessary either to aver or prove

³¹⁷ *Stutsman v. Thomas*, 39 Ind. 384.

³¹⁸ *Coursin v. Ledlie*, 31 Pa. St. 506.

³¹⁹ *Cramer v. Moore*, 36 Ohio St. 347.

³²⁰ *Byles, Bills*, 120; *Chit. Bills*, 79; 1 *Daniel, Neg. Inst.* 165; 1 *Edw. Bills & N.* § 440; 1 *Pars. Notes & B.* 176; *Townsend v. Derby*, 3 *Metc. (Mass.)* 363; *Holliday v. Atkinson*, 5 *Barn. & C.* 501; *Turnpike Road v. Hurin*, 9 *Johns. (N. Y.)* 217; *Knight v. Pugh*, 4 *Watts & S. (Pa.)* 445; *Bristol v. Warner*, 19 *Conn.* 7; *Hartman v. Shaffer*, 71 *Pa. St.* 312; *Matteson v. Morris*, 40 *Mich.* 52; *Byrne v. Grayson*, 15 *La. Ann.* 457; *Daniel v. Andrews*, *Dud. (Ga.)* 157; *Flint v. Phipps*, 16 *Or.* 437, 19 *Pac.* 543; *Nichols & Shepard Co. v. Dedrick*, 61 *Minn.* 513, 63 *N. W.* 1110; *Wolf v. Wolf*, 97 *Iowa*, 279, 66 *N. W.* 170; *Union Bank v. Ross*, 21 *La. Ann.* 513; *McMahon v. Crockett*, *Minor (Ala.)* 362; *Harris v. Cato*, 26 *Tex.* 338; *Campbell v. McCormac*, 90 *N. C.* 491; *Caples v. Branham*, 20 *Mo.* 244; *Ingersoll v. Martin*, 58 *Md.* 67; although denied by plea. *Bogie v. Nolan*, 96 *Mo.* 85, 9 *S. W.* 14; and this presumption extends to a contemporaneous suretyship, *Savage v. Fox*, 60 *N. H.* 17; and to all joint makers, *Hale v. Shannon*, 57 *Hun.* 466, 11 *N. Y. Supp.* 129; although it may have been paid to only one, *First Nat. Bank of Nephi v. Foote*, 12 *Utah*, 157, 42 *Pac.* 205; and to the indorsement of a stranger on a nonnegotiable note, *Rogers v. Schulenburg*, 111 *Cal.* 281, 43 *Pac.* 899. And a promissory note is evidence of a pecuniary consideration, and will sustain a recovery under the money counts. *Hughes v. Wheeler*, 8 *Cow. (N. Y.)* 77. Such presumption applies to a check, unless it is held under suspicious circumstances. *Foster v. Paulk*, 41 *Me.* 425. So, to a note given for a patent. *Gerrish v. Bragg*, 55 *Vt.* 329. So, to an extension indorsed

a consideration in the first instance for such an instrument.³²¹ This presumption applies also to indorsements of such paper, and inures to the benefit of the holder in an action against the indorser.³²² It applies also to acceptances.³²³ The natural and usual presumption in the case of a bill of exchange is of a debt due from the drawee to the drawer.³²⁴ In like manner, in the case of

on a note, under a statute including any "written instrument," *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074; *Niblack v. Champeny* (S. D.) 72 N. W. 402; or to a note for a settlement between lawyer and client, *Willard v. Pinard*, 65 Vt. 160, 26 Atl. 67; or to a note by an executor or administrator, *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70; *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804; *Whitney v. Clary*, 145 Mass. 156, 13 N. E. 393; or by a decedent, if his estate prove sufficient, *Goodwin v. Goodwin*, 65 Ill. 497; but this consideration for a married woman's note must be proved, *Schlatterer v. Nickodemus*, 51 Mich. 626, 17 N. W. 210; *Fisk v. Mills*, 104 Mich. 433, 62 N. W. 559; notwithstanding her own admissions, *Buhler v. Jennings*, 49 Mich. 538, 14 N. W. 488. So, a note by a parent to a child for services long since rendered will not be presumed to be for a valuable consideration. *Arnold v. Franklin*, 3 Ill. App. 141.

³²¹ *Byles*, Bills, 120; 1 *Daniel*, Neg. Inst. 165; 1 *Edw. Bills & N.* § 440; *Story*, Prom. Notes, § 158; *Bank of Troy v. Topping*, 13 Wend. (N. Y.) 557; *Nichols v. Woodruff*, 8 Blackf. (Ind.) 493; *Wagner St. c. 34*, § 6; *Glasscock v. Glasscock*, 66 Mo. 627; *Adams v. Adams*, 25 Minn. 72; *Sterling v. Kious*, 7 Ohio, 237; *Rector v. Fornier*, 1 Mo. 204; *Richmond v. Patterson*, 3 Ohio, 368. But see, contra, *Rossiter v. Marsh*, 4 Conn. 196. So, the consideration for the note is presumed in favor of a purchaser after maturity. *James v. Chalmers*, 5 Sandf. (N. Y.) 52. If the presumption is rebutted, the burden then falls on the plaintiff. *Campbell v. McCormac*, 90 N. C. 491; *Conmey v. Macfarlane*, 97 Pa. St. 391. But the fact that the note was given by a husband to his wife has been held not to affect the presumption. *Muzzey v. Cable*, 19 Wkly. Dig. (N. Y.) 142.

³²² *Dumond v. Williamson*, 18 Ohio St. 515; *Johnson v. Dickson*, 1 Blackf. (Ind.) 256; *New Orleans Canal & Banking Co. v. Templeton*, 20 La. Ann. 141; *Connerly v. Insurance Co.*, 66 Ala. 432; *Scribner v. Hanke*, 116 Cal. 613, 48 Pac. 714; *Smythe v. Scott*, 106 Ind. 245, 6 N. E. 145. But, if the discount is procured by the maker, the indorsement is prima facie for his accommodation. *Jennings v. Kosmak*, 20 Misc. Rep. 300, 45 N. Y. Supp. 802. And see § 472, supra.

³²³ *Kendall v. Galvin*, 15 Me. 131; even a parol acceptance, *Spurgeon v. Swain*, 13 Ind. App. 188, 41 N. E. 397. The consideration for an acceptance is prima facie the acceptor's debt to the drawer. *Doyle v. Unglish*, 143 N. Y. 556, 38 N. E. 711.

³²⁴ *Byrd v. Bertrand*, 7 Ark. 321.

a bank check, it is presumed that the drawer was, at the time of giving the check, indebted in the amount named to the payee.³²⁵ And, in the case of a note, that it is given in settlement of the maker's debt to the payee.³²⁶

A nonnegotiable note, in like manner, in general, imports a consideration;³²⁷ and in some states a consideration, though not expressed in the instrument, is presumed in the case of a note payable out of a particular fund.³²⁸ And in Indiana, by force of the statute, there is a like presumption in the case of notes payable in goods.³²⁹ While at common law, as has been said already, a note payable in goods is not negotiable, and does not import a consideration.³³⁰ It has been held that such presumption exists in the case of a sealed note also, the account which shows the consideration having been produced and marked for identification, but not offered in evidence.³³¹

On the other hand, this presumption is not to be extended to the

³²⁵ *Terry v. Ragsdale*, 33 Grat. (Va.) 342; *Poucher v. Scott*, 33 Hun (N. Y.) 223; *In re Humfreville*, 6 App. Div. 535; *Koehler v. Adler*, 47 N. Y. Super. Ct. 518; *Mills v. McMullen*, 4 App. Div. 27, 38 N. Y. Supp. 705, 39 N. Y. Supp. 550; but is not of itself sufficient proof of a set-off, *Aubert v. Walsh*, 4 Starkie, 293.

³²⁶ *Tyler v. Busey*, 3 MacArthur, 344; and has settled all such indebtedness up to that date, *Bishop v. Welch*, 35 Ind. 521; *Grimmell v. Warner*, 21 Iowa, 11; *Broughton v. Thornton*, 50 Ga. 568; *Piper v. Wade*, 57 Ga. 223; *De Freest v. Bloomingdale*, 5 Denio (N. Y.) 304. And such evidence has been said to be conclusive, *Mahnke v. Neale*, 23 W. Va. 57. But see, contra, *Davis Provision Co. v. Fowler*, 20 App. Div. 626, 47 N. Y. Supp. 205; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551, 5 Atl. 407.

³²⁷ *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, affirming 57 Hun, 518, 11 N. Y. Supp. 278; *Mortimer v. Chambers*, 63 Hun, 335, 17 N. Y. Supp. 874; *Taylor v. Newman*, 77 Mo. 257; *Louisville, E. & St. L. Ry. Co. v. Caldwell*, 98 Ind. 245. But see, contra, *Bristol v. Warner*, 19 Conn. 7; *Birleback v. Wilkins*, 22 Pa. St. 26.

³²⁸ *Stewart v. Street*, 10 Cal. 372. So, *Coursin v. Ledlie*, 31 Pa. St. 506, where there is mere reference to a fund for reimbursement. But see, contra, where the note is to be paid out of the fund, *Averett v. Booker*, 15 Grat. (Va.) 163; *Wickersham v. Beers*, 20 Ill. App. 243.

³²⁹ *Rogers v. Maxwell*, 4 Ind. 243.

³³⁰ *Wingo v. McDowell*, 8 Rich. (S. C.) 446.

³³¹ *Conway v. Williams*, 2 Hun, 642; and that such presumption is conclusive, *Webster v. Bailey*, 118 N. C. 193, 24 S. E. 9.

signature of a co-maker who signs a note after its delivery.³³² And in such case a fresh consideration is necessary, and must be proved. In like manner, a written guaranty of a note already due does not imply a consideration, and in some states such guaranty is void, if the consideration be not expressed in writing.³³³ So, an indorsement made by another person than the payee of a note after its delivery is in the nature of a guaranty, and requires the consideration to be expressed.³³⁴ But a guaranty indorsed on the note at the time of its delivery need not express any consideration in it.³³⁵ Nor need the consideration be expressed in a guaranty if it is given on account of a debt existing between the guarantor and the payee.³³⁶

Consideration Expressed—"Value Received."

§ 563. A bill of exchange, containing the words "value received" or other equivalent words, is presumed to be for good consideration, not only between the original parties, but also as to other and subsequent parties.³³⁷ And an action of debt will lie against the indorser or in favor of an indorsee of such a bill.³³⁸ And where a note containing such an expression was found among the papers of the payee after his death, it was held to be presumptively for a valid consideration.³³⁹ And such a note made at the maker's

³³² Courtney v. Doyle, 10 Allen (Mass.) 122; Clopton v. Hall, 51 Miss. 482.

³³³ Smith v. Ives, 15 Wend. (N. Y.) 182; Nichols v. Allen, 23 Minn. 542.

³³⁴ Crooks v. Tully, 50 Cal. 254; Mallory v. Gillett, 21 N. Y. 412. But an indorsement of this character, made before delivery of the note, is not within the statutes of frauds. Ford v. Hendricks, 34 Cal. 675. Neither is such an indorsement, though made after delivery, if agreed upon before and forming part of the original contract. Howland v. Aitch, 38 Cal. 133.

³³⁵ Nabb v. Koontz, 17 Md. 283.

³³⁶ Sheldon v. Butler, 24 Minn. 513.

³³⁷ Mandeville v. Welch, 5 Wheat. 277; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714; Stronach v. Bledsoe, 85 N. C. 473. So, "for value received, and for love and affection." Cotton v. Graham, 84 Ky. 672. In an indorsement such words indicate a consideration adequate to the face of the note. Waldrup v. Black, 74 Cal. 409, 16 Pac. 226. But they are not evidence against the assignor of a nonnegotiable certificate in an action brought by him against a pledgee of his assignee. Moore v. Bank, 55 N. Y. 41.

³³⁸ Raborg v. Peyton, 2 Wheat. 385.

³³⁹ Holliday v. Lewis, 14 Hun (N. Y.) 478. And delivery by way of gift

death, for the purpose of a gift, has been held to estop his representatives from denial of the consideration.³⁴⁰ But this case has been questioned, and cannot be considered to be of any authority now.³⁴¹ The words "for value" in like manner import a consideration.³⁴² So, too, a stub annexed to a note given for services containing the words, "to make the amount the same as C. W." ³⁴³ So, too, the words in a note "agreeably to my father's last will, I promise," etc.³⁴⁴ And the recital of a consideration raises a presumption in its favor in the case of a nonnegotiable note.³⁴⁵ But such words, or their equivalent, are not necessary to raise such a presumption in the case of negotiable paper.³⁴⁶

Consideration—Pleading and Evidence.

§ 564. As we have seen that it is unnecessary in a declaration upon a negotiable instrument to aver the consideration, it follows

has been presumed from finding such note among the deceased donor's papers in a place accessible to the donee. *Fulton v. Fulton*, 48 Barb. (N. Y.) 581.

³⁴⁰ *Bowers v. Hurd*, 10 Mass. 427.

³⁴¹ *Story*, Prom. Notes, § 183, note; *Parish v. Stone*, 14 Pick. (Mass.) 202; *Holley v. Adams*, 16 Vt. 206; *Smith v. Kittridge*, 21 Vt. 248. And it is said in *Hill v. Buckminster*, 5 Pick. (Mass.) 394, by Parker, C. J., that the opinion expressed in *Bowers v. Hurd*, "that to a promissory note, in which value is acknowledged to have been received, it cannot be objected in defense between the original parties that there was no existing consideration when the promise was made, though it would be competent to show that the consideration had failed, or that it was illegal, * * * is untenable, * * * though the case itself was rightly decided upon other principles." But a presumption of consideration for the note of a deceased maker exists in favor of the holder against the personal representative of the maker. *Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241; *Redding v. Redding's Estate*, 69 Vt. 500, 38 Atl. 230.

³⁴² *Rowland v. Harris*, 55 Ga. 141.

³⁴³ *Cowee v. Cornell*, 75 N. Y. 91.

³⁴⁴ *Horn v. Fuller*, 6 N. H. 511.

³⁴⁵ *Bourne v. Ward*, 51 Me. 191; *Conrad Seipp Brewing Co. v. McKittrick*, 86 Mich. 193, 48 N. W. 1086. So, of a duebill, *Messmore v. Morrison*, 172 Pa. St. 300, 34 Atl. 45; or a sealed note by a married woman, *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; or a guaranty indorsed on a railroad bond, *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9.

³⁴⁶ *Edgerton v. Edgerton*, 8 Conn. 6; *Mitchell v. Railroad Co.*, 17 Ga. 574; *Kendall v. Galvin*, 15 Me. 131; *Moses v. Bank*, 149 U. S. 298, 13 Sup. Ct. 900;

that such averment, when made, is immaterial, and need not be proved.³⁴⁷ And if a note be given for the purchase of a horse with a certificate that he was a thoroughbred, the truth of the certificate need not be proved in an action brought by the payee on the note.³⁴⁸ But it seems that if a note be given to a tax collector in payment of the maker's taxes, in a suit upon it it is necessary for the payee to aver that he paid the taxes for the maker.³⁴⁹ And the averment that a note was given for value received has been held in Connecticut to be material, and a general averment in such case that the note was for valuable consideration has been held insufficient.³⁵⁰

The common law did not require the want or failure of consideration to be specially pleaded, but it might be given in evidence under the general issue. But notice of such defense was formerly necessary to put the plaintiff to his proof.³⁵¹ Want of consideration may, however, be specially pleaded, although not required by statute.³⁵² It is now required in England by the new rules of pleading, and in some states by statute, that want or failure of consideration should be specially pleaded.³⁵³ And in Illinois,

Clarke v. Marlow (Mont.) 50 Pac. 713; Taylor v. Newman, 77 Mo. 257; Sprague v. Sprague, 80 Hun, 285, 30 N. Y. Supp. 162; Wilson v. Wilson, 26 Or. 315, 38 Pac. 189; Carnwright v. Gray, 127 N. Y. 98, 27 N. E. 835, affirming 57 Hun, 518, 11 N. Y. Supp. 278. But see, contra, in the case of a negotiable bill of exchange, Benjamin v. Tillman, 2 McLean, 215, Fed. Cas. No. 1,304; and as to negotiable notes, Camp v. Tompkins, 9 Conn. 550. See, also, § 178, *supra*.

³⁴⁷ Wilson v. Codman, 3 Cranch, 195; James v. Scott, 7 Port. (Ala.) 30; Friedman v. Johnson, 21 Minn. 12; Caples v. Branham, 20 Mo. 244; Lindell v. Rokes, 60 Mo. 249.

³⁴⁸ Mulliken v. Boyce, 1 Gill (Md.) 60.

³⁴⁹ Dickson v. Gamble, 16 Fla. 687.

³⁵⁰ Rossiter v. Marsh, 4 Conn. 196.

³⁵¹ Paterson v. Hardacre, 4 Taunt. 114; Payne v. Cutler, 13 Wend. (N. Y.) 605; Burton v. Stewart, 3 Wend. (N. Y.) 236. This is, however, now held to be unnecessary. Mann v. Lent, 1 Moody & M. 240, 10 Barn. & C. 877; Bailey v. Bidwell, 13 Mees. & W. 73; Heath v. Sansom, 2 Barn. & Adol. 291. So, in an action by the drawer against the acceptor. Hardy v. Ross, 4 Ill. App. 501.

³⁵² Mills v. Oddy, 6 Car. & P. 728; Matlock v. Livingston, 9 Smedes & M. (Miss.) 489; Hunter v. McLaughlin, 43 Ind. 38.

³⁵³ 1 Chit. Pl. 516; Easton v. Pratchett, 6 Car. & P. 736; Harvey v. Towers,

where there is such a statute, it has been held that to aver a note to have been given for the assignment of another note, which was without consideration, is no sufficient averment of want of consideration for the first note.³⁵⁴ Where failure of consideration, however, is specially pleaded, it is not necessary to aver that the plaintiff had notice of such failure.³⁵⁵

Consideration—Parol Evidence.

§ 565. In general, the production of a note or bill and proof of its execution is sufficient to make out a *prima facie* case in favor of the holder.³⁵⁶ The presumption of consideration may, however, be rebutted, and parol evidence is admissible for this purpose, where the matter proved would itself be admissible as a defense. Thus, the original agreement, which formed the consideration of a note, may be proved by parol.³⁵⁷ And such evidence is admissi-

6 Exch. 656; *Rose v. Mortimer*, 17 Ill. 475; *Keith v. Mafit*, 38 Ill. 303; *Sprague v. Sprague*, 80 Hun, 285, 30 N. Y. Supp. 162; *Patterson v. Gile*, 1 Colo. 200; *Munro v. King*, 3 Colo. 238. So, in Vermont as to partial failure. *Williams v. Hicks*, 2 Vt. 36. This is true in England, at least as to a special count in *assumpsit*, if not as to the common counts. *Passenger v. Brooks*, 7 Car. & P. 110, 1 Bing. N. C. 587. So, if want of consideration be pleaded to a note given for the debt of an intestate, there should be an averment that the maker had no assets of the intestate. *Serle v. Waterworth*, 4 Mees. & W. 9. And in general such plea is insufficient, unless the particulars be specially pleaded. *Stoughton v. Kilmorey*, 2 Crompt. M. & R. 72. But an insufficiency of this sort in the plea is cured by the verdict. *Easton v. Pratchett*, 1 Crompt. M. & R. 798.

³⁵⁴ *Smith v. Doty*, 24 Ill. 163. But it is sufficient to plead that a boiler forming the consideration of the note was warranted and of no value. *Beers v. Williams*, 16 Ill. 69.

³⁵⁵ *Nisbett v. Brown*, 30 Ark. 585.

³⁵⁶ *Hilton v. Smith*, 5 Gray (Mass.) 400.

³⁵⁷ *Rose v. Phillips*, 33 Conn. 570; *Bender v. Pryor*, 31 Tex. 341; or that it was furnished in unequal amounts by the two payees, *Tisdale v. Maxwell*, 58 Ala. 40; or was an executory agreement, which the payee had performed, *Howard v. Stratton*, 64 Cal. 487, 2 Pac. 263; *Leighton v. Bowen*, 75 Me. 504; or was of no value, *Lathrop v. Hickson*, 67 Ga. 445; or was intended as a mere receipt or voucher, *Smith v. Rowley*, 34 N. Y. 367; *Rice v. Howland*, 147 Mass. 407, 18 N. E. 229; or with right reserved to return and cancel, *Labbee v. Johnson*, 66 Vt. 235, 28 Atl. 986; or that it proceeded from the payee as executor. *Hill v. Whidden*, 158 Mass. 267, 33 N. E. 526; or (notwithstanding

ble to prove the real consideration, whatever may be the statement in the instrument as to consideration or value received.³⁵⁸ Thus, where a note was expressly "for money loaned," it was held that parol evidence was admissible to show that it was given for a balance due on a note originally given for the purchase of a slave.³⁵⁹ So, it may be shown by parol that a note was given in consideration of indulgence granted in a suit;³⁶⁰ or of attorney's fees;³⁶¹ or of services by the payee, which were already secured by a lien;³⁶² or in settlement of a dispute about a horse;³⁶³ or as a collateral only;³⁶⁴ or to prove, in an action by the payee of a draft against the acceptor, that the draft was given in part payment of a claim due at the time from the drawer to the payee.³⁶⁵ So, parol evidence is admissible to prove failure of consideration³⁶⁶ or illegality.³⁶⁷ The offer of parol evidence as to the ac-

an express charge of a wife's separate estate) was given for an existing debt of the maker's husband. *Produce Bank v. Bache*, 30 Hun, 351.

³⁵⁸ *Cocke v. Blackburn*, 57 Miss. 689; *Self v. Herrington*, 11 Ala. 489; *Pitts v. Allen*, 72 Ga. 69; *Anderson v. Brown*, Id. 713; *Newton v. Jackson*, 23 Ala. 335; *Braden v. Graves*, 85 Ind. 92; *Dowden v. Wood*, 124 Ind. 233, 24 N. E. 1042; *Board of Trustees of Seventh Day Baptist Memorial Fund v. Saunders*, 84 Wis. 570, 54 N. W. 1094; *Ohleyer v. Bernheim*, 67 Miss. 75, 7 South. 319; *Wilson v. Ellsworth*, 25 Neb. 246, 41 N. W. 177; *Walker v. Haggerty*, 30 Neb. 120, 46 N. W. 221; *Hawkins v. Collier*, 101 Ga. 145, 28 S. E. 632. So, where the consideration is only in part expressed. *Everhart v. Puckett*, 73 Ind. 409.

³⁵⁹ *Pollen v. James*, 45 Miss. 129; *Miller v. McKenzie*, 95 N. Y. 575; *Ramsey v. Young*, 69 Ala. 157.

³⁶⁰ *Rodgers v. Rosser*, 57 Ga. 319.

³⁶¹ *Scaife v. Beall*, 43 Ga. 333.

³⁶² *Butts v. Cuthbertson*, 6 Ga. 166.

³⁶³ *Perry v. Hill*, 68 N. C. 417. This was allowed in an action of trover for the horse, although no consideration was expressed in the note. Id.

³⁶⁴ *Hazzard v. Duke*, 64 Ind. 220; *Maine Mut. Marine Ins. Co. v. Farrar*, 66 Me. 133; *Van Haagen Soap Co.'s Estate*, 141 Pa. St. 214, 21 Atl. 598.

³⁶⁵ *Walker v. Sherman*, 11 Mete. (Mass.) 170.

³⁶⁶ *Mann v. Smyser*, 76 Ill. 365; *Dickin v. Morgan*, 54 Iowa, 684, 7 N. W. 145; *Jones v. Noe*, 71 Ind. 368; *Pierce v. Hight*, 76 Ind. 355; *Hubbard v. Galusha*, 23 Wis. 398; *Jones v. Buffum*, 50 Ill. 277; *Litchfield v. Falconer*, 2 Ala. 280.

³⁶⁷ *Griffin v. Cowan*, 15 La. Ann. 487; *Newsom v. Thighen*, 30 Miss. 414; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90. So, by proof of contemporaneous verbal agreement for usury. *Roe v. Kiser*, 62 Ark. 92, 34 S. W. 534.

tual consideration does not necessarily destroy the original presumption, although it may do so.³⁶⁸

The rule admitting parol evidence in such cases does not, however, do away with the rule excluding such evidence, when offered for the purpose of contradicting or varying a written instrument.³⁶⁹ Thus, it has been held inadmissible to show that the consideration for a bill of exchange and acceptance was an agreement to surrender a note which was not surrendered, upon the ground that such evidence would tend to make the acceptance a conditional one.³⁷⁰ But it seems that evidence of a contemporaneous verbal agreement may be used to show a partial or total failure of consideration.³⁷¹ So, in an action by the payee of a bill of exchange against the acceptor, it may be shown as a failure of consideration that the conditions on which the acceptance was given have not been complied with.³⁷²

But parol evidence is not admissible, in an action on a note, to show a contemporaneous agreement that it might be extinguished by a part payment;³⁷³ or that the maker should not be held liable;³⁷⁴ or that the note was intended as a mere receipt for money placed in maker's hands for a special purpose, and so used;³⁷⁵ or that it was to be paid out of a particular fund only;³⁷⁶ or that the consideration was in part an unperformed agreement;³⁷⁷ or on a note for land, to show a contract other than the deed, for the purpose of impeaching the note.³⁷⁸ Nor is it admissible to show

³⁶⁸ *Durland v. Durland*, 153 N. Y. 67, 47 N. E. 42. And see *Stimson v. Vroman*, 99 N. Y. 74; *Bruyn v. Russell*, 52 Hun, 19, 4 N. Y. Supp. 784; *Turner v. Browder*, 5 Bush (Ky.) 216.

³⁶⁹ *Langan v. Langan*, 89 Cal. 187, 26 Pac. 764.

³⁷⁰ *Foster v. Clifford*, 44 Wis. 569; *Charles v. Denis*, 42 Wis. 56.

³⁷¹ *Smith v. Carter*, 25 Wis. 283; or a want of consideration, *Sawyer v. Orr*, 140 Mass. 234, 5 N. E. 822.

³⁷² *Wise v. Neal*, 39 Me. 422.

³⁷³ *Ewing v. Clark*, 76 Mo. 545.

³⁷⁴ *Kulenkamp v. Groff*, 71 Mich. 675, 40 N. W. 57, except so far as it may tend to show him to be an accommodation party.

³⁷⁵ *Dickson v. Harris*, 60 Iowa, 727, 13 N. W. 335.

³⁷⁶ *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283.

³⁷⁷ *Hyde v. Tenwinkel*, 26 Mich. 93; *McKegney v. Widekind*, 6 Bush (Ky.) 107.

³⁷⁸ *Stookey v. Hughes*, 18 Ill. 55.

by parol that a note given by A. to B., in consideration of C.'s note to A. and a debt due from C. to B., was given only to facilitate the collection of C.'s debt, and was only to be paid by A. when C. had paid him.³⁷⁹ So, where notes were given in carrying out a written contract for land, the maker was not allowed to show a contemporaneous parol agreement for a certain rate of allowance for deficiency that might appear in the quantity of timber on the land purchased with the notes.³⁸⁰ Nor can the maker of a note show that it was given for more than was really due "to keep down a fuss."³⁸¹ And it has been held in Indiana that want of consideration alone in the transfer of a note cannot be proved by parol evidence, although it would be otherwise if such transfer were accompanied with fraud.³⁸²

Consideration—Burden of Proof.

§ 566. As has been said, any statement of consideration in a note or bill may be explained, or even contradicted, in all cases where want of consideration or failure or illegality in it would constitute an available defense.³⁸³ The burden of proving any consideration, so far as it rests on the plaintiff at all, is fully satisfied by proving the instrument itself.³⁸⁴ The burden of proof of want of consideration is in all cases upon the defendant setting

³⁷⁹ *Gillett v. Ballou*, 29 Vt. 296. So, it has been held inadmissible to show that a note was given for the transfer of certain debts, and was only to be paid out of the proceeds collected. *Walters v. Smith*, 23 Ill. 342. But in defense to a note containing in brackets the words, "for two mills, remit as soon as sold," such evidence has been held admissible. *Ward v. Perrigo*, 33 Wis. 143.

³⁸⁰ *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497.

³⁸¹ *Ellis v. Drake*, 52 Ga. 617.

³⁸² *Treadway v. Cobb*, 18 Ind. 36.

³⁸³ *Abbott v. Hendricks*, 1 Man. & G. 791; *Litchfield v. Falconer*, 2 Ala. 280; *Barker v. Prentiss*, 6 Mass. 430; *Matlock v. Livingston*, 9 Smedes & M. (Miss.) 489; *Boynton v. Twitty*, 53 Ga. 214; *Search v. Miller*, 9 Neb. 26, 1 N. W. 975.

³⁸⁴ *Burnham v. Allen*, 1 Gray (Mass.) 496. But the presumption is only that a note or bill is given for money advanced or due at the time, and the burden is on the holder to prove that it was given to secure a fluctuating balance. *In re Boys*, L. R. 10 Eq. 467.

it up.³⁸⁵ In like manner, the burden of proving failure of consideration is upon the defendant.³⁸⁶

In like manner, the burden of proof is on the defendant alleging that the consideration of a bill or note was illegal;³⁸⁷ e. g. that the note was usurious;³⁸⁸ or was given for liquor sold without a license;³⁸⁹ or for the sale of a lottery prize.³⁹⁰ But the presumption of a valid consideration must be met by proof, and mere denial by averment in the answer is, in general, not sufficient to rebut the presumption.³⁹¹ Nor is such presumption, in the case of an indorsement, rebutted by mere proof of the want of a proper

³⁸⁵ Byles, Bills, 122; Chit. Bills, 80; Story, Prom. Notes, § 181; Smith v. Martin, 9 Mees. & W. 304; Bingham v. Stanley, 2 Q. B. 117; Mills v. Barber, 1 Mees. & W. 425; Fearn v. Filica, 7 Man. & G. 513; Robins v. Maidstone, 4 Q. B. 815; Percival v. Frampton, 2 Crompt., M. & R. 180; 3 Dowl. 748; Whittaker v. Edmunds, 1 Moody & R. 366, 1 Adol. & E. 638; Collins v. Martin, 1 Bos. & P. 651; James v. Chalmers, 6 N. Y. 209; Sawyer v. Vaughan, 25 Me. 337; Fitch v. Redding, 4 Sandf. (N. Y.) 130; Trustees of Iowa College v. Hill, 12 Iowa, 462; Henderson v. Girardeau, 15 La. Ann. 382; Nevins v. Chapman, Id. 353; Hardy v. Ross, 4 Ill. App. 501; Martin v. Tucker, 35 Ark. 279. So, that an indorsement was intended merely to transfer title. Allin v. Williams, 97 Cal. 403, 32 Pac. 441.

³⁸⁶ Stephens v. Lanier, 20 La. Ann. 347; Muggah v. Tucker, 10 La. Ann. 683; Green v. Casey, 70 Ala. 417; McKenzie v. Improvement Co., 5 Wash. 409, 31 Pac. 748; Herman v. Gunter, 83 Tex. 66, 18 S. W. 428; Bisbee v. Torinus, 26 Minn. 165, 12 N. W. 168; Conmey v. Macfarlane, 97 Pa. St. 361; or a partial failure, Bisbee v. Torinus, supra.

³⁸⁷ Edmunds v. Groves, 2 Mees. & W. 642; Wyatt v. Bulmer, 2 Esp. 538; Wyman v. Fiske, 3 Allen (Mass.) 238; Emery v. Estes, 31 Me. 155; Pixley v. Boynton, 79 Ill. 351; Pryor v. Coulter, 1 Bailey (S. C.) 517; Powell v. Graves, 14 La. Ann. 873; Brown v. Kinsey, 81 N. C. 245; Hone v. Ammons, 14 Ill. 29. So, that a corporation note was given for private accommodation. Martin v. Manufacturing Co., 44 Hun, 130. That a note for "futures" is for a gaming consideration will not be presumed. Williams v. Connor, 14 S. C. 621. It is a question for a jury whether a note was given for a wager or not. Craig v. Andrews, 7 Iowa, 17.

³⁸⁸ Hudson v. Mortgage Co., 100 Ga. 83, 26 S. E. 75; Waterman v. Baldwin, 68 Iowa, 255, 26 N. W. 435; White v. Benjamin, 138 N. Y. 623, 33 N. E. 1037.

³⁸⁹ Doe v. Burnham, 31 N. H. 426. Both facts must be proved, viz. that the note was given for spirituous liquor and that the liquor was sold without license.

³⁹⁰ Terry v. Olcott, 4 Conn. 442.

³⁹¹ Greer v. George, 8 Ark. 131; Trustees of Orphan School v. Fleming, 10 Bush (Ky.) 234; Gutwillig v. Stumes, 47 Wis. 428. In Vermont, however,

revenue stamp at the time of its delivery;³⁹² or of the absence of the payee from a trial in court, the note having been given for his services as attorney in the case.³⁹³ In some states, by force of statute, the denial of a valid consideration by plea or answer puts the consideration in issue, and throws on the plaintiff the burden of proving it.³⁹⁴

Burden as to Holder for Value.

§ 567. On the other hand, where want or failure of consideration is proved, this does not, in general, throw the burden on the plaintiff of showing himself to be a holder for value without notice.³⁹⁵ But it was formerly held that, where a note was shown to have been given for accommodation, this burden fell upon the holder.³⁹⁶ In the words of Lord Abinger in *Mills v. Barber*: "There is a substantial distinction between bills given for accommodation only, and cases of fraud, inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation is no evidence of a want of consideration in the holder." It is therefore to be considered as the rule now established that

the general issue puts in issue the consideration as well as the execution, and it is incumbent on the plaintiff in such a case to prove the consideration. *Good-enough v. Huff*, 53 Vt. 482.

³⁹² *Long v. Spencer*, 78 Pa. St. 303.

³⁹³ *Douglass v. Eason*, 36 Ala. 687.

³⁹⁴ Gen. St. Mass. c. 129, § 17; *Davis v. Travis*, 98 Mass. 222; *Estabrook v. Boyle*, 1 Allen (Mass.) 412; *Martin v. Donovan*, 15 La. Ann. 41.

³⁹⁵ *Gray v. Bank*, 29 Pa. St. 365; *Albrecht v. Strimpler*, 7 Pa. St. 476; *Dingman v. Amsink*, 77 Pa. St. 114; *Knight v. Pugh*, 4 Watts & S. (Pa.) 445; *Brown v. Street*, 6 Watts & S. (Pa.) 221; *Wilson v. Lazier*, 11 Grat. (Va.) 478. So, too, *Whittaker v. Edmunds*, 1 Moody & R. 366, modifying *Heath v. Sansom*, 2 Barn. & Adol. 291. But many cases hold that the burden falls on the plaintiff of proving himself in such case a holder for value. *Rogers v. Morton*, 12 Wend. (Mass.) 484; *Small v. Clewley*, 62 Me. 155; *Delano v. Bartlett*, 6 Cush. (Mass.) 364; *Thompson v. Armstrong*, 7 Ala. 256; *Zook v. Simonson*, 72 Ind. 83; *Harbison v. Bank*, 28 Ind. 133.

³⁹⁶ *Bytes, Bills*, 122; *Black River Savings Bank v. Edwards*, 10 Gray (Mass.) 387.

mere evidence that a bill or note was given for accommodation will not throw upon the plaintiff the burden of proving himself to be a holder for value.³⁹⁷ Where the accommodation is itself a fraud on a partnership or corporate maker, the proof amounts to evidence of fraud, and shifts the burden accordingly.

On the other hand, it is held that evidence that an indorser signed a note merely as guarantor throws on the plaintiff the burden of proving himself a holder for value.³⁹⁸ And so does evidence that the bill or note in question was stolen from the defendant, or was lost by him;³⁹⁹ although it has been doubted whether this rule would apply to a bank bill stolen from the bank before it was put into circulation.⁴⁰⁰ In like manner, evidence that the maker was sick and intoxicated at the time of making the note throws on the holder the burden of proving that he paid value for it.⁴⁰¹ This is true, also, where the consideration is proved by the defendant to be illegal.⁴⁰² So, where it is shown that the note was given in renewal of a note given originally for an illegal sale of liquor.⁴⁰³ So, where a note is proved to have originated in fraud, the burden falls on the plaintiff of proving himself to be

³⁹⁷ Byles, Bills, 122; *Mills v. Barber*, 1 Mees. & W. 425; *Percival v. Framp-ton*, 2 Crompt., M. & R. 180; 3 Dowl. 748; *Whittaker v. Edmunds*, 1 Moody & R. 366, 1 Adol. & E. 638; *Clark v. Holmes*, 2 Fost. & F. 75; *Jacob v. Hun-gate*, 1 Moody & R. 445. And this has been held to be the rule notwithstanding plaintiff's admission of the fact on the record. *Edmonds v. Groves*, 2 Mees. & W. 642; *Smith v. Martin*, 9 Mees. & W. 304; *Fearn v. Filica*, 7 Man. & G. 513. But see, contra, *Bingham v. Stanley*, 2 Q. B. 117; *Robins v. Maid-stone*, 4 Q. B. 815.

³⁹⁸ *Sandford v. Norton*, 14 Vt. 228.

³⁹⁹ *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. (Mass.) 488; *Matthews v. Poythress*, 4 Ga. 287; *Merchants' & Planters' Nat. Bank v. Trustees of Masonic Hall*, 62 Ga. 271; *Devlin v. Clark*, 31 Mo. 22.

⁴⁰⁰ *Metcalf, J.*, in *Worcester County Bank v. Dorchester & Milton Bank*, *supra*.

⁴⁰¹ *Holland v. Barnes*, 53 Ala. 83.

⁴⁰² *Wyat v. Campbell*, Mood. & M. 80; *Bailey v. Bidwell*, 13 Mees. & W. 73; *Sisternans v. Field*, 9 Gray (Mass.) 331; *Tucker v. Morrill*, 1 Allen (Mass.) 528; *Smith v. Edgeworth*, 3 Allen (Mass.) 233; *National Bank v. Kirby*, 108 Mass. 497; *Emerson v. Burns*, 114 Mass. 348; *Paton v. Coit*, 5 Mich. 505; *Wing v. Ford*, 89 Me. 140, 35 Atl. 1023; *Cottle v. Cleaves*, 70 Me. 256; or where it is admitted to be illegal, *Bingham v. Stanley*, 1 Gale & D. 237, 2 Q. B. 117. But see *Hill v. Northrup*, 4 Thomp. & C. (N. Y.) 120, 1 Hun (N. Y.) 612.

⁴⁰³ *Holden v. Cosgrove*, 12 Gray (Mass.) 216.

a holder for value.⁴⁰⁴ So, too, where the note, though originally valid, has been obtained and negotiated by fraud;⁴⁰⁵ or fraudulently transferred by an agent;⁴⁰⁶ or fraudulently diverted by the payee.⁴⁰⁷ And this has also been held to be the case where there is no consideration for the note;⁴⁰⁸ or where the consideration of a note given for goods purchased fails through a subsequent fraudulent conversion of the goods by the payee.⁴⁰⁹

The further consideration of the burden of proof of notice or want of notice, as affecting the bona fide character of the holder, is left for a subsequent part of this work.⁴¹⁰

⁴⁰⁴ Chit. Bills, 725; *Duncan v. Scott*, 1 Camp. 100; *Paterson v. Hardacre*, 4 Taunt. 114; *Rees v. Marquis of Headfort*, 2 Camp. 574; *Thomas v. Newton*, 2 Car. & P. 606; *Harvey v. Towers*, 6 Exch. 656; *Holme v. Karsper*, 5 Bin. (Pa.) 469; *Hart v. Potter*, 4 Duer (N. Y.) 458; *New York & V. S. S. Bank v. Gibson*, 5 Duer (N. Y.) 574; *Maples v. Browne*, 48 Pa. St. 458; *Munroe v. Cooper*, 5 Pick. (Mass.) 412; *Marston v. Forward*, 5 Ala. 347; *Bertrand v. Barkman*, 13 Ark. 150; *Wallace v. Bank*, 1 Ala. 349; *Smith v. Braine*, 16 Q. B. 244; *Tatam v. Haslar*, 23 Q. B. Div. 345; *McClintick v. Cummins*, 2 McLean, 98, Fed. Cas. No. 8,698; *Jordan v. Grover*, 99 Cal. 194, 33 Pac. 889; *Harrington v. Johnson*, 7 Colo. App. 483, 44 Pac. 368; *Zook v. Simonson*, 72 Ind. 85; *Mitchell v. Tomlinson*, 91 Ind. 167; *Eichelberger v. Bank*, 103 Ind. 401, 3 N. E. 127; *Skinner v. Raynor*, 95 Iowa, 536, 64 N. W. 601; *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347; *Crampton v. Perkins*, 65 Md. 22, 3 Atl. 300; *Haines v. Trust Co.*, 56 N. J. Law, 312, 28 Atl. 796; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801; *Douai v. Lutfens*, 21 App. Div. 254, 47 N. Y. Supp. 659; *Owens v. Snell*, Heitshu & Woodard Co., 29 Or. 483, 44 Pac. 827; *Real-Estate Inv. Co. v. Russell*, 148 Pa. St. 496, 24 Atl. 59; *Wright v. Hardie*, 88 Tex. 653, 32 S. W. 885; *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907; *Williams v. Huntington*, 68 Md. 590, 13 Atl. 336; *Rhinehart v. Schall*, 69 Md. 355, 16 Atl. 126.

⁴⁰⁵ *Ross v. Bedell*, 5 Duer (N. Y.) 462; *Hale v. Shannon*, 57 Hun, 466, 11 N. Y. Supp. 129.

⁴⁰⁶ *McLemore v. Cannan*, 9 La. Ann. 22; *Hazard v. Spencer*, 17 R. I. 561, 23 Atl. 729. So, where it is delivered in violation of an escrow. *Landauer v. Sioux Falls Imp. Co.* (S. D.) 72 N. W. 467. And see § 447, *supra*.

⁴⁰⁷ *Sperry v. Spaulding*, 45 Cal. 544; *Mundy v. Pritchard*, 22 Misc. Rep. 22, 47 N. Y. Supp. 1073.

⁴⁰⁸ *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726; *Mossop v. His Creditors*, 41 La. Ann. 296, 6 South. 134.

⁴⁰⁹ *Hutchinson v. Boggs*, 28 Pa. St. 294. But see, *contra*, as to failure of consideration by nonperformance of the payee's agreement for use of proceeds of the note, *Lamb v. Burke*, 132 Pa. St. 413, 20 Atl. 685; and as to failure in general, *Knight v. Pugh*, 4 Watts & S. (Pa.) 445; *Kelman v. Calhoun*, 43 Neb. 157, 61 N. W. 615; *Crosby v. Ritchey*, 47 Neb. 924, 66 N. W. 1005.

⁴¹⁰ See § 1024 *et seq.*, *infra*.

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